The Rise of Global Delivery Services

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A Case Study in International Regulatory Reform

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To James Ira Campbell, F.A.I.A.

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Acknowledgments

With great pleasure I acknowledge that the policy reform efforts described in this book were in no sense solitary adventures. On the contrary, the policy campaigns summarized herein, and attendant historical documents, were collaborative undertakings from conception to execution. A brief account of principal debts follows, necessarily omitting the names of most individuals.

The energy and vision which gave rise to global delivery services flowed primarily from a handful of remarkable and innovative entrepreneurs. Although few pioneers are still active in these more settled times, their contributions remain in the vitality of the industry they created. Among the entrepreneurs, three require special mention. Larry Hillblom, Gordon Barton, and Fred Smith—guiding spirits behind DHL, TNT, and Federal Express, respectively—not only built the foundations of the major global express companies of today but also contributed directly and personally to the concepts embodied in the policy presentations in this book. They were the big thinkers as well as the big dreamers for this sector.

Most of the historical papers included in this book were originally presented on behalf of a company or group of companies. In each such case, industry officials supervised preparation and reviewed final copy. These papers are their product as well as mine. While it is impossible to list all of these individuals, I would like to acknowledge specifically the wise and patient advice of legal colleagues Tim Bye of TNT and Sarah Prosser and Nancy Sparks of Federal Express and customs experts Bob Battard and Ken Glenn of Federal Express.

The warp and woof of these reform campaigns were produced for the most part by a team of skilled and dedicated legal, economic, and political advisers who labored for years to win acceptance of the industry, as counsel to DHL, the International Express Carriers Conference, European Express Organisation, and national express associations. No less than the entrepreneurs and industry officials, these advisers can look upon the global delivery service sector with justifiable pride of accomplishment. This group of long time consultants to the industry included, in France and Belgium, Dominique Borde, Jacques Derenne, Jean-Marie Duchemin, Bernard Le Grelle, and Eric Morgan de Rivery; in Ireland, Michael D'Arcy; in Italy, Livia Magrone and Samaritana Rattazzi; in Germany, Gerta Tzschaschel and Ralf Wojtek; in the United Kingdom, Ian Greer, Julie Harris, Richard Linsell, and John Roberts; and, in the early days in the United States, Herb Rosenthal and John Zorack. From

time to time, the ranks of these advisers were supplemented by other talented individuals as well. Collaboration with all was a privilege and abiding pleasure.

My colleagues and I are fully sensible of the fact that policy advocacy is but one half of a conversation. Reform is wholly dependent on the receptivity of dedicated and diligent government officials and judges. In twenty-five years, we have been fortunate to meet many such public officials around the world. Without their fidelity to the public interest and attention to detail—I will never forget Raymond Dumey of the European Competition Directorate quizzing me on a footnote written years earlier—none of these reform efforts would have been possible and our civilization would have been that much poorer.

More generally, my understanding of the policy issues presented by the rise of delivery services has been materially advanced by the efforts of a small but diverse community of scholars, analysts, and advocates from around the world who have sought to advance public policy towards the delivery services sector. In this regard, I would like to record my particular appreciation for the efforts of organizers and participants in two sets of postal policy seminars: those of the Rutgers Center for Research in Regulated Industries, organized by Professors Michael Crew of Rutgers University and Paul Kleindorfer of the University of Pennsylvania and those of the Wissenschaftliches Institute für Kommunikationsdienste, organized by Ulrich Stumpf and his colleagues. Still more specifically, I am especially and personally indebted to two individuals who have for years generously shared both their knowledge of the industry and their passion for the truth: Bob Cohen of the U.S. Postal Rate Commission and Cathy Rogerson of the U.S. Postal Service and PricewaterhouseCoopers.

Closer to home, I have been blessed with many fine assistants without whose tolerance and assistance, precious little would have been accomplished, most notably Joanne Brown, Sandy Chivers, Gua Van Schoorl, Sheila Turek, and Jennifer Philbert.

And of all the wonderful reformers whom I have been fortunate to meet in these long policy campaigns, the greatest may have been an early discovery: my wife, Karen Geary, for she has reformed me.

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Global Delivery Services and Regulatory Reform

You fellows have discovered a business that is illegal in every country in the world. No wonder no one ever thought of that before!

- Altamiro Boscoli, Brazilian lawyer (1983)

Global delivery services are becoming a central feature of the global economy.

- Fred Smith, Chairman, Federal Express (2000)

This book tells the story, or much of the story, of how international couriers and express companies sought to orchestrate fundamental reforms in economic regulatory policies during the last quarter of the twentieth century, thus opening the way for development of global delivery services integrating both private carriers and leading public post offices. In these efforts, legislative advocacy, litigation, public affairs, public relations, and scholastic appeal, were economically blended and carefully pitched since the melody of reform was at all times faint compared to the chorus supporting the status quo. In the audience, governments of major industrialized countries and intergovernmental organizations attended skeptically.

At the beginning of the twenty-first century, the prospect of convenient, rapid, reliable, inexpensive global delivery services is apparent even if not yet completely realized. Global delivery services are emerging from still unfinished mergers and alliances between private express companies, parcel and freight companies, and leading national post offices. Necessary reforms in international legal structures continue. Using global delivery services, it will soon be possible to send all types of documents and parcels around the globe with the same ease, efficiency, and reliability that characterize a good national infrastructure featuring overlapping postal, express, and fast freight services. Global delivery services are the physical reflection of the internet.

Three decades ago, the idea of a global delivery service was well outside the bounds of accepted public policy. The major delivery services were public postal administrations, each confined to a national territory. A handful of private couriers had begun to provide end-to-end international services for urgent documents, but these were regarded as illegal interlopers by postal administrations, to be tolerated only until official express mail services could be improved. Customs officials, urged on by customs brokers, were preparing to stop couriers from clearing commercial shipments that did not pass through the expensive and time-consuming legal hoops applicable to general air freight. International airlines, quasi-public organizations, discovered couriers tendering inordinate amounts of excess baggage and resolved to end this "abuse" of passenger privileges.

This book offers an account of how private international express companies addressed such early and basic questions of economic regulatory policy and thus laid the legal groundwork for the emergence of global delivery services. It is a "case study" rather than an history. The focus of the book is the problem of inducing regulatory reform viewed from the standpoint the primary agitators, the couriers and express companies. Nine interrelated policy battles are described. In each case, a summary of the course of events is followed by copies of major policy presentations from the period. By way of introduction, this chapter provides a brief account of the evolution of international delivery services sector and pertinent legal regimes.

ORIGINS OF COURIER AND EXPRESS SERVICES

The roots of global delivery services sprang from improvements in two types of technology: air transportation and telecommunications. Introduction of jet aircraft into commercial airline fleets in the 1960s reduced the costs and delays inherent in long distance commerce and set off a boom in international trade.[1] Between 1960 and 1970, revenue ton-miles produced by U.S. air carriers in domestic air transportation increased 237 percent while international air transportation increased 476 percent.[2] Improvements in air transportation led to far flung business operations. Small improvements in telex technology, and then quantum leaps in the telecommunication and computer manipulation of data, made it feasible to "track and trace" individual international shipments. Private courier and express companies developed to take advantage of these new technologies and to serve the new businesses that grew up around them.[3]

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[1]The first turbo-jet passenger aircraft in U.S. air service, the Boeing 707, entered commercial air service in 1958; the first wide body jet aircraft, the Boeing 747, began service in 1969.

[2]Civil Aeronautics Board, *Handbook of Airline Statistics 1973*, table 4. Between 1960 and 1969, overall revenue ton-miles, all services, in domestic service (excludes service between 48 contiguous states and Alaska or Hawaii) increased from 3.73 to 12.56 billion; international (includes service to/from Alaska, Hawaii, and U.S. territories) increased from 1.29 to 7.43 billion.

[3]See, e.g., economic studies by the Bureau d'Informations et de Prévisions Économiques (BIPE) and others discussed in chapter 10, below.

The first international delivery services were air courier companies. "Couriers"—a term meaning "running messenger"—originated in the late 1960s in North America, Western Europe, and the Pacific Rim to provide fast and reliable delivery services for urgent documents, such as financial, shipping, and engineering papers. Couriers usually transported items from city to city as airline passenger baggage. As volume grew, air couriers reserved whole cargo "containers" on certain air routes.[4] By the late 1970s, the leading international courier was DHL.[5] Begun in 1969 and headed by Larry Hillblom, a recent law school graduate, DHL first offered rapid delivery of shipping and banking documents between the west coast of the United States and Hawaii. Skypak, a courier originating in Australia and expanded by Australian transport entrepreneur Gordon Barton, was second to DHL in the international market by 1980. Other early pioneering courier companies included World Courier, an expensive, specialist service founded by New Yorker Jim Berger to serve the financial community; Airport Couriers, started in 1966 by Bertie Coxall, an ex-Pan American employee, to move urgent documents around Heathrow Airport; IML, a British courier begun in the early 1970s by Andrew Walters and originally specializing in service between London and West Africa; Overseas Courier Services (OCS), an Australian-Japanese operation created to distribute Japanese newspapers; Calico, an early rival of DHL organized by John Callan; London Aire, a New York-London specialist founded by American Roy Harry and Britisher Mike Davids; and City Courier, a continental courier led by Dutchman Jaap Mulders. Purolator and Loomis, established American armored car companies, were also early participants in the new market but ultimately failed to make the transition to courier operations.

While air couriers predominated on international routes, national express companies organized fleets of trucks and small aircraft to transport urgent documents and parcels in domestic commerce. In transportation terminology, an "express" is a special purpose conveyance dispatched on a more urgent basis than similar, normally scheduled conveyances (e.g., an "express rider" or an "express train"). An air express service was one that employed its own aircraft to transport urgent documents and parcels without relying on the cargo services of scheduled passenger airlines. A hub and spoke air transport operation dedicated to urgent documents and parcels was feasible only in large, developed economies. The paradigm was Federal Express, started in the United States in 1972 by Fred Smith. In Europe, Jaap Mulder's XP, an outgrowth of City Courier, pioneered express air operations in 1981.

The common *raison d'être* of courier and express companies was their

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[4]In large aircraft, cargo and baggage are loaded into metal boxes or "containers" shaped to fit snugly into the space below the passenger deck. Use of containers, which slid on rollers built into the frame of the aircraft, sped up and simplified the loading and unloading of aircraft.

[5]The company name was derived from the initials of the founders, Adrian Dalsey, Larry Hillblom, and Robert Lynn.

ability to make innovative use of advances in transportation and communication technologies to provide a new type of pickup and delivery service, one that was faster and more reliable than traditional postal services, albeit more costly to produce. Express industry techniques of tracking and tracing and end-to-end coordination of transportation services were subsequently adopted by post offices and air freight forwarders, producing a general improvement in the ability of business to coordinate the movement of documents and goods among distant corners of the world.

MERGING OF COURIER, EXPRESS, AND POSTS

By the late 1980s, the distinction between courier and express operations began to disappear. Couriers began to operate aircraft on selected intercontinental routes, and regional express companies began to use courier services to serve parts of the globe where traffic was insufficient to support dedicated aircraft. Through acquisition, merger, and failure, the global industry coalesced into four major systems:

- DHL (purchased Calico and part of Securicor);
- TNT Skypak (union of Skypak, and TNT, an Australian transport conglomerate; purchased XP);
- Federal Express (purchased Gelco/Loomis);
- United Parcel Service (leading U.S. parcel company, purchased IML)

Dedicated international aircraft operations also allowed these companies to offer international express service for heavier items, invading the preserve of "air cargo" services.

In 1989, the hitherto bright line between post offices and international express companies began to fade. Recognizing the difficulty of providing high quality international express service without centralized management of cross-border operations, twenty of the largest national post offices formed the International Post Corporation, a private corporation based in Brussels. One activity of the International Post Corporation was operation of a hub and spoke air cargo system based in Brussels and dedicated to carriage of the post offices' express mail. As a competitor to private international express services, the International Post Corporation proved inadequate. Shareholders of International Post Corporation failed to cede sufficient authority for true centralized management. In 1991, five major post offices—those of Canada, France, Germany, Netherlands, and Sweden—gave up on International Post Corporation as an international express carrier and purchased one-half of TNT Skypak. In 1996, the largely privatized Dutch Post Office bought out its partners in the joint venture, including the Australian parent of TNT Skypak, and formed TNT Post Group, the first merger of large scale international express and postal operations.

Creation of TNT Post Group was quickly followed by additional combinations of public and private operations. At the end of the 1990s, a second, even more comprehensive amalgam of public and private operations

was engineered by Deutsche Post, corporatized successor of the German Bundespost Postdienst. Deutsche Post acquired a controlling interest in DHL as well as ownership of an assortment of European parcel companies and large international air freight forwarders based in Europe and the United States. Other major post offices began to look for private sector partners. In 2000, the French post office, La Poste, announced a partnership with Federal Express. The British and Singapore post offices announced a three-way joint venture with TNT Post Group to provide international business mail services. In early 2001, the U.S. Postal Service concluded a business alliance with Federal Express.

On March 9, 2000, in testimony before the Postal Service Subcommittee of the U.S. House of Representatives, Fred Smith, founder and chairman of Federal Express, summarized these developments as follows:

> Economic trends which have powered the growth of the national economy are rapidly transforming the global economy as well. The air express industry has been a primary facilitator of this global economic advance. Air transport accounts for less than 2 percent of the weight of goods shipped internationally, but more than 40 percent of value. . . . [N]o country can expect to operate a modern economy or be at the forefront of trade in the twenty-first century without a strong air express service.
>
> Express companies were the first type of international delivery service to harness the potential of these technologies. Specializing in the collection and delivery of urgent documents and parcels, international express companies have developed a seamless global service that is the same locally and internationally. Looking to the future, however, the implications of modern technology are not confined to express operations. Today, systems developed for international express services are being adapted to the movement of international mail and high value freight. Distinctions between international express, postal, and high-end freight services are disappearing. Global delivery services are becoming a central feature of the global economy.[6]

INTERNATIONAL REGULATORY REFORM

International regulatory reform is a multifaceted task. The regulatory framework for international commercial activities consists of interwoven threads of national and international law. Reform requires policy changes at both national and international levels. This is inevitably a long process, but it is not an impossibly long process because governments influence each other. Regulatory reforms adopted in one country affect prospects for reform in other countries; reform discussions in intergovernmental organizations are affected by and affect reform processes in member countries. The advocate for reform

[6]Frederick W. Smith, "Statement of Frederick W. Smith, Chairman, President, and Chief Executive Officer, FedEx Corporation," in *International Postal Policy: Hearings Before the Subcommittee on the Postal Service of the House Comm. on Government Reform*, 106th Cong, 2d Sess, 69, 70-71 (2000).

must thus put his case in several different policymaking fora while keeping an eye out for interrelationships between fora.

In the case of global delivery services, regulatory reform was rendered more complicated still by the fact there was no single legal regime that restrained the emergence of global delivery services. That is, there was no such thing as "courier and express regulation" at national or international levels. Threshold impediments to development of global delivery services were found in three categories of law that reinforced the effects of national borders: postal, customs, and aviation laws. Despite the technological and commercial influences encouraging emergence of global delivery services, development was restrained by outdated regulatory policies embodied in these three sets of laws.

Postal law formed the most elemental barrier. Rooted in the nineteenth century, national and international postal laws presumed that carriage of documents within a national territory is a monopoly service provided by the national postal administration. Under this approach, international document service could be achieved only by exchange of mails between postal administrations. A private courier or express company carrying urgent international documents across national boundaries ran afoul of both national postal monopoly laws and provisions of an international treaty, the Universal Postal Convention. Postal officials keenly resented private couriers who, as one postal official put it, were stealing the "fillet mignon" of the postal business.

Like postal laws, customs laws reinforced national borders. Designed to protect national security and ensure collection of duty, customs laws focused on controlling large quantities of cargo imported for resale or use in a manufacturing process. When applied to shipments of time-sensitive documents and small parcels, traditional customs procedures introduced delays and costs that rendered impossible a global delivery service comparable to domestic services. In international trade, the constraints of postal laws and customs laws reinforced one another: only post offices, which did not provide truly global services, enjoyed simplified customs provisions.

Aviation laws introduced other types of difficulties. In the early days of international delivery services, the volume of traffic was insufficient to justify operation of aircraft dedicated to express items. Commercial passenger airlines provided the only practical means of transporting documents and parcels around the world quickly, yet passenger airlines offered no service tailored to the needs of the courier companies that collected and delivered such items. Airlines resisted the practice of transporting urgent documents and parcels as the baggage of courier passengers. Moreover, as the volume of items grew, on routes where traffic would justify the operation of dedicated aircraft, international aviation agreements prohibited couriers and express companies from establishing their own international air transportation systems.[7]

[7]One country, the United States, was expansive enough to sustain a wholly internal system

Reforming the law to accommodate the needs of global delivery services posed a difficult challenge. In each case, those already authorized to provide commercial services strongly opposed new types of services which might supplant them. Each existing service had friends in government. Indeed, in each country, the postal administration, in particular, was among the largest and most politically powerful of national institutions. In comparison, advocates of reform were small and almost always viewed as foreign. From this precarious starting position, international couriers, later merged with express companies and progressive post offices, undertook to make the case for legal reforms at both the international and national levels.

The clash between the vision of global delivery services and the reality of nationally based legal regimes that controlled international commerce began in a serious way in the mid 1970s with the debate over the scope of the postal monopoly law in the United States. If the U.S. postal monopoly were interpreted to prohibit private express services, global delivery services would have been impossible. Over time, the effort to confer legitimacy on global, rather than nationally based, delivery services extended across diverse fora in the United States, Europe, and other countries, and to intergovernmental organizations.

More than a quarter century later, great progress has been made, but the work remains unfinished. Indeed, absence of definite resolutions is an inevitable byproduct of a policymaking process this is divided among many different authorities. To give scale to the efforts described in this book, one might imagine the end product of this regulatory reform campaign to be a new international legal framework for global delivery services, one attuned to the needs of global rather national systems, applicable to private as well as public service providers, and incorporating nonpostal as well as traditionally postal provisions. Such a reform would be comparable to that accomplished by the World Trade Organization in 1997 when it concluded a basic telecommunications agreement that replaced the conceptual foundations of the International Telecommunications Convention of 1872. By this standard, it remains unclear when or how a fundamentally new legal framework could develop in the realm of physical delivery services. The final chapter in this book offers one suggestion, submitted to the Universal Postal Union by the International Express Carriers Conference in April 2000.

POLICY ADVOCACY BY THE EXPRESS INDUSTRY

The approach towards public policy advocacy employed by the courier and express industry in its first quarter century and illustrated in this book is

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of dedicated express aircraft. In pioneering such a system, Federal Express likewise found that the U.S. regulatory scheme for air transportation was unable to recognize the special needs and benefits of express services. Federal Express was one of the leading voices in the deregulation of the U.S. airline system in 1977 and 1978. Deregulation of the U.S. aviation sector is beyond the scope of this book.

unconventional by the standards of the established corporate world. In some respects, the status of courier and express companies as lowly outsiders compared to their political opponents led them to adopt, and adapt, the scholarly and litigatious techniques of "public-interest" organizations. In other respects, courier and express companies took advantage of their entrepreneurial and international status to outflank slower, nationally based opponents.

The premise of the policy advocacy of the courier and express industry was the optimistic view that a sound, well articulated argument generates its own political momentum in most industrialized countries. In modern economies, reform of any major regulatory policy inevitably generates a wide range of opponents, including large vested interests. Yet reform is possible because of a relatively under reported feature of governmental decision making: with large issues at stake and major opponents on all sides, respected policymakers not infrequently seek the "safe harbor" of sound public policy. While the attendant political risk and cost in precious staff time will always limit the number of legislators willing to seek out sound public policy, a few well informed legislators can be disproportionately influential in shaping collective decisions. Courier and express companies, relatively powerless in other respects, therefore addressed policy issues "on the merits" by helping key legislators conceptualize credible long term public policy options, not limited to the specific concerns of the express industry, and then by demonstrating how reforms advocated by the express industry would be consistent with the public interest. Specific policy recommendations were advanced not to define an opening position for political negotiations but to identify a final position for sound legislation or regulation.[8]

The reform campaigns described in this book also illustrate a multi-disciplinary approach derived, in part, from the desperate nature of early policy encounters. To induce regulatory reform, courier and express companies turned to any tools at hand and used (and reused) them as economically as possible: legislative proposals, legal cases, administrative proceedings, scholarly seminars, and public relations. A law suit might be filed to force a political decision even if the case, viewed in isolation, was unpromising. A scholarly seminar might be supported as a means of educating the staff of an administrative agency. Similarly, the express industry took advantage of relationships between political jurisdictions. A policy initiative in Paris might be delayed to await developments in Bonn or Brussels. An inquiry by a hopelessly conservative intergovernmental organization might be supported as an economical way to educate national authorities, or a national law reform might be pressed as the key to reforming an intergovernmental organization. In the early days, the courier and express companies did not have the size or

[8]The premise that economic reform may be more susceptible to merit-based argumentation than often supposed is examined at length in a study on deregulation in the United States by two political scientists, M. Derthick and P.J. Quirk, *The Politics of Deregulation.*

wealth or corporate life expectancy that would allow them the luxury of viewing governmental affairs, regulatory law, litigation, public relations, and economic analysis as separate disciplines committed to different experts nor could policy efforts in one jurisdiction be treated as distinct from policy efforts in another jurisdiction.

In the world of international courier and express services, the original agitator for regulatory reform was DHL. DHL's founder, Larry Hillblom, was a lawyer by training and iconoclast by temperament. He believed passionately that governmental rules could and should be shaped to serve the needs of commerce and the good of society. Hillblom spent corporate resources and his own time in pursuit of long term policy reforms that might appear quixotic in a less successful entrepreneur.[9] Regardless of short term costs, DHL's aggressive leadership in policy matters paid dividends in reputation among members of "the establishment" in countries around the world and saved the industry from several early policy crises.

In mid 1983, leadership in the policy campaigns of the international courier and express industry passed to the International Courier Conference. In late1982, DHL concluded that a global trade association was needed to harmonize industry policy advocacy. DHL was especially troubled that its efforts to deal with postal monopoly disputes in Argentina and the Sudan had been undercut by industry disunity. On June 24, 1983, DHL invited the leading international couriers to meet to discuss cooperation in areas of policy reform. Eleven days prior to this invitation, the need for unity was dramatically underscored by a letter to all couriers from the European Commission asking for a report on relations with European postal monopolies. In response to DHL's invitation, on August 25 and 26, 1983, the chief executives of DHL, Gelco, IML, Securicor, TNT Skypak, and World Courier met in a hotel in Geneva; only Federal Express demurred. After two days, participants hesitantly agreed to form a trade group, "the International Courier Conference." The term "conference" was chosen because the fiercely competitive entrepreneurs wished to avoid a sense of permanent association. Temporary articles were approved in a second meeting in New York on November 8, and Gordon Barton, chairman of TNT Skypak, was elected chairman of the Conference.[10]

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[9]In 1977, Hillblom demanded an opportunity to testify before Congress in favor of airline deregulation and then focused his testimony solely on a plea for a total exemption from federal aviation regulation for companies smaller than a certain size, a size by then exceeded by DHL itself. Hillblom argued that small innovators were especially important to the long run health of any industry and particularly burdened by the complexities and uncertainties of regulation. *Aviation Regulatory Reform: Hearings Before the Subcommittee on Aviation of the House Committee on Public Works and Transportation*, 95th Cong, 1st Sess, 1323 (1978).

[10]An Australian, Barton combined a legal education with entrpreneurial spirit and political flair. To protect his trucking company, IPEC, Barton had led a legal challenge to the Australian interstate railroad monopoly that ultimately succeeded in the Privy Council in London and, in a single stroke, deregulated the trucking industry in Australia. *See Hughes and Vale Proprietary L.D. and State of New South Wales v. Commonwealth of Australia*, [1955] A.C. 241 (Privy Council, 1954). Opposed to the Vietnam War, Barton co-founded the Australia Party, a small but influential

For six years, from mid 1983 to mid 1989, the Conference was the major vehicle for stimulating policy reforms that would permit the industry to take root and grow. Under Barton's chairmanship, the Conference functioned as the top policy coordinating committee for the international express industry. Its mode of operation was simple but effective. Meetings were attended by chief executives or direct representatives who were personally familiar with key policy issues and commanded the resources needed to address them. The Conference developed and executed policy reform campaigns by means of a cadre of lawyers and public affairs consultants retained in key jurisdictions including Brazil, Egypt, the European Union, France, Germany, Ireland, Italy, the United Kingdom, and the United States. At first, this team (much of which was originally assembled and managed by the author as DHL's counsel) was contributed to the Conference by DHL. After March 1985, the team (and the author) were retained by the Conference directly. Several chapters of this book reflect the substantive work of the Conference.

In May 1985, the Conference catalyzed formation of an industry voice for reform in the United States. From the first meeting of the Conference, members had expressed concern about the absence of an industry trade association in the United States capable of devoting significant resources to reform of national policies related to international express services. U.S. customs issues, in particular, were a top priority. Focused primarily on domestic affairs and only marginally involved in policy reform, the Air Courier Conference of America (ACCA) had no substantive influence in U.S. policymaking. At an ACCA annual general meeting held at Hilton Head in May 1985, Conference representatives proposed creation of an International Committee that would function semi-independently within ACCA and assume responsibility for industry policies with respect to international issues. Although composed of ACCA members, the International Committee would be funded by a special levy on its membership so that its policy advocacy capabilities would not be limited by the low dues structure of ACCA. With reluctance, ACCA agreed to establish the International Committee as preferable to the alternative, creation of a wholly separate international courier association by Conference members.

The nature of the Conference was modified substantially in an annual general meeting held on April 12 and 13, 1987, in Montreal. On motion of TNT, the Conference decided to adopt defense of international remail as a major goal. Unenthusiastic about remail, dominant member DHL insisted that TNT and Federal Express should henceforth make the same contribution to the costs of the Conference as DHL. Federal Express, supported by prospective

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group that helped elect an antiwar prime minister in 1972. In 1979, Barton moved to Europe and expanded IPEC into a European express trucking company; IPEC later purchased and built up Skypak courier service. For a short autobiographical account of Barton's early career, see A. Curthoys, A.W. Martin, and T. Rowse, *Australians From 1939* (New South Wales, Australia: Fairfax, Syme & Weldon Associates, 1987).

member United Parcel Service, in turn demanded that the Conference be renamed the International Express Carriers Conference. The new arrangements were agreed, and the mission, funding, and name of the Conference were modified. In April 1988, United Parcel Service, after long hesitation, joined the Conference as a fourth major partner. In addition to the four majors, the Conference at this time included three smaller members: IML Air Services Group, Oversea Courier Service, and Securicor Express International.

In June 1989, the Conference, as originally conceived, collapsed due to growing disagreement over the methods of the Conference and diverging commercial interests among members. Several members believed that industry officials, rather than jointly retained consultants, should assume responsibility for development and execution of policy reform efforts. Members also questioned the benefit of close coordination of policy advocacy in different fields, noting that different issues required different technical expertise. Likewise, they believed that world regions were so distinct that policy should be developed and executed to a greater extent in regional and national organizations.

The Conference therefore reorganized. Centralized development and execution of policy reform efforts through reliance on a group of common advisers was discarded in favor of an arrangement whereby the Conference entrusted management of specific projects to individual members, subject to Conference agreement on policy positions. The Conference also decided to sponsor and defer to regional associations. The most important of these were the European Express Organisation (EEO) and Conferencia Latino Amerciana de Empresas Courier (CLADEC). Despite these changes, some Conference members remained dissatisfied. In November 1988, Securicor left the Conference and, with DHL, announced plans to establish a rival European association unrelated to the Conference.[11] In June 1989, DHL, the moving force behind the founding of the Conference, quit when members declined to terminate efforts to defend international remail. With the departure of DHL, the Conference was unable to speak for all major parties in the industry.

In October 1989, Gordon Barton looked back on the accomplishments of the Conference in the period 1983 to 1989 in the follo wing terms:

> The growth and change we have witnessed in the international express industry since 1983 have been dramatic. This remarkable commercial progress has been possible, however, only because of our joint efforts to clear from our path regulatory debris that has accumulated over the centuries: postal monopoly laws, customs regulations, transport restrictions, and so forth. In this Herculean effort, the Conference has carried out research and legal studies, formulated and publicized policies and plans, and

[11]The Association of European Express Carriers was composed of representatives of national express associations rather than direct representatives of European express companies. In 2000, AEEC and EEO merged to form the European Express Association.

carried them out with remarkable success.

> Although we have not done all that we might have done, I believe it is fair to say that few industry groups in the world have accomplished so much with so little. We have time and again won reforms despite determined opposition from some of the largest and most powerful interest groups in the political arena: national airlines, freight forwarders, and above all, the post offices.[12]

After 1989, leadership in industry policy campaigns became more diffuse. The International Express Carriers Conference, under rotating chairmen, took the lead in customs reform efforts at the Customs Cooperation Council and in representation in other intergovernmental organizations. The most important postal reform debates were taking place in Europe where industry efforts were directed by European Express Organisation, energetically led by Anton van der Lande of United Parcel Service. Industry policy efforts in South America were developed through CLADEC. In the United States, the major express companies were accustomed to advocating their policy positions separately to the U.S. government; they cooperated through the International Committee of the Air Courier Conference of America when they were in agreement and acted individually when they were not.

By the end of the century, the only chief executive of a global delivery service that still approached regulatory reform with the verve and vision of the early express industry was Federal Express's Fred Smith.[13] During efforts to reform U.S. postal policy in the period 1995 to 2000, Federal Express played a major role in shaping the policy debate over national and international policy because of Smith's decision to work constructively with Congress, the Postal Service, and the Administration towards progressive, procompetitive policies. In repeated appearances before for the House Postal Service Subcommittee, Smith masterfully summarized the themes of long written statements without reference to notes.[14] Nonetheless, as of 2001, the outcome of postal reform in the U.S. remains in doubt, in part because of the differing concepts of reform espoused by major delivery services, including the leading express companies, the large newspapers, and the Postal Service.

ORGANIZATION OF THIS BOOK

This book provides a record of nine facets of the broad regulatory reform campaign conducted by the international courier and express industry from the

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[12]From the introduction to "History, Philosophy, and Goals of the Conference," a pamphlet published by the International Express Carriers Conference in October 1989.

[13]In the 1970s, Smith personally led the successful effort to persuade Congress to deregulate air cargo operations in the United States, an "absolutely and positively" crucial step in development of U.S. air express industry which, in turn, set the stage for the dominant presence of U.S. companies in the global sector.

[14]One thirty-year veteran of the Washington postal policy scene proclaimed Smith's performance in the Subcommittee's September 1996 hearing the best congressional testimony he could recall on any subject.

mid 1970s to early 2001. Although division of this book into parts is intended to make events more comprehensible, in reality these issues were interrelated and addressed simultaneously. Moreover, it should be kept in mind that this book omits other important public policy campaigns, also simultaneous and interrelated. At the outset, policy campaigns in developing countries have been omitted. While policy debates in developing countries were often very important and hard fought, it was in the industrialized countries and intergovernmental organizations where these issues were first and most fully discussed. Other important policy developments not addressed in this book, either because they were more derivative than seminal or because they fall outside the first hand experience of the author, include: major postal reform efforts in Australia, Canada, New Zealand, and Sweden; certain customs modernization efforts in the United States and the European Union; and the step-by-step efforts to win international air transportation rights for integrated express carriers. Despite these omissions, it is hoped that the policy campaigns described in this book provide a fair sense of the early, most fundamental policy battles.

In the case of each policy campaign described, an overview chapter provides the background of the issue and a summary of events. Since each campaign took place over many years, it is impossible to provide a full account of how policy reforms were pursued by the international express industry. Nonetheless, the overview chapters seek to convey a sense of the overall strategy and the extent and reasons for success or failure. In several cases, final outcomes are still to be determined. Each overview chapter is followed by one or more policy documents prepared during the course of the campaign. Some were widely noted and achieved a positive reputation even among opponents. These historic documents explain the nature of arguments employed in a way that later accounts cannot. The original documents have been reproduced without change except for standardization of style (headings, typographical conventions, legal citation form, etc.) and correction of misspellings or other obvious typographical errors.

The purpose of this collection of essays and historical documents is threefold. First, building new global services in a sector long thought to be beyond innovation was an exciting and interesting adventure, and much of the excitement and interest involved issues of public policy. Many of the documents employed in shaping new public policies are now difficult to obtain. This book preserves some of this history for students of and participants in the industry. A second purpose of this book is to provide a collection of policy perspectives and arguments that may still retain currency. The effort to establish a legal framework that will facilitate global delivery services is far from finished. Some of the ideas advanced in this book, originally rejected as too “radical,” may be worthy of reconsideration. Finally, it is hoped that an account of the experiences of the international courier and expresses companies may be useful, even encouraging, to other emerging global

industries who likewise find themselves confronted with the seemingly impossible task of international regulatory reform.

Part 1

U.S. Postal Monopoly

CHRONOLOGY

29 Jun 1973	Board of Governors' report on postal monopoly; USPS proposes comprehensive postal monopoly regulations.
20 Oct 1974	Comprehensive postal monopoly regulations adopted by USPS.
6 Aug 1976	Postal Rate Commission declines to review USPS postal monopoly regulations.
Apr 1977	Postal Service Commission recommends exemption from postal monopoly for time sensitive documents.
29 Nov 1977	*ATCMU* case: District Court dismisses complaint against postal monopoly regulations.
6 Apr 1978	House approves H.R. 7700 with Lott amendment limiting postal monopoly.
19 Jul 1978	Couriers testify before Senate subcommittee.
16 Aug 1978	Senate committee approves H.R. 7700 with revised Eagleton amendment exempting time-sensitive letters from postal monopoly.
28 Dec 1978	USPS proposes general revisions to comprehensive postal monopoly regulations.
9 Mar 1979	*ATCMU* case: Circuit Court upholds postal monopoly regulations.
3 May 1979	House subcommittee hearings begin.
9 Jul 1979	USPS proposes suspension for urgent letters.
Aug 1979	House subcommittee meets American businessmen in Far East.
11 Sep 1979	USPS adopts non-controversial revisions to postal monopoly regulations and abandons others.
24 Oct 1979	USPS "suspends" postal monopoly for urgent domestic and international letters.

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Overview: U.S. Postal Monopoly

> *In my reading of . . . 150 years of statute and statutory interpretation, there emerges only one consistent theme from the Postal Service— it has always latched onto whatever interpretation of the word "letter" which would give it the most extensive monopoly power which Congress at that time seemed disposed to allow.*
>
> - Judge Wilkey dissenting in *ATCMU* case (1979)

In the 1970s, the newly established U.S. Postal Service adopted an expansive view of the postal monopoly law and insisted on the illegality of private express companies specializing in transmission of "time-sensitive" business documents. Postal inspectors harassed carriers and customers. Private express companies fought back in the courts, administrative proceedings, and congressional hearings. In 1979, the Postal Service yielded to Congressional pressure and adopted administrative regulations that reflected the Postal Service's acquiescence in a role for couriers and express companies in U.S. commerce.

U.S. Postal Monopoly Law

At the heart of this debate was the U.S. postal monopoly law, an ancient text of uncertain meaning. The monopoly statute in effect in 1970 was enacted in 1872 as part of a general codification of postal laws. In 1909, the most important postal monopoly provisions were transferred without substantive change to the first U.S. criminal code. These provisions were reenacted, again without substantive change, in the Criminal Code of 1948, the law in effect in 1970.[1] Between 1872 and 1970, the postal monopoly laws were amended in minor respects, but the basic scope of the monopoly was unchanged.

[1]Act of June 25, 1948, ch. 654, 62 Stat 776, enacting title 18, United States Code.

The 1872 postal code combined two legal threads of the monopoly, one dating from the earliest days of the republic and the other from 1845, dawn of the industrial revolution. The first thread prohibited anyone but the government from establishing a "postal service" for the carriage of letters. A "postal service" was originally a series of "posts" or designated relay stations, such as taverns and inns, where foot messengers or mounted messengers could rest and obtain fresh supplies. After carrying a pouch, or "mail," of letters one or more "stages," the distance between relay stations, a messenger would hand off the pouch to the next messenger. A ban on establishment of private postal services was adopted in England in 1660 to limit circulation of political ideas and enrich supporters of the king. It was copied into American law by the Continental Congress in the Ordinance of 1782. The prohibition against setting up private "foot posts" and "horse posts" was later extended to private carriage of letters by transportation companies operating stage coaches and river boats.

In 1970, this thread of the postal monopoly law was found in section 1694 of the Criminal Code of 1948 which provided:

> Whoever, having charge or control of any conveyance operating by land, air, or water, which regularly performs trips at stated periods on any post route, or from one place to another between which the mail is regularly carried, carries, otherwise than in the mail, any letters or packets, except such as relate to some part of the cargo of such conveyance, or to the current business of the carrier, or to some article carried at the same time by the same conveyance, shall, except as otherwise provided by law, be fined not more than $50.

The other main thread in the postal monopoly law was a prohibition against establishment of "private expresses" first adopted by Congress in 1845. A "private express" is a company that arranges for the transportation of baggage and freight for the particular purpose of transporting letters and parcels. In the late 1830s, private express companies such as Harnden & Company, Pomeroy & Company, Wells Fargo, and Adams Express arranged for courier passengers to carry bags of letters on board newly constructed railroads and steamship lines. As business grew, express companies leased whole railroad cars on scheduled trains. To complete their networks, express companies also arranged for mounted messengers on certain routes. In several prominent cases, the government failed to persuade the courts that private express companies violated the law forbidding private postal systems. In 1845, after long debate, Congress prohibited establishment or use of private express services and forbade transportation companies from carrying their couriers. [2]

In 1970, the central provision of the 1845 act, with slight amendments, appeared as section 1696 of the Criminal Code of 1948 as follows:

> (a) Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the

[2]For a good history of these early express companies see Alvin F. Harlow, *Old Waybills.*

> same by regular trips or at stated periods over any post route which is or may be established by law or from any city, town, or place to any other city, town, or place, between which the mail is regularly carried, shall be fined not more than $ 500 or imprisoned not more than six months, or both.
>
> This section shall not prohibit any person from receiving and delivering to the nearest post office postal car or other authorized depository for mail matter any mail matter properly stamped.
>
> (b) Whoever transmits by private express or other unlawful means, or delivers to any agent thereof, or deposits at any appointed place for the purpose of being so transmitted, any letter or packet, shall be fined not more than $ 50.
>
> (c) This chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation or by special messenger employed for the particular occasion only. Whenever more than 25 such letters or packets are conveyed or transmitted by such special messenger the requirements of section 60l of title 39 shall be observed as to each piece.[3]

By 1970, application of the 1872 postal monopoly to daily commerce had become uncertain. The composition of mail and the nature of postal service had changed greatly. Personal and business correspondence, the core of the postal function in 1872, was a minor part of the mail stream of 1970. In the intervening century, few judicial decisions had illuminated the scope of the postal monopoly. Over the years, lawyers for the Post Office Department had issued numerous administrative rulings claiming that various types of messages were "letters" for the purpose of interpreting the monopoly, but these rulings were brief, poorly reasoned, and inconsistent.

POSTAL MONOPOLY REGULATIONS, 1974

In 1970, Congress abolished the Post Office Department and established the U.S. Postal Service as an independent federal agency, i.e., an agency outside the direct control of the President. Ultimate authority to manage the Postal Service was vested in a Board of Governors consisting of nine Governors, each appointed by the President for a nine-year term, and the Postmaster General and Deputy Postmaster General, appointed by the nine Governors. The purpose of the act was to improve the national postal system by shielding the Postal Service from political influence and setting it on a more "business-like" course.[4]

While transforming the Postal Service into a more commercial and independent organization, the 1970 act also directed the Postal Service's Board of Governors to review the scope of the postal monopoly. On June 29, 1973,

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[3]Section 601 of title 39 permits the private carriage of a letter out of the mails if sender has applied to the envelope and cancelled postage stamps in the amount that would have charged if the letter had been posted.

[4]For an account of the aims and results of the Postal Reorganization Act of 1970 see J.T. Tierney, *Postal Reorganization: Managing the Public's Business.*

the Board reported that no changes should be made in the postal monopoly statutes, commonly but inaccurately called "private express statutes."[5] On the same day, the Postal Service proposed to substantially redefine the scope of the monopoly by adoption of administrative regulations.[6] Following a second notice of proposed rulemaking, the Postal Service adopted comprehensive postal monopoly regulations, effective October 20, 1974.[7]

The 1974 regulations adopted a fundamentally new approach towards defining the scope of the postal monopoly and enforcing its provisions. Instead of determining the scope of the monopoly by interpreting the word "letter," the 1974 regulations defined every tangible communication to be a "letter" and fixed the scope of the monopoly by means of administrative regulations which purported to "suspend" the postal monopoly for specific types of communications or particular classes of mailers or services. The new definition of "letter" was "a message directed to a specific person or address and recorded in or on a tangible object."[8] This definition of "letter" included all printed matter and commercial papers as well as non-verbal media such as photographs and blueprints.[9] To assuage public outrage, the new regulations announced "suspensions" of the postal monopoly to allow private carriage of newspapers, magazines, checks (when sent between banks), and data processing materials (under certain circumstances).[10] As legal authority for its suspensions of the postal monopoly, the Postal Service cited an 1864 law which had never previously been interpreted to provide such authority. Another innovation in the 1974 regulations proclaimed that mailers and private carriers contravening the postal monopoly were subject to a "back postage" fine, i.e., a civil fine equal to the postage that would have been paid if letters had been posted instead of transmitted by private express.[11] This provision presented the mailer or private express company with the prospect of huge fines assessed by a self-interested Postal Service rather than a possibly more forgiving U.S. attorney.

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[5]House Committee on Post Office and Civil Service, *Statutes Restricting Private Carriage of Mail and Their Administration: A Report by the Board of Governors to the President and the Congress Pursuant to Section 7 of the Postal Reorganization Act*, Comm Print No 93-5, 93d Cong, 1st Sess (1973).

[6]38 FR 17512 (Jul 2, 1973).

[7]39 FR 3968 (Jan 31, 1974); 39 FR 33209 (Sep 16, 1974).

[8]39 CFR 310.1(a).

[9]The 1974 regulations provided that USPS's Law Department would issue "advisory opinions" on the scope of the monopoly. 39 CFR 310.6. Accordingly, USPS lawyers advised that the postal monopoly covered carriage of various items not normally considered "letters" in ordinary usage. *See, e.g.*, PES Letters 74-24 (1974), 75-1 (1975) (payroll check); 75-5 (1975) (Wal Disney posters); 76-5 (1976) (fishing license); 75-32 (1975) (football tickets); 75-11 (1975) (IBM punch cards); 74-14 (1974) (blueprints); 78-11 (1978) (data processing tapes and computer programs); 76-8 (1976) (gasoline company credit card); 75-9 (1975) (box of merchandise with advertisement enclosed); 74-7 (1974), 74-15 (1974) (intra-company memoranda); 78-14 (1978) (electronically transmitted document when converted to hard copy form and carried from or to telecommunications service).

[10]39 CFR 310.1(a)(7) n 1, 320.

[11]39 CFR 310.5.

By making the right to use private carriers a matter of administrative grace, the Postal Service was able to force mailers and private carriers to acquiesce in enhancement of the investigative powers by the Inspection Service. The first and second notices of proposed rulemaking imposed reporting conditions on private express companies operating within the scope of proposed suspensions for intracompany and data processing documents. Private carriers would be required to register with the Postal Service and provide annual reports of their operations. The second notice also provided for affidavits from major customers of private carriers. The final notice of rulemaking abandoned most of these procedures as "unworkable" and unnecessary since the proposed suspension for private carriage of intracorporate documents was deleted. The final rule, however, required private carriers operating within the scope of the data processing suspension to register with the Postal Service, to allow postal inspectors access to covers of shipments (which showed delivery times), and to keep records. The final rule further stated that the Postal Service could administratively withdraw the suspension with respect to a particular private carrier if it failed to abide by the terms of the suspension.[12]

Armed with the postal monopoly regulations, Postal Service inspectors and lawyers used intimidation to discourage customers of private couriers. They relied on the expansive regulatory definition of the monopoly as though it were vested with the same legal authority as statute. Unsuspecting mail room managers had no way to distinguish between the law of Congress and advocacy by the Postal Service Law Department. Postal inspectors called on customers of private express companies, demanding details of a customer's use of private carriers, pointing out the costs of potential "back postage" fines, and extolling the advantages of the Postal Service's own Express Mail service. A senior vice president of Purolator summed up the Postal Service campaign as follows: "An overwhelming body of evidence leads to the conclusion that the USPS has used the Private Express Statutes in an *in terrorem* fashion to induce customers away from private expedited carriers and into using Express Mail."[13]

POSTAL RATE COMMISSION REJECTS OVERSIGHT, 1976

In addition to establishing the independent U.S. Postal Service, the Postal

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[12]"Failure to comply with the notification requirements of this section and carriage of material or other action in violation of other provisions of this Part and Part 310 are grounds for administrative revocation of the suspension as to a particular carrier for a period of less than one year . . . ." 39 FR at 33213, *codified* 39 CFR 320.3(d).

[13]*Private Express Statutes: Hearings Before the Subcommittee on Postal Operations and Services of the House Committee on Post Office and Civil Service*, 96th Cong, 1st Sess, 121, 127 (1979) (testimony of John Delany, Senior Vice President and General Counsel, Purolator Courier Corporation). *See also Postal Service Amendments of 1978: Hearings on S 3229 and HR 7700 Before the Subcommittee on Energy, Nuclear Proliferation, and Federal Services of the Senate Committee on Governmental Affairs*, 95th Cong, 2d Sess, 335 (1978) (testimony of Time Critical Shipment Committee).

Reorganization Act of 1970 established the Postal Rate Commission, a second independent agency. The Postal Rate Commission consisted of five members appointed by the President and an expert staff. The essential task of the Postal Rate Commission was to provide an independent evaluation of the fairness of the Postal Service's proposed changes in rates and mail classifications; for example, whether a given rate increase should fall more heavily on first class letters and less on advertising mail, or visa versa.

Even before the Postal Service finally adopted the 1974 regulations, United Parcel Service (UPS) and Associated Third Class Mail Users Association (ATCMU) questioned their propriety in the course of a mail classification proceeding before the Postal Rate Commission. UPS and ATCMU asked the Postal Rate Commission to hold that the postal monopoly regulations, like new postal rates and classifications, must be submitted to the Commission for a "recommended decision" before ef fectiveness.

Public Counsel for the Commission, Norman Schwartz, an experienced and capable regulatory lawyer, agreed with the complainants. He began by pointing out the expansive nature of the Postal Service's "definition" of "letter":

> The Postal Service proposes to expand the legal basis of its statutory monopoly. The proposed definition of the word "letter" would expand the scope of the postal monopoly to include the following materials not formerly considered letters:
> (1) checks and other commercial papers;
> (2) legal papers and documents;
> (3) matter sent for filing, storage or destruction;
> (4) newspapers and magazines;
> (5) catalogs;
> (6) directories;
> (7) certain data processing materials;
> (8) matter conveying information already known to the addressee;
> (9) exact copies;
> (10) official records;
> (11) answers to examination papers;
> (12) matter sent for auditing or preparation of bills;
> (13) pictures or visual representations;
> (14) manuscripts and news items.[14]

Schwartz then focused acutely on the weakest point in the Postal Service's claim of authority for the proposed regulations, the claim of authority to suspend the postal monopoly:

> Postal Service proposes to adopt a broad reading of the scope of its monopoly and then "affirmatively suspend" the prohibition against private

[14]"Legal Memorandum of Assistant General Counsel, Litigation Division, Concerning the Role of the Postal Rate Commission in the Exercise of the Legal Controls over the Private Carriage of Mail and the Postal Monopoly" at 2, Docket No MC 73-1 (1974).

> carriage for certain kinds of mail. The legal officers of the Postal Service say that section 601 of the Postal Reorganization Act permits this procedure. We disagree. Invocation of this section has the legal effect of doing exactly the opposite of what Postal Service intends. A suspension under section 601 prevents private carriage; it does not permit private carriage as Postal Service believes. Our interpretation of section 601 is fully supported by the language of the section, by the legislative history of section 601 and by the criminal nature of the statute.[15]

Without addressing these issues, the Postal Rate Commission, on August 6, 1975, concluded that it did not have jurisdiction over the postal monopoly regulations.[16]

Even though the Postal Rate Commission declined direct oversight over the postal monopoly regulations, Purolator sought to use cases before the Commission to gather evidence of abuses in Postal Service enforcement of the monopoly. In late 1978, the Postal Service filed with the Commission a proposal to begin an intracity express mail service called Express Mail Metro Service.[17] Purolator demanded a complete accounting of efforts to use the Inspection Service and the postal monopoly laws to suppress competition by private express companies. After numerous pleadings, the Commission granted Purolator's request but limited it to redacted records relating to three cities: Chicago, Gulfport (Mississippi), and Columbus (Ohio). Records of 10 Inspection Service investigations were produced. They indicated that, on at least some occasions, enforcement efforts of the Inspection Service were closely coordinated with sales efforts. When the Postal Service resisted further discovery, Purolator settled for a formal admission that Postal Service practices revealed in respect to the three cities "accurately reflect prevailing Postal Service policies and practices at the times they were prepared." Purolator later used the fruits of these proceedings to lend substance to congressional testimony.

POSTAL SERVICE COMMISSION, 1977

By the mid 1970s, there was uneasy sense in Washington that the Postal Reorganization Act of 1970 was coming unglued. The price for an ordinary first class letter had risen from 8 cents in 1970 to 10 cents in 1974 to 13 cents in late 1975. Postal deficits increased from $200 million or less in the early

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[15]Ibid. at 33. At the end of the quoted passage, the Public Counsel added the following note: "The suspension technique is a rather ingenious tool for achieving what appears to be Postal Service's goal, i.e., gathering under its exclusive domain nearly all mailable matter. It permits the immediate adoption of a broad definition of the scope of its monopoly while keeping potential ire of mailers under control. No mailer can really complain so long as there is a suspension in force. If Postal Service were to withdraw its suspension some years hence, it should cause no surprise when Postal Service argues in court that the long standing administrative interpretation of the scope of the postal monopoly should be given great weight."

[16]"Statement of General Policy Determining Lack of Jurisdiction and Order Terminating Proceeding," Order No 133, Docket No RM 76-4.

[17]Postal Rate Commission, Docket MC 79-2, Express Mail Metro Service Proposal, 1978.

1970s to more than $1 billion in 1976. Total mail volume stopped growing, and complaints about poor quality service were rife. A widely-circulated study by Postal Service staff urged a reduction in service standards and consideration of reducing the postal monopoly.[18] Proposed solutions ranged from reassertion of political control over the Postal Service, advocated by Congressional leaders who regretted their loss of influence, to deregulation, suggested by members of the Ford Administration. In January 1977, the Department of Justice issued a pamphlet, *Changing the Private Express Laws*, that traced the history of the monopoly law from Queen Elizabeth I of England and concluded that "what is necessary, therefore, is a thoroughgoing, independent analysis to appraise the potential public impact of these longstanding laws."

DHL and Purolator participated in this early political debate as members of a postal committee of the National Association of Manufacturers (NAM). In April 1976, NAM filed a statement with a Senate committee outlining, inter alia, the need for private courier service for important business documents:

> The effective functioning of modern business depends to a large degree on the rapid transmission of information. The increased costs that businesses must bear as a result of the Postal Service's regulations are particularly objectionable because the Postal Service cannot provide the rapid and dependable service that businesses require.[19]

To permit increased use of couriers, NAM urged amendment of the postal monopoly law to list specific items which could be carried out of the mails. The NAM proposal would have codified exceptions to the monopoly already found in postal monopoly regulations and provided new exceptions for advertisements enclosed in cargo, data processing materials, and most importantly, "communications between corporations which are members of an affiliated group of corporations." On January 26, 1976, the NAM proposal was introduced as H.R. 2460 by a junior Republican congressman from Mississippi, Trent Lott. In a heavily Democratic congress, the Lott proposal appeared to have no chance for serious consideration.

In fall 1976, Congress responded to strong but conflicting complaints about the Postal Service by establishing a special study commission, the Commission on Postal Service. The Commission was instructed to recommend improvements in the postal laws and to consider the role of private express services. The Commission, chaired by Gaylord Freeman, a prominent banker, held hearings throughout the United States. The couriers split on whether to testify before the Commission. Leery of the fact that two of the commissioners were union leaders, DHL decided that it should concentrate on obtaining supportive testimony from its customers. Purolator and Loomis, two of the

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[18]House Committee on Post Office and Civil Service, *Postal Service Staff Study: The Necessity for Change*, Comm Print No 94-26, 94th Cong, 2d Sess (1976).

[19]*Postal Reorganization: Hearings on S. 2844 Before the Senate Committee on Post Office and Civil Service*, 94th Cong, 2d Sess, 247 (1976).

largest couriers and established armored car companies; both testified in favor of competition in the delivery of urgent letters and documents.

One way or another, efforts by couriers and their customers made an impression. In April l977, the Postal Service Commission issued its report which concluded, inter alia,

> The Postal Service sought to control diversion of volume to private carriage by subjecting nearly every message to the statutes and then "suspending" the regulations for letters requiring extremely expedited delivery service which the Postal Service did not provide. . . . The Commission recommends that Congress enact legislation defining the scope of the private express statutes. The legislation should respond to the need of business for expedited delivery of extremely time-sensitive matter. . . . [E]xclusions from the private express statutes should be based not merely on the content of mail, but also in recognition of service requirements which the Postal Service is not prepared to meet.[20]

This report first introduced the concept of an exception to the postal monopoly defined by reference to service standards rather than to the content of items transported.

POLICY REFORM AND THE COURIERS

Although private express companies had a common interest in limiting the scope of the postal monopoly, coordination of political efforts proved elusive. The largest courier, Purolator, was a cautious, well-established company, with extensive ground-based messenger services and the beginnings of an international air courier system. Purolator was represented by an even more established Washington law firm. In rate cases before the Postal Rate Commission, Purolator raised important postal monopoly issues, but it felt uncomfortable venturing beyond such well marked paths.

The most activist of the couriers was DHL, whose founder, Larry Hillblom, was a lawyer who had personally investigated the arcane legal history of the postal monopoly law.[21] Although very small compared to Purolator, DHL was the leading international courier. Hillblom and DHL were also fresh from winning a postal monopoly confrontation with the post office in Hong Kong in 1975-76, the first country in which the post office and express services clashed over public policy. Like Purolator, DHL was an early and active member of NAM postal committee. In 1976, DHL assembled and distributed to interested customers an extensive binder of legal and policy analyses of the postal monopoly. In early 1978, this collection of documents was distilled into "A Practical Guide to the United States Postal Monopoly,"a 55-page booklet that became the de facto "bible" on postal monopoly law. Despite DHL's urging, other express companies declined to participate in this

[20]1 *Report of the Commission on Postal Service* 72-73 (1977).

[21]P. Donnici, L Hillblom, L. P. Lupo, and M.B. Collins, "The Recent Expansion of the Postal Monopoly to Include Commercial Information: Can it be Justified?" 11 USF L Rev 243 (1977).

educational effort.

Other leading express companies, while not as wary as Purolator, were hesitant to join DHL in rocking the boat too much. Federal Express, although aggressive and entrepreneurial like DHL, viewed itself as an express parcels service with only a marginal interest in postal monopoly law. Loomis, based in the western United States, had a long history of legal and regulatory disputes with DHL. United Parcel Service, at this time, was the leading parcel delivery service but was not considered an express company.

The couriers did not attempt to coordinate their political and legal efforts until early 1978. Although New York City messenger companies initiated formation of an industry trade association, the Air Courier Conference of America, in May 1977, ACCA proved politically inactive. The first serious meeting of top officials of the leading courier companies took place in February 1978 at Chicago's O'Hare Airport at the instigation of DHL. This group agreed to form a policy coordinating committee called the Time Critical Shipment Committee.[22] Even within this framework, however, philosophical differences among the parties made united action difficult.

ATCMU CASE, 1976-1979

While the Postal Service Commission was reconsidering postal reform for Congress, the Associated Third Class Mail Users rushed to court to force a precipitous judicial review of the 1974 postal monopoly regulations. On September 21, 1976, only a month and a half after the Postal Rate Commission decided that it did not have jurisdiction over the postal monopoly regulations, ATCMU asked a federal District Court to declare the regulations invalid on various grounds, primarily because of extension of the definition of "letter" to include printed advertisements. The District Court declined and on November 29, 1977, dismissed the complaint.[23] ATCMU appealed to the Circuit Court for the District of Columbia, setting the stage for what is still, two decades later, the most important postal monopoly decision since the 1970 act.

Concerned about the breadth of authority claimed by the Postal Service in this case and the prospect of validation by the Circuit Court, DHL urged other express companies to join together to intervene in the appeal. When all declined, DHL entered the case as an *amicus curiae* by teaming up with National Mass Retailers Institute (NMRI). NMRI supported a narrow view of the postal monopoly but was unwilling to underwrite the cost of intervention; DHL was willing to undertake the legal work but feared retaliation from the Postal Service. While DHL paid for the legal work, only NMRI's name appeared in the case.

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[22]The Committee retained Purolator's law firm, Cleary, Gottlieb, Steen and Hamilton, as legal counsel, Federal Express's counsel, John L. Zorack, as lobbyist.

[23]Associ*ated Third Class Mail v U.S. Postal Service*., 440 F Supp 1211 (DDC 1977), *aff'd* 600 F2d 824 (1979), cert den 444 US 837 (1979).

In the appeal, ATCMU framed the issue in dispute as, 'Whether a public advertisement is a "letter" within the meaning of the private express statues?' In defense of its regulations, the Postal Service took the position that since 1792 the term "letter" has been used in the postal laws to include all types of communications, including newspapers, magazines, and pamphlets. With respect to advertisements in particular, the Postal Service pointed to three legal opinions issued by Post Office Department Solicitor William Lamar in 1916 which asserted that the postal monopoly precluded private carriage of "circulars." In adopting this position, the Postal Service disregarded many inconsistent interpretations of the postal monopoly in the wake of the 1872 act.

In retrospect, it is plain that ATCMU's approach to this case was badly misconceived. ATCMU's framing of the issue did not require the court to address the general, seemingly indefensible, concept of "letter" but only the specific claim that "advertisements" are not "letters." More importantly, ATCMU failed to put in issue the Postal Service's claimed authority to suspend the postal monopoly, the weakest point in the regulatory scheme and a necessary constituent of the Postal Service's broad claim of monopoly. ATCMU's historical research was inadequate to refute sweeping generalizations by the Postal Service. DHL, as NMRI, tried to complement ATCMU's presentation. As the court's opinion makes clear, DHL's historical research gave the court difficulties at numerous points.[24]

On March 9, 1979, two members of the three-judge panel upheld the validity of the postal monopoly regulations insofar as they applied to advertisements. The court's opinion, however, is laced with doubts and caveats: "Indeed, we are hopeful that our recital of the ambiguities and uncertainties will spur Congress to give the matter some attention." The third member of the panel issued a strong dissent. Nonetheless, as DHL feared, the *ATCMU* decision remains the most important legal precedent upholding the authority of the Postal Service to regulate its competitors.

PROPOSED REVISION OF MONOPOLY REGULATIONS, 1978

On December 27, 1978, the Postal Service proposed to amend the 1974 postal monopoly regulations.[25] The notice of proposed rulemaking began by noting that the 1974 definition of letter "appears to have served well and the definition has been approved judicially"by the District Court in the *ATCMU* case. In draft revisions, the Postal Service proposed to extend or perfect its

[24]Although better versed in the history of the postal monopoly that ATCMU, DHL itself was not fully prepared for this case. Subsequent research has revealed, for example, that: (i) in 1881, in response to a request from the Postmaster General, the Attorney General specifically ruled that the 1872 postal monopoly did not include all first class mail, much less advertisements classifiable as third class mail and (ii) in 1919, in response to a direct question from Congress, the Postmaster General substantially retreated from Lamar's claims of a monopoly over the carriage of printed advertisements. Such points were never presented to the Court of Appeals.

[25]43 FR 60615 (Dec 28, 1978).

claim of monopoly in several respects.

The notice of proposed rulemaking provoked a strong reaction. More than one hundred comments were filed. The Department of Justice submitted a 76-page brief which forcefully argued that:

- the Postal Service was obliged to ascertain and consider the impact of the regulations on competition;
- the Postal Service's definition of "letters and packets" was overly broad in at least some respects; and
- the postal monopoly regulations failed to comply with ordinary due process criteria because they "combine the investigatory, prosecutorial, and adjudicative functions in one department."[26]

Chapter 3 reproduces the comment of DHL in this rulemaking proceeding. In this paper, DHL, like the Department of Justice, used the occasion of the proposed revision to criticize the whole basis of the postal monopoly regulations. The extensive legal and historical argument in this comment drew on DHL's research for the *ATCMU* case. DHL's intent was not so much to dissuade the Postal Service as to educate congressional committees and federal agencies that were simultaneously reconsidering the scope of the postal monopoly.

CONGRESSIONAL INTERVENTION, 1977-1979

The confrontation between the Postal Service and couriers was ultimately resolved through Congressional intervention. The unlikely first step was House approval of the Lott/NAM proposal. During the course of 1977, the House Committee on Post Office and Civil Service responded to the report of the Postal Service Commission by developing a proposal for postal "reform," H.R. 7700, that would have subjected the Postal Service to more control by the President and Congress. On April 6, 1978, during floor consideration of H.R. 7700, Representative Lott unexpectedly succeeded in adding his proposal to clarify the postal monopoly as an amendment. The House then approved H.R. 7700 and sent it to the Senate.

In July 1978, the Senate Governmental Affairs Committee, chaired by Senator John Glenn of Ohio, took up postal reform. The couriers, appearing together as the Time Critical Shipment Committee, offered an economic analysis of the effect of exempting urgent documents from the postal monopoly. The study, prepared by a former Postal Service official, Arthur Eden, estimated the loss of postal revenues would be "relatively inconsequential." In committee hearings, a broad cross-section of businessmen testified to the need for private carriage of time-sensitive business documents, including the National Association of Manufacturers, the Chamber of Commerce of the United States, a large securities firm, a state university, a

[26]"Comments of the United States Department of Justice" in response to amendments to 39 CFR 310 proposed at 43 FR 60615 (1978).

cosmetics manufacturer, an association of real estate brokers, a giant oil company, a gas utility company, and an association of airlines.[27] After the hearings, it became clear that the Senate committee was willing to address the issue of urgent documents in some manner but unwilling to accept the Lott Amendment because it was viewed as imprecise. Senator Tom Eagleton of Missouri, a member of the committee, began to develop an appropriate amendment.

At this point, the effort to develop an exemption from the postal monopoly for urgent documents was threatened by the couriers' own shortsightedness. In the week following the hearing, without consulting DHL, legal counsel for the Time Critical Shipment Committee agreed with Eagleton's staff on a draft amendment that would require the Postal Service to issue regulations exempting "time-sensitive" letters from the postal monopoly whenever (i) the nature of the letter required delivery within twelve hours or by noon of the addressee's next business day and (ii) the Postal Service was unable to provide the required service by first class mail. When it learned of this proposal, DHL objected that the draft amendment failed to exempt international express service from the postal monopoly—because international letters could not be delivered within the specified time limits—and statutorily recognized the Postal Service's otherwise unlawful claim of authority to define and condition administrative "suspensions" of the postal monopoly. Purolator, supported by the other couriers, rejected the DHL position as politically unrealistic.

The only remedy for this anti-international and legally dangerous approach was to ask another member of the Senate committee to press for amendment of the draft Eagleton amendment. DHL appealed to Senator T ed Stevens of Alaska, pointing out that the time limits in the draft amendment would preclude courier service between Alaska and main body of the United States for the same reasons that it precluded courier service between the United States and foreign points. To underscore this point, DHL asked its many customers in Alaska to explain their individual needs for courier service to the senator's staff. Senator Stevens was convinced. On August 1, 1979, the Senate subcommittee agreed in principle on the Eagleton amendment as modified by two crucial suggestions from Senator Stevens: (i) transportation time outside the contiguous 48 states would not be counted in time periods defining "time-sensitive" letters and (ii) the Postal Rate Commission, not the Postal Service, would be authorized to issue the regulations defining the postal monopoly exemption for urgent letters. In subsequent negotiations over specific language, the subcommittee agreed to fix the scope of the exemption in the statute itself rather than delegating such authority to the Postal Rate Commission.

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[27] *Postal Service Amendments of 1978: Hearings Before the Subcommittee on Energy, Nuclear Proliferation, and Federal Services of the Senate Committee on Governmental Affairs*, 95th Cong, 2d Sess (1978).

On August 16, the full Senate Governmental Affairs Committee approved the Senate version of H.R. 7700, including the modified Eagleton Amendment exempting urgent documents from the postal monopoly.[28]

The Postal Service vigorously opposed the recommendation of the Senate committee. Postmaster General William Bolger warned the majority leader of the Senate that "Exploitation of the [proposed] loophole . . . could result in the building of tremendous pressures in the years ahead to pump billions of dollars of additional Federal subsidies into the Postal Service."[29]

The 95th Congress adjourned in October 1978 without completing work on H.R. 7700. Nonetheless, the concept of exempting time-sensitive documents from the postal monopoly law had now attained respectability in Congress.

Early in the 96th Congress, in May l979, the Subcommittee on Postal Operations and Services in the House of Representatives began hearings on private delivery of time-sensitive documents.[30] In these hearings, DHL, Federal Express, and Purolator testified separately. Shippers, bankers, manufacturers, securities dealers, and others testified in support of permitting private delivery. During the hearings, subcommittee members expressed dissatisfaction over the Postal Service's refusal to accept any exemption for urgent documents.

Chapter 4 reproduces the statement of DHL in the subcommittee hearing of June 20, 1979. DHL explicitly made the case for exempting international express services from the U.S. postal monopoly. During DHL's testimony before the House subcommittee, Chairman Charles H. Wilson of California expressed an interest in meeting directly with American businessmen abroad during a subcommittee trip to the Far East scheduled for August. DHL arranged for such conferences in Seoul, Hong Kong, and Singapore. Wilson and his colleagues returned from the Far East with a tangible, firsthand appreciation of the need of American businesses for private carriage of urgent international documents to and from the United States. By the end of this trip, it was obvious to all that Congress would act if the Postal Service did not.

URGENT LETTER SUSPENSION, 1979

To stall legislation, on July 9, l979, the Postal Service published a proposal to amend its regulations to "suspend" the postal monopoly insofar as it applied to the carriage of urgent letters.[31] Making no reference to Congressional deliberations, the Postal Service's notice was ostensibly a response to public comments on the draft revisions proposed in December 1978. Stimulated by the couriers, the public response to the proposed new exemption for urgent documents had been tremendous. More than 140

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[28]S Rep No 95-1191, 95th Cong, 2d Sess (1978). The report was published on September 13, 1978.

[29]Letter to Senator Edmund S. Muskie, Sep 26, 1978, at 2.

[30]*Private Express Statutes: Hearings Before the Subcommittee on Postal Operations and Services of the House Committee on Post Office and Civil Service*, 96th Cong, 1st Sess (1979).

[31]44 FR 40076 (1979).

comments were received; almost all strongly supported the proposal. Whether or not Postmaster General Bolger was in fact prepared to go forward with the proposed regulation in July was unclear. By mid September 1979, when Bolger returned from the opening ceremonies of the congress of the Universal Postal Union in Rio de Janeiro, it was apparent that he had no choice but retreat.

On September 11, 1979, the Postal Service adopted the noncontroversial revisions to postal monopoly regulations announced in December 1978. The controversial amendments were quietly abandoned. In this manner, the Postal Service avoided providing any response to the fundamental criticisms raised by the Department of Justice, DHL, and other commenters.[32] On October 24, l980, the Postal Service adopted a slightly revised version of the proposed regulation suspending the postal monopoly to allow private carriage of urgent letters.[33] The most important change clarified that international time-sensitive letters were exempted from the postal monopoly due to the special problems of international businessmen.

The final rule for time-sensitive letters defined "time-sensitivity" by use of two alternative tests. First, a letter is considered time-sensitive if the sender can prove that the "value or usefulness of the letter would be lost or greatly diminished" if the letter is not delivered within twelve hours or by noon of the addressee's next business day, excluding periods of transportation outside the forty-eight contiguous states. The second test, the "double postage" test, deems a letter to be time-sensitive if the shipper pays the private express company at least twice as much as the otherwise applicable domestic first class postage, or $3.00, whichever is greater.

In a followup hearing by the House subcommittee, on November 13, 1979, Chairman Wilson questioned Postmaster General Bolger on the effect of the new rule on postal finances and the postal monopoly generally. After predicting diversion of billions of dollars of postal revenues only one year earlier, the Postmaster General blandly denied any impact at all:

> MR. WILSON. You do not view the time-sensitive proposition as opening up the private express statutes?
>
> MR. BOLGER. I do not. I think it has had little or no impact on the volume of the Postal Service.[34]

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[32]44 FR 40899 (Jul 13, 1979) (splitting rulemaking); 44 FR 52832 (Sep 11, 1979) (adopting non-controversial amendments).

[33]44 FR 61178 (1979).

[34]*Private Express Statutes: Hearings Before the Subcommittee on Postal Operations and Services of the House Committee on Post Office and Civil Service*, 96th Cong, 1st Sess, 337 (1979).

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DHL Comment on Postal Monopoly Regulations (1979)

Executive Summary

In 1872, Congress granted the post office the current statutory monopoly over the regular carriage of "letters" to places it regularly serves.

On December 28, 1978 the Postal Service proposed a series of new revisions to its regulations which purport to define the scope of the postal monopoly by defining the key term "letter." Under the Postal Service's revised definition of "letter" the monopoly would include any "addressed message recorded in or on a tangible object," including checks, labels, printed matter, photographs, sound recordings, data processing, and shipping papers. The proposed regulations also purport to suspend the postal monopoly to allow private carriage of certain items under specified conditions. Finally, the proposed regulations announce certain possible penalties for violation of the postal monopoly.

After reviewing, in some detail, the enactment of the current postal monopoly statutes and the history of administrative interpretation of the postal monopoly, we comment as follows:

1. The Proposed Rules are invalid to the extent that they purport to extend the postal monopoly to the carriage of items not "letters," as that word is used in its ordinary and popular sense of "current and personal written correspondence."

2. The Proposed Rules are invalid to the extent they purport to suspend the prohibitions of the postal monopoly.

3. The Proposed Rules are invalid to the extent that they purport to (a)

DHL Corporation, "Comments of DHL Corporation In the Matter of Proposed Rulemaking Amendments to 39 CFR Parts 310 and 320: Proposed Revisions in the Comprehensive Standards for Permissible Private Carriage of Letters, 43 FR 60615 (Dec 28, 1978)" (Mar 12, 1979) (submitted to U.S. Postal Service).

establish a fine for violation of the postal monopoly equal to the postage the Postal Service would have collected on the privately carried letters, (b) authorize the Postal Service to impose such a fine, or (c) authorize the Postal Service to sue for judicial enforcement of such a fine.

Finally, we remark that the Proposed Rules strongly suggest a virtual indifference to the underlying statutes or potential enforceability in court. Rather, the Proposed Rules appear to amount a federal agency's attempt to use the law to intimidate competitors rather than to govern constituents.

I. THE PROPOSED RULES

On December 28, 1978, the United Postal States Service gave public notice in the Federal Register of "Proposed Revisions in Comprehensive Standards for Permissible Carriage of Letters" (hereafter referred to as "Proposed Rules"). 43 FR 60615-23 (1978), to be codified as 39 CFR parts 310 and 320. The Postal Service has asked for public comments by March 12, 1979. 44 FR 7982 (1979).

In general, the Proposed Rules give the appearance, at least, of decreeing substantive legal rules which delineate when and under what circumstances private persons may engage in the business of transporting documents and small parcels for others. Wherever private carriage is discouraged, senders of documents and small parcels will, of course, have to use the Postal Service to communicate with each other.

The basic scope of the prohibitions against private carriage is set forth in the Proposed Rules as a purported "definition" of the word "letter," as that term is used in certain criminal statutes, 18 USC 1693-99 (1970). Proposed Rules § 310.1. These criminal statutes outlaw the private carriage of 'letters" under various circumstances, thereby creating a limited postal monopoly over the carriage of letters. The proposed "definition" would also apply to some related postal statutes, 39 USC 601-06 (1970), which generally provide an exception to the criminal prohibitions and authorize the Postal Service to search for and seize illegally carried letters. Proposed Rule § 310.1(f).

In addition to resetting the reach of these criminal statutes, the Proposed Rules also purport to suspend the criminal statutes to allow the private carriage of certain kinds of items under specified circumstances. Proposed Rules §§ 310.1(a)(7) n 1, 320.1-320.7.

A third important element of the Proposed Rules is their proclamation of certain possible penalties for the violation of the Proposed Rules, including injunction, fine or imprisonment or both, and liability for an amount of money equal to the postage that would have been paid if the privately carried letters had been carried by the Postal Service. Proposed Rules §§ 310.2(a), 310.5.

The Proposed Rules also set forth several lesser rules which explain how the rules can be amended, restate some statutory exceptions to the monopoly, establish reporting requirements for private carriers of data processing, and so on.

In response to the Postal Service's notice of proposed rulemaking, DHL Corporation submits the following comments.

II. INTRODUCTION: THE STATUTORY POSTAL MONOPOLY AND THE HISTORY OF ADMINISTRATIVE INTERPRETATION

The United States Postal Service is an "independent establishment of the executive branch of the Government of the United States" legislatively created by Congress and the President in 1970 by the Postal Reorganization Act, Pub L 91-375, 84 Stat 719. 39 USC 201 (1970). The authority to direct the operations and policies of the Postal Service is vested in an eleven-member Board of Governors. 39 USC 202, 402 (1970). The Postal Service is the legal successor to the Post Office Department, an administrative department of the Presidency from 1789 until 1970. Act of September 22, 1789, ch. 16, 1 Stat 70.

Ever since it established the old Post Office Department, Congress has also restrained, to some degree, private messengers or common carriers or both from competing with the post office. The scope of the statutory protection granted the post office, however, has varied substantially from statute to statute.[1]

Between the postal code of 1872 and the Postal Reorganization Act of 1970, there were no major changes in the scope of the statutes which prohibited private competition with the Post Office Department. The only major substantive change in the law was the addition, in 1909, of the penalty of imprisonment for private carriers (but not users of private carriers). This added penalty was but a small item in the monumental Act of March 4, 1909, ch. 321, 35 Stat 1088, which organized and standardized the diverse penal statutes into the first criminal code of the United States. The basic restrictions on private carriage were thus removed from the postal code and explicitly designated as criminal statutes. *Id*. §§ 179-86, 35 Stat 1123-24.

The statutes which relate to the post office's private competitors are today found in both the criminal and postal codes. Sections 1693 through 1696 of the criminal code make it illegal for a common carrier or express company regularly to carry "letters" between places the Postal Service regularly serves.

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[1]The basic scope of the monopoly was changed substantially on nine occasions, in the years 1792, 1794, 1825, 1827, 1836, 1838, 1845, 1852, 1864, and 1872. Act of February 20, 1792, ch.7, § 14, 1 Stat 236 (expanding scope of prohibition and fine); Act of May 8, 1794, ch. 23, 514, 1 Stat 360 (addition of specific prohibition against common carriers); Act of March 3, 1825, ch. 64, g 18, 4 Stat 107 (clarification of restraints on common carriers, elimination of prohibition against private expresses); Act of March 2, 1827, ch. 61, $ 3, 4 Stat 238 (prohibition against establishment of foot or horse post); Act of July 2, 1836, ch. 270, 5 42, 5 Stat 89 (extension of monopoly to navigable waterways); Act of July 7, 1838, ch. 172, § 2, 5 Stat 283 (extension of monopoly to railroads); Act of March 3, 1845. ch. 43, §§ 9, 10, 5 Stat 735-36 (expansion of monopoly to all mailable matter, reinclusion of prohibition against private expresses); Act of August 31, 1852, ch. 113, § 8, 10 Stat 141-2 (exception to monopoly for stamped letters); Act of March 25, 1864, ch. 40, 5 7, 13 Stat 37 (authorizing Postmaster General to suspend exception for stamped letters); Act of June 6, 1872, ch. 335, 55 227-39, 17 Stat 311 (restricting the prohibition to the carriage of "letters"). *See* G.L. Priest, "The History of the Postal Monopoly in the United States," 13 J. Law & Econ. 33 (1973).

There are also prohibitions against sending letters by private carrier or transporting private carriers. *See* 18 USC 1693-99 (1970). Section 601 of the postal code creates an exception from the general criminal prohibitions by allowing the private carriage of stamped letters. Section 602 forbids ships to carry foreign letters out of the mails. Sections 603 through 606 describe the powers of the Postal Service and other law enforcement officials to search for and seize illegally carried letters. *See* 39 USC 601-06 (1970). These criminal and postal statutes are often referred to collectively as "the private express statutes."

When the Postal Service was created in 1970, it automatically became the beneficiary of the existing criminal prohibitions against the private carriage of letters. The private express statutes, however, remained essentially unexamined and untouched by the 1970 reorganization, although Congress directed the Board of Governors to reevaluate the need for a postal monopoly. Postal Reorganization Act, Pub L 91-375, § 7, 84 Stat 783 (1970).

For many decades following enactment of the current monopoly statute in 1872, administrative interpretation of the scope of the postal monopoly was generally agreed to be primarily the province of the Attorney General, not the Post Office Department. Lawyers for the Post Office Department did prepare short legal opinions, usually for various postal officials. But, until at least 1912, the Postmaster General looked to the Attorney General for "official" administrative opinions. For example, in 1896 the Postmaster General asked the Attorney General to interpret the private express statutes with respect to a series of questions concerning the legality of railroads carrying certain matter out of the mails. Upon receiving a reply, the Postmaster General indicated that he was bound by the answers of the Attorney General and modified his outstanding order accordingly. Order of the Postmaster General No 488 (August 20, 1896); 21 Op Atty Gen 394 (1896). *See also*, 28 Op Atty Gen 537 (1910).

The last time the Postmaster General sought a ruling from the Attorney General appears to have been on May 16, 1912. 29 Op Atty Gen 418 (1912). At least as late as 1922, however, the attitude of the legal staff of the Post Office Department was that it was obvious that the Department of Justice, not the Post Office Department, was the source of "authoritative" administrative interpretations of the scope of the postal monopoly, "As you know, [the postal monopoly law] being a penal statute, an authoritative construction cannot be furnished by this [Post office] department." 7 Ops Sol POD 360, 362; *accord*, 4 Ops Sol POD 300, 302 (1906).

Prior to 1934, very little legal weight seems to have been ascribed to the postal lawyers' opinion letters on the postal monopoly. The Post Office made little effort to collect and publish these opinion letters. Those written before 1892 were not gathered and bound until 1905. Even after 1905, the Post Office Department did not publish its legal opinions with any reasonable promptness. Opinions for the period 1892-1908 were published in 1909; for the period 1909-1920, in 1928; for the period 1921-1928, in 1929; for the period 1929-

1935, in 1936; and for the period 1936-1951, in 1952. See 1-V *Official Opinions of the Assistant Attorneys-General for the Post-Office Department; VI-IX Official Opinions of the Solicitor of the Post-Office Department*. Moreover, even a cursory perusal of these opinions reveals references to prior opinions that are missing and presumably lost. 5 Ops Sol POD 386 (1910), for instance, refers to three legal opinions by postal lawyers, all of which were written after 1900 but none of which are included in the bound volumes.

These bound legal opinions of the Post Office Department's lawyers were apparently never given very wide distribution. After 1951, the Post Office stopped binding them altogether, and, so far at least, the Postal Service has not resumed the practice.

Beginning in 1905, the Post Office Department also produced a digest of legal decisions affecting the postal laws as an appendix to its standard manual of postal law, *Postal Laws and Regulations*. This pamphlet was updated in 1925, 1928, and 1934. Not until the last edition did this digest include any references to opinions of the postal lawyers as legal authority for interpretations of the postal monopoly.

The shift in postal lawyers' opinions to more expansive definitions of the term 'letter" began about this time. An early, expansive opinion declared a printed pension voucher to be a "letter" because it "conveys to the [addressee] specific information in writing" and because the acknowledgment communicated in the printed voucher "could as well be . . . made informally in what is commonly and generally termed a 'letter." Neither citations nor reasons were supplied for these vague tests. 3 Ops Sol POD 359 (1902). Notwithstanding the drift toward such vague tests, some postal solicitors' opinions before 1914 or so continued to equate "letters" with "personal correspondence" or with the ordinary usage. *See* 5 Ops Sol POD 193, 194 (1909); 5 Ops Sol POD 402, 404 (1911).

During the second decade of the twentieth century, Solicitor W.H. Lamar wrote several convoluted, but fuzzy opinion letters which were often cited later as precedents for broad claims of monopoly. On March 2, 1916, Lamar offhandedly held circulars to be "letters," thereby contradicting the position of prior Post Office Department regulations. 6 Ops Sol POD 372 (1916). In another, more extensive opinion Mr. Lamar stated that "insurance policies as documents and bills, receipts, etc., as such are acceptable only as first-class matter. If deposited for handling by the Postal Service they become 'letters.'" The authorities cited for this conclusion were various decisions by the lower courts dealing with statutes since repealed or rendering judgements since overruled by higher courts. 6 Ops Sol POD 373 (1916). On October 13, 1916, Lamar held that bulk shipments of insurance reports weighing 12 pounds were "letters." 6 Ops Sol POD 457 (1916). On April 24, 1918, Lamar declared bulk shipments of carbon copies of letters were "letters" if shipped for someone's information since "these letters constitute communications." 6 Ops Sol POD 606 (1918).

After the days of Solicitor Lamar, postal legal opinions lost all contact with the underlying statutes or the prior decades of interpretation. In 1921, Acting Solicitor Southerland interpreted payroll tickets to be "letters" because they "constitute communications of current information." 7 Ops Sol POD 92 (1921). Also in 1921, Solicitor Edwards decided that samples of merchandise from Montgomery Ward were "letters" because they "constitute live communications." 7 Ops Sol POD 131, 132 (1921). Three years later, Solicitor Edwards found that 75-pound boxes of insurance records and cancelled drafts were "letters" because they "convey intelligence or information between the writer and the recipient, upon which the recipient may rely, act, or refrain from acting." 7 Ops Sol POD 496 (1924). In 1927, Solicitor Donnelly decided that punched cards transmitting information were "letters." 7 Ops Sol POD 622 (1927).

Although postal legal opinions became quite expansive after 1905, the Post Office Department did not promulgate its views to the public in any general manner until the Depression year of 1934, sixty-two years after the enactment of the postal monopoly. Until then, no one but the lawyers of the Post Office Department and the few recipients of opinion letters could have known that, contrary to decades of prior practice, the Post Office Department viewed itself as the authoritative source of administrative interpretations of the postal monopoly laws and that it interpreted the key word "letter" considerably more broadly than did the common man in ordinary con versation.

Notice of the Post Office's enlarged administrative interpretation of the private express statutes was given in two ways. An unannotated pamphlet was distributed to the public, particularly to those who used private carriers. *See* Post Office Department, *The Private Express Statutes* (1st ed. 1934). This legal pamphlet was not a unified, coherent interpretation of the scope of the postal monopoly but an uneven and inconsistent compilation of the prior legal opinions (reading the most expansive opinions most expansively). This legal pamphlet went through five editions and later became known as "POD 111." Also in 1934, as noted above, a new edition of the digest of legal decisions was printed which contained references to opinions by postal lawyers since 1872. It is somewhat unclear, however, how these old postal opinion letters suddenly became citeable sources of law in 1934 when they had not been thought worthy of mention in prior editions of the same publication.

The next step in the evolution of administrative interpretation of the private express statutes came in 1954. In December of that year the Post Office Department first provided formal notice of its understanding of the postal monopoly by publishing its administrative position in the form of regulations in the Federal Register. 19 FR 7772 (1954). These regulations were simply announced. The Post Office Department never engaged in a rulemaking for regulations dealing with the private express statutes.

These are the three ancestors of the Proposed Rules which are the subject of this rulemaking—the postal solicitors' opinions, the summary legal

pamphlets begun in 1934, and the decreed regulations dating from 1954.

The first rulemaking dealing with the postal monopoly was undertaken by the Postal Service in 1974. *See* 38 FR 17512 (1973). In that proceeding, only one other federal agency submitted comments, the Interstate Commerce Commission. The ICC stated its view that the Postal Service's proposed postal monopoly regulations were "a denial of due process," "arbitrary, capricious, and unwarranted," and "[an] infringe[ment] upon this Commission's jurisdiction." "Comments of the Interstate Commerce Commission re Proposed Restrictions on Private Carriage of Letters," at 5, 7-8 (August 23, 1973). Nevertheless, the Postal Service adopted these regulations in generally similar form. 39 FR 33209 (1974).

The 1974 regulations were seen by non-postal observers as a substantial enlargement upon the old Post Office Department's interpretation of the scope of the postal monopoly. *See*, *e.g.*, "Legal Memorandum of Assistant General Counsel, Litigation Division, Concerning the Role of the Postal Rate Commission in the Exercise of the Legal Controls over the Private Carriage of Mail and the Postal Monopoly," Postal Rate Commission Docket No MC 73-1 (1974). The 1974 regulations were also notable in that they were the first instance in which postal authorities had declared suspensions of the postal monopoly.

The Proposed Rules which are the subject of these comments are set forth in the second general proposed rulemaking undertaken by the Postal Service with respect to regulations dealing with the postal monopoly. *See* 39 FR 60615 (1978).

III. SUMMARY OF COMMENTS

The postal monopoly enacted by the Congress in the postal code of 1872 prohibited only the private carriage of "letters." As statutory analysis and contemporaneous administrative interpretations make clear, the word "letters" was used in the "ordinary and popular" sense of "current and personal written correspondence."

The Proposed Rules declare a far broader interpretation of the word "letter" than Congress intended in 1872. They therefore clearly contravene a fundamental axiom of administrative law that "the rulemaking power granted to an administrative agency . . . is not the power to make law. Rather it is the 'power to adopt regulations to carry into effect the will of Congress as expressed in the statutes.'" *Ernst and Ernst v Hochfelder*, 425 U.S. 185, 214 (1976). This principle has been proclaimed again and again in many Supreme Court opinions over the years and specifically reaffirmed by the Court at least six times in the last three years. Indeed, the Proposed Rules are even more transparently ultra vires than were the agency rules rejected by the Supreme Court in these recent cases, for the Proposed Rules are not issued by the federal agency charged with administering the private express statutes (that is, the Department of Justice) nor are they consistent with basic national economic

and social policies. Compare, e.g., the EPA rules rejected by the Court in *Adamo Wrecking Co. v United States*, 98 S Ct 566 (1978).

Since the post office cannot expand its own monopoly and since a review of history shows that neither the Congress nor the Judiciary has done so, the scope of the postal monopoly remains as enacted in 1872. We conclude that the definition of "letter" in the Proposed Rules is invalid to the extent that it exceeds the "ordinary and popular" meaning of that term, i.e., "current and personal written correspondence," to paraphrase the contemporaneous definition of the post office's own lawyers.

The Proposed Rules also announce that the Postal Service has administratively suspended the postal monopoly for certain kinds of materials sent by specified persons under particular conditions. The Proposed Rules cite 39 USC 601(b) (1970) as authority for these suspensions. Although this statute was enacted in 1864, the first time that postal authorities ever proclaimed this suspension power was in 1973. We find it impossible to believe that so important a power lay unnoticed and unused for 109 years. Moreover, the plain meaning of the words of § 601(b) preclude the statutory interpretation presumed by the Proposed Rule, and the legislative and statutory history of § 601 completely support the plain meaning of that provision. Indeed, the history of the statute strongly suggests that the Postmaster General so interpreted this section in 1937.

We conclude, therefore, that the Proposed Rules are invalid to the extent that they purport to effect suspensions of the prohibitions of the postal monopoly.

Proposed Rule § 310.5 purports to establish a fine for violation of the postal monopoly amounting to a sum of money equal to the postage that the Postal Service would have been paid if the illegally carried letters were sent through the mails. As legal opinions by both the Attorney General and the Post Office Department Solicitor concede, however, there is no statutory basis for such a fine. The Proposed Rule also purports to authorize the Postal Service to adjudicate the liability for such fines and seek judicial enforcement of such judgements. Congress, however, has delegated authority to adjudicate such matters to the district courts, not the Postal Service, and has barred the Postal Service from authorizing itself to appear in court.

For these reasons, we conclude that the fine and adjudicatory procedure purportedly established by Proposed Rule § 310.5 are invalid *in toto*.

IV. COMMENTS

(1) THE PROPOSED RULES ARE INVALID TO THE EXTENT THAT THEY PURPORT TO EXTEND THE POSTAL MONOPOLY TO THE CARRIAGE OF ITEMS NOT "LETTERS" IN THE "ORDINARY AND POPULAR" SENSE OF "CURRENT AND PERSONAL WRITTEN CORRESPONDENCE."

Proposed Rule § 310.1(a) purports to define the scope of the postal

monopoly by defining the term "letter," as used in the criminal statutes prohibiting private letter carriage, to mean: "an addressed message recorded in or on a tangible object."[2] The following items are specifically mentioned as being within this definition of "letter" (the list is not intended to be exhaustive):

- messages on paper which result from electronic transmissions (except telegrams);
- checks, drafts, promissory notes, bonds, other negotiable and nonnegotiable financial instruments, stock certificates, other securities, insurance policies, and title policies (except when sent to or from financial institutions);
- books and catalogues of less than 24 pages;
- tags, labels, stickers, signs or posters not primarily intended to be attached to other objects for reading;
- printed matter (except when sent by a commercial printer to an unrelated person who ordered the printed matter);
- photographic material (except when sent to or from a processor);
- sound recordings and films (except those to be disseminated to the public);
- data processing materials and any materials used as input for data processing;
- advertisements enclosed with merchandise;
- memoranda sent between student or faculty organizations within a university;
- ocean carrier related documents.

In addition, footnote 1 to Proposed Rule § 310.1(a)(7) states that the term "letter" may be even broader than defined in the Proposed Rules. Footnote 1 is confirmed and illuminated by the Postal Service's position before the United States Court of Appeals that the postal monopoly actually extends to all "letters . . . or other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines and periodicals." Brief for Appellee United States Postal Service at 16-23, *Associated Third Class Mail Users v United*

[2]The Proposed Rules do not explicitly state that they are "substantive," rather than "interpretative," though they give that appearance. It seems highly questionable whether the Postal Service has substantive rulemaking power with respect to the private express statutes because (i) the legislative history of the rulemaking authority, 39 USC 401(2), implies otherwise and (ii) this rulemaking authority is explicitly limited to the purposes of title 39, whereas the basic postal monopoly prohibitions are found in title 18. *See* Donnici et al, "The Recent Expansion of the Postal Monopoly to Include the Transmission of Commercial Information: Can It Be Justified?," 11 *U. San. Fran. L. Re*v 243, 276 ff. (1977). Both substantive and interpretative rules are given much deference by courts, however. B. Schwartz, *Administrative Law* 155 (1976). Therefore, the Postal Service's apparent lack of substantive rulemaking power seems a less fundamental defect than that focused upon in our first comment. Regardless of whether the Proposed Rules are considered to be substantive or interpretative, they clearly constitute an attempt to influence behavior in a manner beyond the scope of the authority Congress has granted the Postal Service. As such, they are not entitled to deference by anyone.

States Postal Service, No 78-1065 (DC Cir, argued Nov 20, 1978), *appeal from* 440 F.Supp. 1211 (D DC 1977).

It is self-evident, of course, that the definition of "letter" in the Proposed Rules is far more expansive than the ordinary, everyday meaning of that word. The proposed definition may be contrasted, for example, with the Postal Service's definition of "letter" for the purpose of handling international mail: "Letters and letter packages refer to that class of mail for personal handwritten, typewritten, or recorded communications having the character of current correspondence." United States Postal Service, Publication 42, § 222.1 (1976).

We conclude that the definition of "letter" in the Proposed Rules is invalid for the following reasons:

(a) *The statutory monopoly granted the post office in 1872 extended only to "letters" in the "ordinary and popular" sense of "current and personal written correspondence"*—The current postal monopoly was enacted by Congress in substantially its present form by the adoption of a comprehensive postal code, the Act of June 6, 1872, ch. 335, §§ 227-39, 17 Stat 311-12. As noted above, since that date, only minor and stylistic changes have been made in the language which defines the basic scope of the monopoly.

The variety of things, the carriage of which is prohibited by the postal monopoly, is stated in the statutes to be "letters and packets." 18 USC 1693-99 (1970). The word "packet," however, is an archaic term for a letter of four or more sheets. *Williams v Wells Fargo & Co. Express*, 177 F 352 (8th Cir 1910). Hence, it is simpler, and equally correct, to say that the monopoly extends only to "letters."

The 1872 postal code was an early, specimen title of what eventually became a revision and codification of the entire body of U.S. statutes, the "Revised Statutes." The Commissioners to Revise and Codify the Statutes of the United States were established by Congress by the Act of June 27, 1866, ch. 140, 14 Stat 74. In January 1869, the Commissioners sent to Congress several samples of their work, including a complete revision and codification of the postal laws. H. R. Misc. Doc No 31, 40th Cong, 3d Sess (1869). This postal code was then enacted into law substantially as proposed by the Commissioners in the 1872. *See* U.S. Commissioners to Revise the Statutes of the United States, *Revision of the United States Statutes: Title XLIX, the Postal Code*, p. 3 (1872) (referring to the enactment of pre vious specimen title).

The legislative record of the enactment of the 1872 postal code contains no explanation of the intended scope of the postal monopoly. It was not mentioned in debate nor in any extant committee report. *See* Cong Globe, 41st Cong, 3d Sess, 30-37, 41-47, 83-86 (1870); id., 957-61 (1871); id., 42d Cong, let Sess, 15, 31, 42, 71, 2640-53, 3893, 4091, 4105-06 (1872).

Generally, in order to determine the scope of the postal monopoly enacted by the 1872 act, one would simply read the act itself and assume the words are used as they are used in everyday speech. *See Addison v Holly Hill Co*., 322 U.S. 607, 618 (1944). Indeed, this very principle of statutory construction was

explicitly endorsed by the Commissioners who drafted the law: "Words of general use are to be understood in their ordinary and popular meaning." *See United States Statutes as Drafted by the Commissioners Appointed for that Purpose: As Bound for Examination by the Committee of the House of Representatives of the 42d Congress on the Revision of the Laws*, Vol. 1 (1872).

Under such a commonsense approach, one would conclude that the postal monopoly extended only to "letters," as that term is used in its "ordinary and popular" meaning. Moreover, a reading of the statute as a whole confirms this conclusion. Throughout the 1872 postal code, which was drafted as a whole by the Commissioners, the word "letter" is consistently used in a non-technical sense and other terms are used when reference is made to other sorts of documents. *See, e.g.*, §§ 99, 148, 156, 163, 240, 17 Stat 296, 300-04, 312. In fact, §§ 130-31 of the act appear to define statutorily the term "letter" to mean "correspondence wholly or partly in writing" as distinct from "all matter exclusively in print" (§ 132) or "unsealed circulars, prospectuses, maps, corrected proof sheets, maps, prints, engravings, or other mailable matter" (§ 133). 17 Stat 300. Such a definition, of course, agrees with the "ordinary and popular" meaning.

Since the postal monopoly as enacted in the 1872 postal act is as unambiguous as ordinary words can be, there is no reason—and no legal justification—to look beyond the plain words of the statute for indications that Congress may have been thinking of the term "letter" in some obscure, technical sense differing from the ordinary sense. *See United States v Bowen*, 100 U.S. 508 (1879).

Just what the postal monopoly included as it was enacted in 1872, however, is too important a question to leave any stone unturned. As already noted, Congress left no records indicating its thinking. So we must turn to the next most helpful guide to the meaning of legislation, the words of the administrators who helped draft the legislation and began to execute it under the eyes of the Congressmen that wrote it. The Supreme Court has observed, "[P]ractice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with responsibility of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Co. v United States*, 288 U.S. 294, 315 (1933).

During the period following enactment of the 1872 postal act, it was generally recognized that authoritative administrative interpretation of the private express statutes was the job of the Attorney General. The understanding of the Department of Justice was summed up by Attorney General MacVeagh in an 1896 opinion for the Postmaster General, "What is a 'letter,' I can make no plainer than it is made by the idea which *common usage* attaches to it." Postmaster General, Order No 488 (1896) (quoting the Attorney General) (emphasis added).

The lawyers for the Post Office Department likewise evinced a similar,

but somewhat more involved, understanding of the word "letter" as used in the private express statutes. On some occasions, postal attorneys made statements such as the following;

> As to what is a "letter," [as used in the private express statutes] it has *never*, so far as I have been able to learn, *been defined other than the common, ordinary acceptation of the term*.

5 Ops Sol POD 193, 194 (1909) (emphasis added); *see* Postmaster General, Order No 488 (1896).

At other times, postal lawyers inclined toward a more technical view. The first opinion of the Post Office Department after passage of the 1872 postal act, for example, indicated that postal lawyers considered the term "letter," as used in the private express statutes, to be statutorily defined by §§ 130-31 of the 1872 act, i.e., "correspondence wholly or partly in writing." 1 Ops Sol POD 36, 38 (1873). In still other opinions, postal lawyers looked to the international postal treaties to explain the scope of the postal monopoly. For example, in 1898 a postal lawyer concluded that commercial papers are not "letters" by referring to the international postal treaty:

> [I]f "old letters" are classed as commercial papers in ascertaining rates of postage in foreign mails, they should be allowed equal privileges with commercial papers in our domestic mails unless there are provisions of law to the contrary, which does not appear to be the fact. . . . *"[C]ommercial papers," although designated first-class matter if presented for mailing, are not considered as matter in the transmission of which the Government claims a monopoly*.

3 Ops Sol POD 211, 213 (1898) (emphasis added); *see* 1 Ops Sol POD 534 (1880); 1 Ops Sol POD 537 (1880). In the international treaties, the term "letter" was negatively defined as that which is not "manuscript papers and documents which have not the character of current and personal correspondence," i.e., a "letter" is a "current and personal written correspondence." *See* General Postal Union Treaty (Berne, Oct 9, 1874), Detailed Regulation XIII (1), 19 Stat 599. The international and domestic statutory definitions were thus quite similar, and both were used by postal lawyers as equivalents to the term "letter" in the private express statutes. More generally, several legal opinions by the Post Office Department simply equate the term "letter" with the term "personal correspondence," either in reference to the ordinary usage of the word or in shorthand reference to the definitions in the 1872 act and the treaty. 2 Ops Sol POD 2 (1885); 2 Ops Sol POD. 552 (1888) (first opinion); 5 Ops Sol POD 193, 194 (1909); 5 Ops Sol POD 402 (1911).

While the Supreme Court has never issued an opinion specifically addressing the scope of the postal monopoly, it too has indicated that its approach to the penal sections of the postal laws is to interpret the statutory language in its "ordinary and popular" meaning. In *United States v Chase*, 135

U.S. 255 (1890), the Court considered the scope of the prohibition in the postal code against using the mails for any "obscene writing." The Government argued that an obscene "letter" was a "writing" within the meaning of the prohibition, but the Court rejected this argument, looking primarily to ordinary usage to distinguish between "letter" and "writing":

> [The Government's interpretation of "writing"] is not its *ordinary and usual acceptation*. Neither in legislative enactments nor in *common intercourse* are the terms "letter" and "writing" equivalent expressions. When in *ordinary intercourse* men speak of mailing a "letter" or receiving by mail a "letter," they do not say mail a "writing" or receive by mail a "writing."

135 U.S. at 258 (emphasis added). (The private express statutes have very rarely been discussed even by lower courts.)

Therefore, both a reading of the entire postal code of 1872 and a review of subsequent administrative interpretation make clear that the postal monopoly as enacted in 1872 was intended and understood by all to create a monopoly which extended only to "letters," as that word is used in its "ordinary and popular meaning." More specifically, postal lawyers understood the phrases "personal correspondence" or "correspondence wholly or partly in writing," or "manuscript papers and documents which have the character or current and personal correspondence" as equivalent to the term "letter," as used in the private express statutes.

It seems fair, then, to summarize by stating that the postal monopoly as enacted in 1872 applied only to the carriage of "letters" in the "ordinary and popular" sense of "current and personal written correspondence."

(b) *The Postal Service cannot expand the scope of its monopoly beyond the scope of the private express statutes as enacted by Congress*—A federal agency like the Postal Service is only a creature of Congress's statutes. It cannot issue regulations which overflow the statutory channel which Congress established for it. This principle is so fundamental to the very concept of a federal agency that, without it, one would be hard-pressed to reconcile the existence of any federal agency with the Constitution.

The Supreme Court has left no doubt on this topic. In *Addison v Holly Hill Co.*, 322 U.S. 607, 617-18 (1944), the Court eloquently expressed the limits of agency rulemaking:

> . . . Congress expresses its meaning of a statute in words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. . . .
>
> Legislation . . . is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that

> experience may disclose that it should have been made more comprehensive. "The natural meanings of words cannot be displaced by reference to difficulties in administration." *Commonwealth v. v Grunseit* (1943) 67 C.L.R. 58, 80. For *the ultimate question is what Congress has commanded*, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. The idea which is now sought to be read into the grant by Congress to the [agency] . . . is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it. *After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him*. [Emphasis added.]

Not even longstanding, consistent administrative interpretation can override the fact that a federal agency is bounded by its statute. The Supreme Court has declared:

> [T]he [Federal Maritime] Commission contends that since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. . . . This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate.

FMC v Seatrain Lines, Inc., 411 U.S. 726, 745 (1973) (emphasis added); *see Dixon v United States*, 381 U.S. 68, 74 (1965).

The Postal Service's authority to expand the postal monopoly by Proposed Rules is even less plausible than the claim of the Federal Maritime Commission rejected by the Court in *Seatrain Lines*. Unlike the Federal Maritime Commission, the Postal Service is not the agency "charged with administration of the statutory scheme" of the private express statutes. The Department of Justice is. *See* 28 USC 516 (1970); 39 USC 409(d) (1970)—a fact that the post office used to concede as a matter of course. Moreover, the Postal Service cannot show that the Proposed Rules "demonstrate the sort of longstanding, clearly articulated interpretation of the statute which w ould be entitled to great judicial deference." *FMC v Seatrain Lines, Inc*., 411 U.S. at 745. On the contrary, the post office's "interpretation" of the postal monopoly has been remarkably inconsistent and changeable over the years. Finally, the Proposed Rules are even less supportable than rules overturned in *Seatrain Lines* in that they contravene a clear national policy to foster maximum feasible competition. *See, e.g., United States v Philadelphia National Bank*, 374 U.S. 321, 372 (1963). Indeed, Congress has recently reaffirmed this policy with avengeance in the realm of air transportation. *See* Airline Deregulation Act of 1978, Pub L 95-504, __ Stat __ (49 USC 1301 et seq); Act of November 9, 1977, Pub L 95-163, 91 Stat 1278 (deregulation of domestic all-cargo air transportation).

Not less than six times in the last three years, the Supreme Court has reiterated its adherence to the fundamental principle that an agency may not exceed the basic scope of its statutory authority. *See International Brotherhood of Teamsters v Daniel*, 47 USLW 4135, 4138 & n 20 (U.S. 1979); *Securities and Exchange Commission v Sloan*, 98 S Ct 1702, 1711-12 (1978); *Adamo Wrecking Co. v United States*, 98 S Ct 566, 571-72 (1978); *United States v Larionoff*, 431 U.S. 864, 873 n 12 (1977); *Santa Fe Industries, Inc. v Green*, 430 U.S. 462, 471-74 (1977); *Ernst & Ernst v Hochfelder*, 425 U.S. 185, 212-14 (1976).

In *Ernst and Ernst*, the Securities and Exchange Commission had issued rules which purportedly broadened the scope of the prohibition against deception in the sale of securities to include negligent as well as intentional conduct. The Court looked not at the Commission's longstanding rules, but back to the underlying statute. The Court held that the Congress simply did not write the statute in words that are "commonly understood" to include negligent conduct:

> *The rulemaking power granted to an administrative agency charged with the administration of the statute is not the power to make law*. Rather it is the "'power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" [cites omitted]. Thus, *despite the broad view of the Rule advanced by the Commission in this case, its scope cannot exceed the power granted the Commission by Congress under [the statute]. . . . When a statute speaks so specifically in terms of . . . commonly understood terminology* of intentional wrongdoing . . . and when its history reflects no more expansive intent, *we are quite unwilling to extend the scope of the statute* to include negligent conduct.

425 U.S. at 213-14 (emphasis added).

Again, it is instructive to compare the gist of the Proposed Rules against the claim rejected by the Supreme Court. Both the Proposed Rules and the SEC's rule in *Ernst & Ernst* are administrative extensions of the scope of statutorily prohibited conduct. In the case of the *Ernst & Ernst* rule, however, the conduct involved was clearly contrary to the public interest, that is, negligent deception in connection with the sale of securities. In the case of the Postal Service's Proposed Rules, the conduct prohibited—competitive carriage of items not ordinarily called "letters"—is clearly *in furtherance* of the basic national commitment to maximum feasible competition.

In *Adamo Wrecking*, the Environmental Protection Agency had, by rule, purportedly defined the statutory term "emission standard" to include a regulation requiring a wrecker to water down asbestos fireproofing in a large building before demolition. The purpose of the regulation was to cut down on the amount of asbestos power emitted into the air. By calling this rule an "emission standard," the EPA Administrator invoked criminal, instead of merely civil, penalties for its violation. The Court held that such a regulation was simply not an "emission standard" as that term is generally understood and

that, although the statute allowed the Administrator to define "emission standards" within "broad limits," it did not empower him "after the manner of Humpty Dumpty . . . to make a regulation an 'emission' standard by his mere designation." 98 S Ct at 572. It seems quite clear that the "wetting down asbestos" rule in *Adamo Wrecking* is at least as closely related to "emissions standards" as the Proposed Rules are to what are "commonly understood" to be "letters."

Adamo Wrecking and *Sloan* also point up a related deficiency in the Proposed Rules, what the *Adamo Wrecking* court called "the lack of specific attention to the statutory authorization." 98 S Ct 574 n 5. To quote from the Court's opinion in *Sloan*, "[T]he mere issuance of [agency orders] without a concomitant exegesis of the statutory authority for doing so, obviously lacks 'power to persuade' as to the existence of such authority." 98 S Ct at 1712.

To summarize, it is unarguable that the scope of the Proposed Rules is limited to the reach of the underlying statutory prohibitions. Furthermore, it is clear that the statute, as enacted by Congress, extended the postal monopoly only to "letters" as that term is used in everyday speech, i.e., "current and personal written correspondence." Hence, unless the scope of the underlying statute has somehow been changed in the intervening 107 years, the Proposed Rules must be considered as invalid. The next section examines this final possibility.

(c) *Neither Congress nor the courts has extended the scope of the postal monopoly beyond the statute as enacted in 1872*—As demonstrated in the previous section, it is impossible for a federal agency to expand upon the scope of its own authority. This principle applies not only to the Postal Service, but to the Executive Branch generally. So, if the scope of the private express statutes, which underlie the Proposed Rules, has been extended, this extension must have come from some action by either the Congress or the courts. An examination of the actions of these other two branches of government, however, reveals that neither has expanded the postal monopoly.

Congress has not altered the language which defines the scope of the postal monopoly statutes in any significant respect since 1872. It has, however, reenacted the basic prohibitions of the private express statutes, now 18 USC 1693-99, on three occasions, in 1874, 1909, and 1948. The only possibility that Congress itself has indirectly expanded the postal monopoly as enacted in 1872 would seem to rest necessarily on the "reenactment doctrine," that is, the concept that, when Congress reenacts a statute, it is presumed to approve the current administrative rulings and regulations arising under that statute.

The reenactment of the postal laws in 1874 was part of the enactment of the Revised Statutes which replaced all prior statutes of the United States. At the time the Revised Statutes of 1874 were enacted, the only administrative legal opinion on the postal monopoly was one by a postal lawyer which stated that the monopoly extended only to "letters," meaning "correspondence wholly or partly in writing." 1 Ops Sol POD 36, 38 (1873).

The reenactment of the postal monopoly in 1909 was part of the incorporation of the private express statutes into the first criminal code. Act of March 4, 1909, ch. 321, §§ 179-86, 35 Stat 1124. This code was the outgrowth of the 1899 report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States. *See* H.R. Doc No 256, 55d Cong, 3d Sess (1899). In a detailed report in 1900, the House Committee on Post-Office and Post-Roads declared that the Commission's redraft of the private express statutes made "no changes of consequence." HR Rept No 551, 56th Cong, 1st Sess, at 2 (1900). The 1908 report of the Special Joint Committee on the Revision of the Laws, whose report became the criminal code, makes no mention of administrative interpretation of the postal monopoly; rather, it suggests that only minor stylistic changes were made except for the addition of the imprisonment penalty. *See* S Rept No 10, Part 1, 60th Cong, 1st Sess, at 20-21, 196-203 (1908). In any case, the only evidence of administrative interpretation of the private express statutes which can be presumed to have been available to Congress in 1909 were the few opinions of the Attorneys General and the opinions of the postal lawyers prior to 1892 (the opinions of the postal lawyers after 1892 were not published until after the criminal code was enacted). As shown above, the gist of these contemporaneous administrative opinions was that the postal monopoly extended only to "letters" as that word is used in ordinary, everyday speech.

The third and last reenactment of the postal monopoly occurred in 1948 with the second codification of the criminal laws. Opinion letters by the lawyers of the Post Office Department had, by this date, claimed interpretations of the key word "letter" which were substantially broader than the "ordinary and popular" meaning of that word (although considerably narrower than the Proposed Rules). Since 1934, this broad definition had been more or less available to the public, but it had not been incorporated into the Code of Federal Regulations. As the Supreme Court has noted, however, the legislative history of the 1948 criminal code indicates that "the general purpose of the new Code was to 'codify and revise . . . the original intent of Congress is preserved.' S Rept No 1620, 80th Cong, 2d Sess, p. 1." *United States v Cook*, 384 U.S. 257, 260 (1966). The revisors' notes in the cited report indicated only minor stylistic and conforming changes were made in the private express statutes.

Did any of these three reenactments constitute Congressional ratification of an administrative interpretation of the scope of the postal monopoly broader than that enacted in 1872? In view of the status of administrative interpretation at each of these reenactments, only the 1948 criminal code even gives rise to this possibility.

Reenactment of a statute has, it is true, sometimes been found to indicate Congressional adoption of the current administrative regulations. *See NLRB v Bell Aerospace Co*., 416 U.S. 267, 274-75 (1974); *cf. Massachusetts Trustees v United States*, 377 U.S. 235, 241 (1964) (reenactment strengthens the

administrative regulations "to some extent"). However, the Supreme Court has on several occasions indicated that this principle does not apply if there is no evidence that "Congress acted with the particular administrative construction before it." *Zuber v Allen*, 396 U.S. 168, 193 (1969). The *Zuber* approach was recently reaffirmed by the Court in *Securities and Exchange Commission v Sloan*, 98 S Ct 1702, 1713 (1978). In *Sloan*, not even the fact that a Congressional committee had indicated knowledge of the administrative interpretation in question was sufficient to result in adoption by reenactment. The Court stated:

> [The SEC] made known to at least one committee their subsequent construction of that [statutory] section . . . *at a time when the attention of the committee and of the Congress was focused on issues not directly related to the one presently before the Court*. Although the section in question was re-enacted in 1964, and while it appears the committee report did recognize and approve of the Commission's practice, this is scarcely the sort of congressional approval referred to in *Zuber*. . . . *We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents*.

98 S Ct at 1713 (emphasis added). Moreover, it has been held that reenactment will not legitimize administrative interpretations which exceed the bounds of the original legislation, as do the Proposed Rules. *Leary v United States*, 395 U.S. 6, 25 (1965); *Commissioner v Acker*, 361 U.S. 87, 93 (1959); *see Securities and Exchange Commission v Sloan*, 98 S.Ct. 1702, 1713 (1978).

When the 1948 reenactment of the private express statutes is viewed against these general principles of the reenactment doctrine, it is perfectly clear the 1948 criminal code cannot possibly be considered a Congressional adoption of a more expansive administrative definition of the word "letter." In that reenactment bill, Congress was faced with the task of considering the entire criminal code of the United States at one time. It was a document which was not supposed to work any substantial changes in the private express statutes, as the revisers' notes indicated. There is no evidence whatsoever that Congress acted with the Post Office's postal monopoly interpretations before it. Indeed, the expansive administrative interpretations of the Post Office were not even codified in the Code of Federal Regulations, the source of administrative interpretations most accessible to Congress.[3]

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[3]The sections of the private express statutes contained in the postal code deal with the search and seizure of illegally carried letters and the exception from the monopoly for stamped letters. 39 USC 601-06 (1970). These provisions have also been reenacted over the years, most recently in 1970. At the time of the 1970 postal act, the administrative interpretations took the form of Post Office Department rulings which, as the Post Office observed, were styled as "opinions and interpretations"—not substantive rules—and generally unenforced. *See* Post Office Department, *Restrictions on Transportation of Letters*, Forward (1967); United States Postal Service, *The Private Express Statutes and Their Administration*, App. E at 20 (1973). The unenforced, interpretative quality of postal regulations may be contrasted with the administrative practice of

The Judiciary has had no more effect on the scope of the 1872 postal monopoly than has the Legislature. Since 1872, there have been only two final judicial determinations of the question of what is a "letter" within the meaning of the private express statutes.

National Ass'n of Letter Carriers v Independent Postal Systems, 336 F Supp 804 (WD Okla 1971), *aff'd* 470 F2d 265 (10th Cir 1972) held that a printed Christmas card is a "letter." In its opinion, the district court reasoned that a "letter" is a "message in writing or printed or otherwise, in whole or in part, addressed to a particular person or concern. . . ." However, this definition was clearly taken from the *only* federal case cited as authority, *United States v Britton*, 17 F 731, 732 (Com. Ct. Ohio 1883). 336 F Supp at 809. In *Britton*, a U.S. commissioner equated a "letter" with a "writing" in order to rule an obscene "letter" within the statutory prohibition against the mailing of obscene "writings." On this point, *Britton* was clearly overruled, sub silentio, by *United States v Chase*, 135 U.S. 255 (1890). On appeal, the Tenth Circuit was concerned primarily with whether a union had standing to enforce the postal monopoly; it did not address the definition of "letter" except to note and affirm the district court's holding. 470 F2d at 269.

The only other final judicial interpretation of the word "letter" is *Williams v Wells Fargo & Co. Express*, 177 F 352 (8th Cir 1910). The Williams court held that a package of currency is not a "letter."[4]

In sum, one case dealing with Christmas cards and grounded in a overruled nineteenth century federal commissioner's decision could hardly be said to constitute a judicial "gloss" expanding the scope of the 1872 postal monopoly beyond the original intent of Congress.

(d) *Summary*—The postal monopoly enacted by the Congress in 1872 prohibited only the carriage of "letters." As statutory analysis and contemporaneous administrative interpretation make clear, the word "letters"

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the Interstate Commerce Commission of granting visible, substantive certificates to carry "commercial papers, documents, written instruments, audit media, and business records." "Comments of the Interstate Commerce Commission re Proposed Restrictions on Private Carriage of Letters," at 3 (August 23, 1973).

In light of the limitations on the reenactment doctrine announced by the Supreme Court as described in text, it is self-evident that the 1970 reenactment of 39 USC 601-06 cannot be considered to have had any effect whatsoever on the scope of the basic prohibitions against private carriers found in 18 USC 1693-99. Furthermore, it is interesting to note that it is at least arguable that the only administrative practice that could have been implicitly approved by Congress in 1970 was the highly visible practice implicit in the ICC's granting of certificates rather than the virtually invisible administrative practice embodied in some postal pamphlets no one paid any attention to.

[4]In addition, there is one judicial determination of this issue which is still on appeal. In *Associated Third Class Mail Users v United States Postal Service*, No 781065 (DC Cir, argued Nov 20, 1978), *appeal from* 440 F Supp 1211 (D DC 1977), the question presented is whether printed advertisements with address labels are "letters" within the scope of the postal monopoly. By reading the 1872 statute as though it did not change prior law, the district court held that the monopoly includes not only printed advertisements but "all matter properly transmittable in the United States mail." 440 F Supp at 1214. Since this case is still unresolved—and, in our opinion, very likely to be overturned—we have not taken it into account in these comments.

was used in the "ordinary and popular" sense of "current and personal written correspondence."

The Proposed Regulations declare a far broader interpretation of the word "letter" than Congress intended in 1872. As recently and as frequently as six times in the last three years, the Supreme Court has reasserted and strengthened its commitment to the basic axiom of administrative law that a federal agency cannot enlarge its authority beyond that granted to it by Congress. The Postal Service's Proposed Rules stand on even shakier ground than do the agency rules recently rejected by the Supreme Court. Unlike the federal agencies involved in those cases, the Postal Service is not even the agency charged with administering the basic prohibitions of the private express statutes, and unlike the rules involved, the Proposed Rules are clearly contrary to a declared national policy.

No action by the Congress or the Judiciary declares or implies any extension of the postal monopoly since 1872.

The scope of the postal monopoly therefore remains unchanged from that enacted by Congress in 1872. The Proposed Rules are invalid to the extent that they purport to extend the postal monopoly to include, as Congress did not in 1872, items which are not "letters" in the "ordinary and popular" sense of "current and personal written correspondence."

(2) THE PROPOSED REGULATIONS ARE INVALID TO THE EXTEND THAT THEY PURPORT TO SUSPEND THE PROHIBITIONS OF THE POSTAL MONOPOLY.

Sections 310.1(a)(7) n.l and 320.1-320.7 of the Proposed Rules purport to suspend the effect of the United States postal monopoly "to allow any person to send or carry the covered materials." Proposed Rules § 320.2.

While the suspensions in $ 320 are clearly delineated, those established by § 310.1(a)(7) n 1 are not. Section 310.1(a)(1) appears to create some suspensions, but the Proposed Rule does not say what they are. We presume, however, that a class of similar items either is or is not within the definition of "letter." Therefore, any item, listed in § 310.1 (a)(7) as a "letter" some of the time, must be a "letter" all of the time. If § 310.1(a)(7) indicates that an item is not within the postal monopoly under certain circumstances, then we presume that this result must be because of a suspension of the postal monopoly.

The suspensions announced in the Proposed Rules, then, appear to include at least the following (in somewhat simplified form):

- telegrams;
- checks, drafts, promissory notes, bonds, other negotiable and nonnegotiable financial instruments, stock certificates, other securities, insurance policies, and title policies when sent to or from financial institutions;
- books and catalogues of more than 24 pages;
- tags, labels, stickers, signs or posters primarily intended to be attached

to other objects for reading;
- printed matter except when sent by a commercial printer to an unrelated person who ordered the printed matter;
- photographic material when sent to or from a processor;
- sound recordings and films if to be disseminated to the public;
- data processing materials and any materials used as input for data processing if sent to or from certain persons within certain time limits
- advertisements enclosed with merchandise;
- memoranda sent between student or faculty organizations within a university;
- ocean carrier related documents when sent to or from port cities.

We conclude that the Postal Service has no authority to suspend the prohibitions of the postal monopoly and that all of the suspensions announced in the Proposed Rules are invalid, for the following reasons.

(a) *It is impossible to believe that a legal power as important as the suspension power could be delegated to a federal agency in 1864 and remain undiscovered until 1973*—The first public mention of this suspensions authority appears to have been in the Board of Governors' report, *The Private Express Statutes and Their Administration* (1973). The report simply assumes that the Postal Service has the authority to suspend the prohibitions of the private express statutes and, in appendix G, indicates that the statutory source of this authority is 39 USC 601(b) (1970). This subsection is also the only specific statutory source for the suspension power mentioned in the Proposed Rules. Proposed Rule § 310.1(a)(7) n 1.

As described below,§ 601(b) was enacted by Congress in substantially its present form in 1864.

In order to believe that the Postal Service has the power to suspend the postal monopoly, one must apparently believe that this suspension power lay in the hands of a federal agency unnoticed and unused for 109 years. This seems to us incredible.

Authority to suspend the postal monopoly is simply too important to have been kept hidden under a bushel for so long. It is tantamount to power to grant or withhold the right to engage in certain kinds of business. It is also tantamount to the power to regulate selected means of physical communications, an activity vital to the Nation's commerce. Moreover, if wielded carefully, the suspension power is the power to render expansive claims of monopoly almost immune from the political pressure which might be brought to bear on congressional oversight committees. With respect to this last point, the public counsel of the Postal Rate Commission has commented as follows:

> *The suspension technique is a rather ingenious tool for achieving what appears to be the Postal Service's goal, i.e., gathering under its exclusive domain nearly all mailable matter. It permits the immediate adoption of a broad definition of the scope of its monopoly while keeping potential ire of*

> *mailers under control*. No mailer can really complain so long as there is a suspension in force. If the Postal Service were to withdraw its suspension some years hence, it should cause no surprise when the Postal Service argues in court that the long standing administrative interpretation of the scope of the postal monopoly should be given great weight.

"Legal Memorandum of Assistant General Counsel, Litigation Division, Concerning the Role of the Postal Rate Commission in the Exercise of the Legal Controls over the Private Carriage of Mail and the Postal Monopoly," at 33, Postal Rate Commission Docket No MC 73-1 (1974) (dismissed by the Postal Rate Commission for lack of jurisdiction, docket RM 76-4, Order No 133 (1976)).

While an absence of supporting voices proves little, we note that, as far as we can ascertain, no court, no federal agency, nor any individual outside the employ of the Postal Service has ever agreed with the Postal Service that it has authority to suspend the postal monopoly laws. On the other hand, in addition to the public counsel of the Postal Rate Commission, at least one scholar has also registered detailed incredulity over the Postal Service's discovery of the suspension power. See George L. Priest, "The History of the Postal Monopoly in the United States," 13 J. Law & Econ. 79-80 nn 229-30 (1973).

(b) *Both the plain meaning of § 601(b) of the postal code and its legislative and statutory history clearly indicate that the Postal Service has no authority to suspend the postal monopoly*—The Proposed Rules state that the source for its suspension power is the authority Congress delegated to the Postal Service in 39 USC 601(b) (1970). *See* §§ 310.1(a)(7) n 1, 320.1 n 1. A careful reading of this statute, and its legislative and statutory history, shows, however, that the authority delegated to the Postal Service by this statute is exactly the opposite of that presumed by the Proposed Rules.

Section 601 of the postal code provides as follows:

> (a) A letter may be carried out of the mails when--
>
> (1) it is enclosed in an envelope;
>
> (2) the amount of postage which would have been charged on the letter if it had been sent by mail is paid by stamps, or postage meter stamps, on the envelope;
>
> (3) the envelope is properly addressed;
>
> (4) the envelope is so sealed that the letter cannot be taken from it without defacing the envelope;
>
> (5) any stamps on the envelope are canceled in ink by the sender; and
>
> (6) the date of the letter of its transmission or receipt by the carrier is endorsed on the envelope in ink.
>
> (b) The Postal Service may suspend the operation of any part of this section upon any mail route where the public interest requires the suspension.

This section generally allows the private carriage of stamped letters, thereby creating an exception to the general prohibitions against the private

carriage of letters found in the criminal code, 18 USC 1693-99 (1970). Subsection (b) states that the Postal Service may suspend the operation of "this section," referring to section 601, of course. It is perfectly plain that subsection (b) thus allows the Postal Service to suspend the exception for stamped letters created by subsection (a), thus applying the general prohibitions in criminal code to stamped, as well as unstamped, letters. Put another way, "if the operation of 39 USC 601(a)(1) through (6) is suspended," then the result is that there is no sort of stamped, enveloped letter which may be carried out of the mails by virtue of 5 601(a). *See, e.g.*, Proposed Rule § 320.4.

Thus, under § 601(b), the Postal Service can only *expand* the postal monopoly under § 601(b), it cannot *contract* it. Proposed Rule § 320.2 announces a contrary effect of the proposed suspensions: "The effect of these suspension is to allow any person to send or carry the covered materials between places serviced by the Postal Service without paying postage. . . ." The effect of a suspension announced in Proposed Rule 320.2 is simply the opposite from that effected by the statutory authority which underlies the Proposed Rule.

The Proposed Rules on suspensions also deviate from the underlying statutory scheme in another respect. In contrast to the suspensions announced in the part 320 of the Proposed Rules, the suspension power in subsection (b) is clearly designed to be exercised on a route-by-route basis. The Proposed Rules, in contrast, define the suspensions in terms of the kinds of items carried, the identity of the sender or addressee, the manner in which the item is handled after delivery, or the ownership of the item itself. There is simply no hint of such sweeping discretion in § 601(b). Section 601(b) speaks only of suspensions "upon any mail route."

The suspensions in the Proposed Rules thus rest upon a reading of section 601 which is exactly contrary to the plain meaning of the words. In section 601 Congress said that letters may be carried out of the mails under certain very narrow specific conditions, provided the Postal Service did not find that this narrow exception was contrary to the public interest. The Postal Service has read section 601 to mean that letters can be carried out of the mails whenever the Postal Service says they can be.

Section 601 of the postal code is plain on its face. Other indicia of legislative intent are therefore irrelevant and of no legal significance. *See Addison v Holly Hill Co*., 322 U.S. 607, 618 (1944). Nonetheless, the real life impact of the power claimed by the Postal Service in this instance is sweeping. Therefore, we shall review in detail the legislative and statutory history of section 601 to demonstrate beyond any doubt that Congress indeed intended exactly what it said in that section.

The stamped letters exception, subsection 601(a), and the suspension clause, subsection 601(b), did not become part of the private express statutes at the same time.

Today's stamped letters exception began as an exception for letters in

government embossed envelopes enacted by section 8 of the Act of August 31, 1852, ch. 113, 10 Stat 141. It provided, in pertinent part, as follows:

> [L]etters enclosed in . . . envelopes as shall be provided and furnished by the Postmaster General, . . . (and with postage stamps on such envelopes being equal in value and amount to the rates of postage to which such letters would be liable, if sent by mail, and such postage-stamps and envelopes not having been before used,) may be sent, conveyed, and delivered otherwise than by post or mail, notwithstanding any prohibition thereof, under any existing law: Provided, That said envelope shall be duly sealed, or otherwise firmly and securely closed, so that such letter cannot be taken therefrom without tearing or destroying such envelope, and the same duly directed and addressed; and the date of such letter or of the receipt or transmission thereof, to be written or stamped, or otherwise appear on such envelope.

By virtue of this 1852 act, letters in government embossed envelopes could be carried out of the mails by private carriers.

The suspension clause, now section 601(b), was not enacted until 1864. Act of March 25, 1864, ch. 40, § 7, 13 Stat 37. This provision originally read as follows:

> And be it further enacted, That the Postmaster General be, and he is hereby, authorized and empowered to suspend the operation of so much of the eighth section of the Act of the thirty-first of August, 1852, as authorizes the conveyance of letters otherwise than in the mails on any such routes as in his opinion the public interest may require.

The Congressional debates make clear that the reason for this suspension authority was that the Post Office Department was having difficulty enforcing the requirements of the embossed envelopes exception passed 12 years earlier. Indeed, the Senate wanted to abolish this exception entirely. The House, however, resisted, and the conference committee compromised on a provision that would allow the Postmaster General to suspend the exception on those routes where abuses were greatest. The gist of the compromise was explained quite lucidly by Congressman Alley, one of the conferees:

> [The Senate proposed a] section [which] repeals the law of 1852 so far as it authorizes the conveyance of letters otherwise than in the mails. By the law of 1845, all mail matter was prohibited from being carried upon post routes by any one out of the mails. In 1852 that law was amended so as to provide that letters and other mail matter might be carried by express companies or by individuals, provided legal postage was prepaid and the envelopes in which the matter was carried were stamped. *The Senate proposed . . . to repeal that law.* In case of the repeal of that law, we should fall back upon the law of 1845. That law was regarded as working a hardship, at the time of the enactment of the law of 1852, upon the business interests of the country, and the reasons alleged by the Senate for its repeal were, that upon the Pacific coast, in many instances, great abuses had been practiced.
>
> [The conference committee compromise] *leaves the matter entirely in the*

> *discretion of the Postmaster General, and he may adopt the remedy so far as it may seem necessary to promote the interest of the public service*.

Cong Globe, 38th Cong, lst Sess, 1243 (1864) (emphasis added). It cannot be doubted that "the remedy" which Congress authorized in the 1864 amendment was to allow the Postmaster General to suspend the exception for letters in government embossed envelopes and *not*, as the Postal Service now claims, to allow the Postmaster General to create new exceptions to the monopoly out of whole cloth.

The 1852 and 1864 acts were combined into section 239 of the Postal Code of 1872. Act of June 6, 1872, ch. 335, § 239, 17 Stat 312. Section 239 was then reenacted in 1874 as Revised Statutes § 3993. In both reenactments only stylistic changes were made. The version in the Revised Statutes read as follows:

> Sec. 3993. All letters inclosed in stamped envelopes, if the postage-stamp is of a denomination sufficient to cover the postage that would be chargeable thereon if the same were sent by mail, may be sent, conveyed, and delivered otherwise than by mail, provided such envelope shall be duly directed and properly sealed, so that the letter cannot be taken therefrom without defacing the envelope, and the date of the letter or of the transmission or receipt thereof shall be written or stamped on the envelope. But the Postmaster-General may suspend the operation of this section upon any mail-route where the public interest may require such suspension.

Section 3993 of Revised Statutes remained unchanged until 1930 when Congress enlarged the exception to allow the private carriage of letters in envelopes which had been "stamped" by means of affixing "postage stamps" instead of the more traditional, and literal, method of embossment:

> Sec. 3993 [as amended]. All letters enclosed *in envelopes with embossed postage thereon, or with postage stamp or stamps affixed thereto, by the sender, or with the metered indicia showing that the postage has been prepaid, if the postage thereon is of an amount* sufficient to cover the postage that would be chargeable thereon if the same were sent by mail, may be sent, conveyed, and delivered otherwise than by mail, provided such envelope shall be duly directed and properly sealed, so that the letter cannot be taken therefrom without defacing the envelope, and the date of the letter or of the transmission or receipt thereof shall be written or stamped upon the envelope, *and that where stamps are affixed they be canceled with ink by the sender*. But the Postmaster General may suspend the operation of this section or any part thereof upon any mail route where the public interest may require such suspension.

Act of June 29, 1938, ch. 805, 52 Stat 1231-32.

The House committee report indicates that these 1938 amendments were drafted by the Post Office Department and enacted by Congress apparently without change. HR Rept No 2785, 75th Cong, 3d Sess at 1 (1938). In his March 1937 transmittal letter to the Speaker of the House, the Postmaster

General stated, "The purpose of this measure is to liberalize the conditions under which letters may be transported outside of the mails upon payment of postage." Id. Plainly, the gist of the 1938 amendments was to allow postage for letters carried out of the mails to be paid by postage stamps or metered stamps as well as by the purchase of embossed envelopes.

The legislative history of the June 1938 amendments is significant because it very strongly implies that in March 1937 the Postmaster General did not believe that he had the authority to create new exceptions to the postal monopoly by administrative suspension. If the Postmaster General had such a power, of course, it was nonsensical for him to petition Congress and wait fifteen months for that which he was already empowered to do without Congressional assent.

The next alteration in the stamped letters exception occurred when the postal laws were collected and codified in 1960, for the first time since 1872. Act of Sept. 2, 1960, Pub L 86-682, § 901, 74 Stat 586. The 1960 postal code only introduced numbered subsections and paragraphs and made some stylistic changes. No further change has been made in the stamped letters exception to date, except that the section was reenacted and given a new section number in the Postal Reorganization Act in 1970, Pub L 91-375, § 2, 84 Stat 719.

(c) *Summary*—The Proposed Rules announce that the Postal Service has administratively suspended the postal monopoly for certain kinds of materials under certain conditions and claim 39 USC 601(b) (1970) as authority for the proposed suspensions. Although this subsection was originally enacted in 1864, the Postal Service first announced its suspension authority in 1973. In view of the practical importance of the power to suspend the postal monopoly, such legal archaeology is extremely difficult to credit. Moreover, the plain meaning of the words of § 601(b) precludes any such interpretation of that statute. The legislative and statutory history of § 601 not only completely support the plain meaning of that section, they very strongly imply that the Postmaster General so understood this section in 1937.

The Proposed Rules which purport to announce suspensions of the prohibitions of the postal monopoly are invalid because the Congress has not delegated to the Postal Service the necessary authority. The announced suspensions are in no way binding upon the Department of Justice, or the postal unions, or anyone else authorized to seek judicial enforcement of the postal monopoly.

(3) THE PROPOSED RULES ARE INVALID TO THE EXTENT THAT THEY PURPORT TO (A) ESTABLISH A FINE FOR VIOLATION OF THE POSTAL MONOPOLY EQUAL TO THE POSTAGE THAT THE POSTAL SERVICE WOULD HAVE COLLECTED ON THE PRIVATELY CARRIED LETTERS, (B) AUTHORIZE THE POSTAL SERVICE TO IMPOSE SUCH A FINE, (C) AUTHORIZE THE POSTAL SERVICE TO SUE FOR JUDICIAL ENFORCEMENT OF SUCH A FINE.

Proposed Rule § 310.5(a) purports to subject "any person or persons who

engage in, cause, or assist" activity made unlawful by the private express statutes to a fine "not exceeding the total postage to which [the Postal Service] would have been entitled had it carried the letters between their origin and destination." Paragraphs (b) and (c) of the Proposed Rule purportedly authorize the Postal Service to impose such fines and seek judicial enforcement of its judgements.

For the reasons stated below, we conclude that the Postal Service has no statutory authority to establish or impose such a fine nor any authority to initiate a civil suit for the enforcement of any such fine and that, therefore, Proposed Rule § 310.5 is invalid *in toto*.

The Proposed Rules do not provide any specific indication of statutory authority for the creation of a "back postage fine." The only statutes cited are the private express statutes generally. But these statutes do not create any such fine nor do they authorize the Postal Service to do so.

It happens that both the Attorney General and the Solicitor for the Post Office Department have remarked upon the absence of any statutory authority for the fine that Proposed Rule § 310.5 purports to establish. In 1918, the Post Office Solicitor advised the United States Attorney for New York City as follows:

> *"Are there any grounds, statutory or otherwise, upon which the Government may maintain a civil action for postage?." . . This question seems to be answered by the old opinion of Attorney General Nelson* (in 4 Ops. A.G. 349), in which it was held that *letters transported by private carriers can not be charged postage* and that "all that the department is competent to do is to enforce the penalties to which all unauthorized carriers of letters on the mail routes are by law subjected." The Attorney General proceeds: "This is the remedy, and the only remedy, provided by law; and, however inefficient it may prove in practice, it is not competent to the Executive to pursue any other."
>
> *I know of no change in the law since Attorney General Nelson rendered this opinion* which would change the conclusion.

6 Ops Sol POD 619 (emphasis added). The postal laws have not changed in any pertinent respect since either Attorney General Nelson or the postal solicitor in 1912 considered the matter.

Congress simply has not authorized a fine for violation of the postal monopoly based upon the amount of postage the Postal Service would have collected if the privately carried letters had been sent through the mails. Since there is no statutory basis for Proposed Rule § 310.5(a), it is invalid.

Proposed Rule § 310.5(6) states procedures by which the Inspection Service and the Law Department of the Postal Service are purportedly authorized to issue a "formal demand" for payment of the fine created by § 310.5(a). Proposed Rule § 310.5(6) goes on to require a person from whom payment is demanded to work through an internal administrative appeal to the Judicial Officer, but denies that person the right to appeal the basic question of

guilt or innocence. The clear implication is that the "formal demand" thus constitutes a binding, *ex parte* imposition of a fine by the Inspection Service or the Law Department.

Where Congress has authorized the Postal Service to impose fines, it has so stated in plain English. *See* 39 USC 5206, 5403, 5604 (1970).There is nothing in the private express statutes or the postal laws generally which authorizes the Postal Service to impose a fine for any violation of the postal monopoly. *See* 39 USC 401, 404 (1970). Since the Congress has not explicitly delegated quasi-adjudicatory discretion to the Postal Service to impose such fines, the adjudication of any such civil liability is delegated to the district courts. 28 USC 1339 (1970) ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.").

We do not think the Postal Service may divest the federal courts of jurisdiction over the adjudication of civil liability in postal matters. Hence, we conclude that even if there were such a fine as described in Proposed Rule § 310.5(a), it would be up to the federal district courts, not the Postal Service, to decide who is liable for what. Proposed Rule § 310.5(b) seems to contradict 28 USC 1339 (1970) and therefore appears to be invalid.

Proposed Rule 310.5(c) can only be read as an announcement of purported Postal Service authority to seek judicial enforcement of a fine imposed under § 310.5(a),

> (c) Refusal to pay an unappealed demand or a demand that becomes final after appeal *will subject the violator to civil suit by the Postal Service* to collect the amount equal to postage. [Emphasis added].

The Postal Service, however, is specifically prohibited by statute from authorizing itself to present its case to a court, either in criminal or civil matters.[5] 28 USC 516 (1970); 39 USC 409(d) (1970). Again, wherever Congress has allowed the Postal Service to represent itself in court, it has expressed this authority in very clear and narrow terms. *See* 39 USC 3007(a) (1970). Since Proposed Rule 310.5(c) contradicts specific statutory provisions in the postal and judicial codes, it seems clearly invalid.

In summary, Proposed Rule § 310.5 purports to authorize the Postal Service to legislate and adjudicate fines for violation of the postal monopoly and to authorize the Postal Service to represent itself in court in such matters. Since all of Proposed Rule § 310.5 either has no statutory basis or directly contradicts specific statutory prohibitions, it is invalid *in toto*.

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[5]The Postal Service's *only* enforcement authority is the power to search for and seize letters carried illegally in "any (1) vehicle passing, or having lately passed, from [a post office], (2) article being, or having lately been, in the vehicle; or (3) store or office . . . used or occupied by a . . . transportation company. . . ." The Postal Service may detain seized letters for a possible forfeiture proceeding in federal district court if approved and conducted by the local U.S. attorney. 39 USC 603-06. (1970).

V. CONCLUDING REMARKS

The most important implications which emerge from the preceding analysis transcend a strictly legal point of view. Two fundamental, and disturbing, conclusions seem inescapable. First, the Postal Service drafted the Proposed Rules with virtual indifference to the statutes enacted by Congress. Second, the Proposed Rules are so far out of line with the teachings of the Judiciary that the Postal Service cannot seriously expect to see these Proposed Rules upheld in court.

If the Postal Service does not see itself as fulfilling the orders of Congress and cannot look to the Judiciary to uphold the Proposed Rules, why does the Postal Service seek to adopt them?

The answer is unmysterious to anyone who has dealt with persons affected by the postal monopoly—because Postal Service regulations on the postal monopoly have the real life practical effect of diverting some business away from private carriers and to the Postal Service. So what if the regulations are invalid? No private carrier and no user of private carriage wants the costs, risks, and adverse publicity that it would take to demonstrate the invalidity of these Proposed Rules in court.

The force of the Proposed Rules lies not in their legal effect, but in the fact that they tell persons what they must do to avoid the risk of litigation with the Postal Service. The mere possibility of litigation is a powerful club. Private carriers are generally much smaller than one five-hundredth the size of the Postal Service, and they are therefore far less able to bear the expenses of a long court fight. The users of private carriers are usually extremely sensitive about possible litigation with "the government." And, of course, for politically powerful users this risk of litigation is removed by carefully drawn "suspensions." Furthermore, the risk of litigation announced in the Proposed Rules is all the more convincing by the Postal Service's unwillingness to abide by adverse judicial holdings beyond the reach of the deciding court's contempt power.[6] As a vice president of one large company remarked to us "The Postal Service's monopoly regulations may be illegal, but we just do not want to risk being meat for the grinder."

The most objectionable aspect of these Proposed Rules thus springs not

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[6]See, for example, postal opinion letter PES 77-24 (reconsidered) (1977) explaining that the Postal Service "would not insist on compliance" with a certain monopoly regulation but only for "shipments to or from locations within the Central District of California, which is composed of the following counties: Los Angeles, Orange, Riverside, San Bernardino, San Luis Obispo, Santa Barbara, and Ventura." Why? Because the federal district court in that area held the Postal Service was incorrectly applying the regulation. *Walt Disney Music Company, Inc. v United States Postal Service*, Civ No 76-2391-1H (D CD Cal, Nov 18, 1976) (unreported). The Postal Service has responded in similar fashion to adverse court rulings on the question of whether or not it is immune from state garnishment actions. That question has been litigated in 19 district courts and 6 courts of appeals, the Postal Service losing all the appellate cases. *See Goodman's Furniture v United States Postal Service*, 561 F2d 462 (3d Cir 1977).

from particular legalisms but from their whole nature and purpose. After one has researched the law in detail and familiarized himself with the operations of the private carriage industry and the activities of the Postal Service inspectors, it is very difficult to come away with any impression other than that the Proposed Rules represent an attempt by a Federal agency to use the laws of Congress to intimidate competitors, rather then to go vern constituents.

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DHL Testimony on International Couriers (1979)

Introduction

DHL Corporation, in conjunction with its foreign affiliates, provides an express pick up and delivery service for "time-sensitive" commercial papers such as intra-corporate records, blueprints, shipping papers, and data processing. DHL differs from most other private carriers in that it handles primarily international documents

It may be helpful to provide some examples. We carry blueprints and other construction documents to and from Saudi Arabia for giant engineering companies in Los Angeles and Houston. We carry complex computerized bills of lading from San Francisco and Los Angeles to Honolulu, Hong Kong, and Singapore for large West Coast shipping companies. We gather cancelled checks and credit card receipts from all over the world and bring them back to the major banks in New York and San Francisco. And we carry legal briefs and official papers from the governments of Samoa, Guam, and Alaska and deliver them to the Supreme Court and the federal agencies here in Washington. In all, DHL operates in about 40 countries.

We are honored to have the opportunity to express our views on the need to reform the Private Express Statutes. At the outset, we would like to express our appreciation to the Subcommittee for holding these hearings and to commend the Subcommittee for approaching this difficult and complex task in an open-minded and responsible manner.

James I. Campbell Jr., counsel, DHL Corporation, "Statement of James I. Campbell Jr" in *Private Express Statutes: Hearings Before the Subcommittee on Postal Operations and Services of the House Committee on Post Office and Civil Service*, 96th Cong, 1st Sess, 211 (1979) (hearing of Jun 20, 1979). Appendices omitted.

BASIC POSITION

DHL supports H.R. 3669 and H.R. 4082, which would exempt time-sensitive letters from the postal monopoly. We would also support refinements to those bills to guarantee against significant diversion of first class mail revenues. For example, we would support a stiffer penalty for abuse of the exemption or a prohibition against pricing private carriage below first class postage rates.

We also suggest to the Subcommittee that it consider an exemption from the postal monopoly for all letters to or from international points (or, better, to or from points outside the continental United States). International trade and communications have become vital to the American economy, accounting for one-third of all U.S. corporate profits. International postal services, however, have totally failed to keep pace, largely for reasons beyond the power of the U.S. Postal Service to correct. While insignificant as a source of Postal Service revenues, the 107-year old international postal monopoly is a serious impediment to modern American commerce.

We believe that there is also a need to clarify the scope of the current postal monopoly so that ordinary men can read the law and understand it. From our study of the evolution of the postal monopoly law, we are convinced that the monopoly which Congress granted the Post Office Department on June 6, 1872 covered only the regular carriage of "letters," as that term is used in ordinary, everyday English. We therefore agree with the Department of Justice, the Federal Communications Commission, and the Interstate Commerce Commission that data processing and electronically transmitted hardcopy messages do not fall within the scope of the current postal monopoly. We agree, as well, with others who have argued that printed matter such as insurance brochures, promotional material sent in bulk, and printed advertisements do not fall within the bounds of the postal monopoly granted by Congress. The fact that such contentions are so strenuously debated, however, demonstrates the need for Congress to clarify whatever it said in 1872. We would support a clarification of the current postal monopoly so that all of us—Postal Service, private carriers, and customers—can plan our businesses more rationally and efficiently.

Most importantly, we believe that reform of the postal monopoly must be accomplished by statute rather than administrative action. The Postal Service, as it concedes, does not have the legal authority to suspend the criminal prohibitions which establish the monopoly. Indeed, the Postal Service does not have authority to suspend the postal monopoly in any practical sense, since the basic enforcement procedures may be instituted by the Department of Justice, the postal unions, or the Customs Service, but not by the Postal Service. Moreover, it is fundamentally unfair—and, perhaps, violative of the Due Process Clause—for the Postal Service, the beneficiary of the monopoly, to be the primary administrator of any exceptions to the monopoly.

POINTS TO BE ADDRESSED IN THIS TESTIMONY

Our testimony will not review all the many aspects of the postal monopoly nor repeat the points made by prior witnesses. In Appendix B, we have included our comments in the Postal Service's current rulemaking on the postal monopoly. These comments provide our thoughts, in some detail, on several key aspects of the current and proposed regulations—the definition of "letter," the purported administrative suspensions of the monopoly, and the purported fine for violating the monopoly, equivalent to "back postage" on items sent privately.

In this summary statement for the Subcommittee, we shall build upon previous testimony and address only three specific points:

(1) As a matter of law, practicality, and fairness, any reform of the postal monopoly must be by statute, not administrative regulation.

(2) The considerations which are used to justify the domestic postal monopoly are largely absent from the international sphere. High quality international communications have become very important to the U.S. economy, and, therefore, international letters should be generally exempt from the postal monopoly.

(3) There are several aspects of the Postal Service's harassment of private carriers and their customers which have not been brought to the attention of the Subcommittee. These include threats of unauthorized fines, detailed general questionnaires distributed by postal inspectors, illegal disposition of seized letters, and unauthorized searches of private businesses' premises.

In addition, we would, of course, be glad to prepare for the Subcommittee detailed comments on any other aspect of the U.S. postal monopoly.

I. NECESSARY REFORM OF THE POSTAL MONOPOLY MUST BE BY STATUTE, NOT ADMINISTRATIVE REGULATION.

Under current law and traditions of due process, reform of the postal monopoly can be accomplished only by statute, not by administrative regulations. The reasons why legislative action are necessary and desirable may be summarized as follows:

(1) The basic prohibitions against private carriage are found in the criminal, not the postal, statutes. As the Postal Service has admitted, it has no authority to suspend these criminal prohibitions. Thus, the Postal Service cannot prevent the Department of Justice or the postal unions from invoking these criminal laws against private carriers or their customers.

(2) Despite the Postal Service's claims to the contrary, the Postal Service has no authority to forbid other federal agencies the Department of Justice and the Customs Service from carrying out their legal responsibilities to seize letters carried outside the mails.

(3) Since any Postal Service regulation can be narrowed or repealed at any time in the future, the Postal Service itself cannot establish a climate of

stability necessary to attract adequate investment in private carriage.

(4) The Due Process Clause of the Constitution may prohibit postal officials from administering a monopoly from which the Postal Service benefits financially.

(5) The Commission on Postal Service, D.C. Circuit Court of Appeals, and Senate Governmental Affairs Committee have all urged that reform of the monopoly is properly the job of Congress, not the Postal Service.

We shall amplify upon each of these statements in turn.

Essentially, there are two procedures for enforcement of the postal monopoly. Certain criminal laws prohibit the regular private carriage of letters to places the Postal Service regularly serves.[1] The Department of Justice or, in some areas, the postal unions, may ask a court for judicial enforcement of the criminal statutes which prohibit private carriage of letters.[2] A court could order a fine, a prison term, or an injunction. Alternatively, the postal code authorizes the seizure of privately carried letters followed by confiscation of the letters if approved by a court. Authority to seize privately carried letters is vested in the Postal Service, the Customs Service, and the U.S. marshals.[3]

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[1]18 USC 1693-99, 1725 (1970). The most important prohibitions are contained in 18 USC 1696(a) and (b), which read, in pertinent part:

> (a) Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law or from any city, town, or place to any other city, town, or place, between which the mail is regularly carried shall be fined not more than $500 or imprisoned not more than six months, or both . . . .
>
> (b) Whoever transmits by private express or other unlawful means, or delivers to any agent thereof or deposits at any appointed place for the purpose of being so transmitted any letter or packet, shall be fined not more than $50.

[2]The Department of Justice's authority to prosecute the criminal laws is found in 28 USC 515 (19701 Some courts have also recognized that a postal union may sue for an injunction under authority of these criminal laws. *United States Postal Service v Brennan*, Doc No 77-6130 (2d Cir Jun 7, 1978); *National Ass'n of Letter Carriers v Independent Postal Systems*, 470 F2d 265 (10th Cir 1972); *contra, American Postal Workers Union, Detroit Local v Independent Postal Systems*, 481 F2d 90 (6th Cir), *cert granted*, 414 U.S. 1100 (1973), cert den, 415 U.S. 901 (1974). The Postal Service is specifically barred from seeking judicial enforcement of the postal monopoly unless given prior permission by the Attorney General. 28 USC 516 (1970); 39 USC 404(d) (1970).

[3]39 USC 604, 606 (1970), which read, in pertinent part:

> Sec. 604. Seizing and detaining letters
>
> An officer or employee of the Postal Service performing duties related to the inspection of postal matters, a customs officer, or United States marshal or his deputy, may seize at any time, letters and bags, packets, or parcels containing letters which are being carried contrary to law on board any vessel or on any post road.
>
> Sec. 606. Disposition of seized mail
>
> Every package or parcel seized by an officer or employee of the Postal Service performing duties related to the inspection of Postal matters, a customs officer, or United States marshal or his deputies, in which a letter is unlawfully concealed, shall be forfeited to the United States. The same proceedings may be used to enforce forfeitures as are authorized in respect to goods, wares, and merchandise forfeited for violation of the revenue laws . . . .

The procedure for judicial enforcement of a forfeiture is found in 19 USC 1602-1618 (1970).

The Postal Service cannot write regulations which overrule, or create exceptions to, a criminal law enacted by Congress, including the laws which prohibit private carriage of letters. This commonsense principle is conceded by the Postal Service. The first time the post office ever issued a regulation which purported to suspend the monopoly was in 1974, 102 years after the current monopoly was enacted by Congress. A month after this regulation was issued, the Postal Service's lawyers responded to a puzzled citizen as follows:

> [W]e do not know how we can clarify the status of carriers or users of carriers under the criminal Private Express provisions operating under [an administrative] suspension . . . promulgated by the Postal Service under the civil Private Express provisions. *No express authority exists in the Postal Service to suspend the provisions of the criminal laws*.[4]

Thus, the Postal Service itself admits that a postal regulation in no way relieves DHL or our customers from the possibility of criminal prosecution by the Department of Justice or a injunction initiated by a postal union's suit.

Nor does a postal regulation prevent the possibility of seizure of letters which the Customs Service or a U.S. marshal may deem to be carried "contrary to law." To understand why, we must briefly look behind the Postal Service's legal mumbo-jumbo concerning suspensions. (See also Appendix B.)

The Postal Service claims that Congress authorized it to suspend the "civil" portions of the postal monopoly laws by enactment of 39 USC 601(b) (1970) But the Postal Service's claim is transparently incorrect. Paragraph 601 (b) was enacted by Congress in 1864. The sole effect of this law as originally enacted was to authorize the Postmaster General to suspend another law which had declared that letters could be carried out of the mails if postage was paid on them. Various codifications over the years have not changed this basic concept. The exception for stamped letters is now found in paragraph 601(a). The suspension authority in paragraph (b) is explicitly limited to the power to suspend "the operation of *this section*"; it says nothing about the suspension of other sections of the postal laws. Indeed, the net result of the Postal Service's administrative suspensions would be exactly the opposite from what Congress authorized. Paragraph 601 (b) authorizes the Postal Service to *expand* the monopoly by cutting back on a statutory exception, but the Postal Service's regulations purport to *contract* the monopoly by creating additional exceptions.

It is interesting to note that in 1937 the Post Office decided it would be a good idea to allow the private carriage of metered as well as stamped letters. Did it use the supposed authority of paragraph 601(b) to suspend the monopoly? No. The Postmaster General petitioned Congress for a new law and waited patiently for more than a year until Congress approved the change.

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[4]Letter to Mr. William Malone, vice president, General Telephone and Electronics Corporation, from Roger P. Craig, deputy general counsel, United States Postal Service, dated November 22, 1974 (*reprinted*, Hearings on the Postal Reorganization Act Amendments of 1975, H.R. 2445, before the Subcomm. on Postal Service of the House Comm. on Post Office and Civil Service, 94th Cong, lst Sess, at 346 [1975]) (emphasis added).

In 1974, however, the Postal Service simply ignored the authority of Congress and started writing its own exceptions to the postal monopoly. This remarkable departure from the law did not go unnoticed. The public counsel of the Postal Rate Commission objected vigorously and suggested that the Postal Service's purpose in inventing this mythical suspension power was to lay the legal groundwork for ever larger claims of monopoly.[5] His objections, however, were mooted when the Postal Rate Commission dismissed this matter for lack of jurisdiction.

Whatever the Postal Service's motives or reasoning behind these unauthorized administrative suspensions, they do not alter the facts regarding enforcement of the postal monopoly by seizure and confiscation. Postal regulations cannot prevent customs officials nor U.S. marshals from seizing letters from DHL. This possibility, is not merely theoretical. For a two-week period in September 1976, customs officials seized virtually all materials brought into San Francisco by all courier companies.

The legal inadequacy of a postal regulation suspending the monopoly is matched by practical difficulties. Any regulation written by the Postal Service could be narrowed or repealed by the Postal Service tomorrow. Such a possibility means that private carriers must operate under the handicap of trying to attract financing and personnel despite the fact that their right to do business is subject to the whims of their largest competitor and could be repealed at any time. Obviously, such a position seriously impairs the position of the private carriers.

Besides the legal and practical problems raised by administrative reform of the postal monopoly, it is fundamentally unfair that a person's ability to do business be legally subject to his competitor's regulations. The Postal Service's strong and continuing interest in limiting any exceptions to the postal monopoly as much as politically feasible is clearly evinced by Postmaster General Bolger's comments on last year's "Eagleton Amendment."

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[5]"Legal memorandum of Assistant General Counsel, Litigation Division, Concerning the Role of the Postal Rate Commission in the Exercise of the Legal Controls over the Private Carriage of Mail and the Postal Monopoly," at 33-42, Postal Rate Commission Docket No MC 73-1 (1974). The PRC public counsel suggested the motive for the Postal Service's claim of a suspension power in the following passage;

> *The suspension technique is a rather ingenious tool for achieving what appears to be the Postal Service's goal, i.e., gathering under its exclusive domain nearly all mailable matter*. It permits the immediate adoption of a broad definition of the scope of its monopoly while keeping potential ire of mailers under control. No mailer can really complain so long as there is a suspension in force. If the Postal Service were to withdraw its suspension some years hence, it should cause no surprise when Postal Service argues in court that the long standing administrative interpretation of the scope of the postal monopoly should be given great weight. [Emphasis added.]

See also George L. Priest, "The History of the Postal Monopoly in the United States," 13 J Law & Econ 79-80 nn 229-30 (1973). Like the public counsel of the Postal Rate Commission, Prof. Priest concludes that Congress has never authorized the Postal Service to suspend the postal monopoly.

> The Postal Service *strongly opposes* enactment of this provision [a time-sensitive exemption similar to H.R. 3669 and S. 11731. . . . We think . . . [it] would result in *loss of revenue* that could threaten the *financial stability* of the Postal Service.[6]

Administration of the postal monopoly by the Postal Service may, indeed, violate the Due Process Clause of the Constitution. The Supreme Court has held that a governmental official may not decide liability if the official, or the institution he represents, has such a strong financial interest in the outcome of the decision that the interest would serve as "possible temptation to the average man." The Court held that such partisan discharge of governmental duties is prohibited by the constitutional requirement of due process. *Ward v Village of Monroeville*, 409 U.S. 57 (1972). In that case, a mayor of a small town was barred from deciding traffic ticket cases because the town, although not the mayor himself, received a substantial amount of revenue from the fines collected. Surely an average man, finding himself employed by Mr. Bolger, would face a "possible temptation" to give a broad interpretation to the postal monopoly and a narrow interpretation to any exceptions.

Sensitivity to such constitutional issues was explicitly voiced by the Senate Governmental Affairs Committee in its report last year on a bill similar to H.R. 3669 and H.R. 4082. The committee stated:

> *It should be noted that the evolution of this exemption [for time-sensitive letters) reflects the committee's commitment to observe due process. As originally drafted, the amendment . . . would have been established by implementing regulations issued by the Postal Service*, or, in one version, by the Postal Rate Commission. The final version, however, writes the basic exemption into the statute, thereby minimizing the need for interpretation and *insuring that the power of interpretation of the basic scope of the exemptions will be with the courts*.

S Rept No 95-1191, 95th Cong, 2d Sess (emphasis added). Shortly after this report was filed, however, the Senate adjourned without acting upon it.

The wisdom and reasonableness of the Senate committee's approach is reinforced by the similar sentiments expressed by the Commission on Postal Service and the U.S. Court of Appeals for the District of Columbia Circuit, both of whom have recently urged Congress to review and clarify the scope of the monopoly. The D.C. Circuit Court of Appeals wrote;

> *Congress is the appropriate body to set the nation's policy [on the scope of the postal monopoly]*. Indeed, we are hopeful that our recital of the ambiguities and uncertainties will spur Congress to give the matter some attention.

Associated Third Class Mail Users v United States Postal Service, No 78-1065, at 6 n 10 (DC Cir 1979). The court's call paralleled the recommendation

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[6]Letter from William Bolger, Postmaster General, to Senator Edmund Muskie, dated September 26, 1978 (emphasis added).

of the Commission on Postal Service two years earlier;

> *The Commission recommends that Congress enact legislation defining the scope of the private express statutes*. The legislation should respond to the need of business for expedited delivery of extremely time-sensitive matter. [Emphasis added.]

Report of the Commission on Postal Service at 73 (1977).

In view of these several legal, practical, and equitable considerations, we respectfully urge this Subcommittee to recommend that any reform of the postal monopoly be accomplished by statute rather than postal regulation.

II. INTERNATIONAL (AND EXTRA-CONTINENTAL) LETTERS SHOULD BE EXEMPT FROM THE U.S. POSTAL MONOPOLY.

The postal monopoly over domestic letters and the postal monopoly over international letters pose very different policy questions for Congress. In this section of our testimony, we shall discuss the following points:

(i) International postal service is totally inadequate to modern commercial needs and is very poor compared to private alternatives.

(ii) International commerce is very important to the United States, accounting for some one-third of U.S. corporate profits. The type of international business conducted by American firms is highly dependent upon good worldwide communications.

(iii) The United States Postal Service has no control over the quality of international postal service since it cannot control foreign post offices, many of which are often beset by problems not faced by the U.S. post office.

(iv) Unlike the domestic postal monopoly, the international postal monopoly is not an important generator of revenues for the U.S. Postal Service.

(v) In light of these special considerations, international letters should be exempted from the postal monopoly entirely.

(vi) Postal service to Alaska, Hawaii, and the Territories shares many of the special characteristics of international postal service, and, therefore, letters to these areas should be exempted from the postal monopoly as well.

	Business days to deliver 90% of shipments (to nearest half day.)		Average transit time in business days (to nearest half day)	
	Post	DHL	Post	DHL
Europe	5.0	1.5	3.5	1.0
Middle East & Iran	12.0	2.5	7.5	1.5
Far East & Pacific	7.5	3.5	5.0	2.0
Alaska & Hawaii	5.0	2.0	3.0	1.5

In a nutshell, the main problem with international postal service is that it is terrible, at least for the purposes of international business. The [above] comparison of international air mail and private carrier delivery times from

New York City to international regions was prepared by an independent consultant for DHL in May 1978.

The deficiencies of the worldwide postal system are an especially serious matter for the United States because America's business dealings with the rest of the world have mushroomed in the last decade. Its main products—expertise and high-technology goods—are highly dependent upon fast and reliable worldwide communications. Between 1965 and 1975, U.S. exports increased from $40 billion to $148 billion while American assets abroad increased from $120 billion to $304 billion. More fundamentally, the Treasury Department last year estimated that fully one-third of all American corporate profits are derived from international activities of American firms.

For the American businessman abroad—whether trying to establish foreign banking relations, manage overseas construction projects or sell highly sophisticated aircraft—the need for good communications to and from the United States is self-evident. As one would expect, given the increase in international trade, communications between the United States and the rest of the world have exploded. Outbound international telephone calls jumped from 12.9 million in 1970 to 40.2 million in 1976 to 50.6 million in 1977. Outbound international telexes increased from 6.7 million in 1970 to 26.3 million in 1976 to 31.9 in 1977.

Despite the dramatic increase in international trade and, especially, U.S.-foreign telecommunications, U.S.-foreign postal communications have actually declined in the last few years. Between 1970 and 1977, the number of international air mail pieces dropped from 531 million pieces to 487 million pieces, representing an 8 percent decrease. In short, the Postal Service has completely failed to keep pace with the communications needs of U.S. international commerce.

This failure, however, is largely the result of factors beyond the control of the Postal Service. The Postal Service must work with foreign post offices that are frequently not up to American standards. In some parts of the world postal officials do not read English and do not make local deliveries, while in other parts of the world, postal strikes are not uncommon. (Countries suffering postal strikes in recent years include Australia, Canada, England, Iran, Ireland, Italy, and Israel.) The fact that all international postal documents are handled by at least two organizations makes control and tracing difficult. As if the intrinsic problems were not enough, an international treaty limits international letter delivery to packages weighing four and half pounds or less (two kilograms), thus closing the international mails to a large portion of blueprints, specifications, financial forms, shipping papers, and other international business documents.

The Postal Service's inability to keep up with the escalating demand for rapid and reliable U.S.-foreign communications has led, of course, to the development of private international delivery services. These private alternatives include specialized "courier" companies, such as DHL or

Purolator, and airline express services, such as Pan American's "Clipper Pack." Regular airfreight forwarders like Emery or Airborne also handle international documents. In addition, a substantial number of foreign-bound documents are carried by company employees as they commute to and from foreign field offices. To our knowledge, there are no overall statistics on the quantity of international documents carried privately. We can only say that DHL has experienced very substantial growth over the last several years.

As early as 1962, the U.S. Congress recognized the public interest in expediting the flow of international commercial papers and business records. In that year, the Tariff Schedules were amended to exempt most business records, blueprints, and data processing from duty. 19 USC 1202 (TSUS 870.10). As the Senate Finance Committee report specifically noted, the purpose of the bill was to eliminate "delays and uncertainties troublesome for business firms . . . with overseas branches." S Rept No 1318, 87th Cong, 2d Sess

More recently, the importance of rapid, private international delivery services to a trading nation's economy has been highlighted by events in Hong Kong and Korea. In October 1976, a bill to expand the Hong Kong postal monopoly to include commercial documents was defeated because of a dramatic, unified storm of protest by international businesses, including many American firms. Similarly, in the fall of 1977, President Park of Korea overruled his ministers and authorized the use of private carriers to import time-sensitive business documents. President Park's decision was especially noteworthy because the debate in Korea had been couched in terms of national security, a crucial governmental concern in that country.

The vital importance of competitive international document delivery services to the U.S. economy may be contrasted with the relative insignificance of the monopoly over international letters from the standpoint of Postal Service finances. Unlike the domestic monopoly, the international postal monopoly generates virtually no extra postal revenues. In fiscal 1978, international air mail accounted for only 2.6 percent of postal revenues and 0.5 percent of the mail volume (pieces of mail). Even with a total exemption for international letters, only a small fraction of this small fraction of postal revenues would be diverted to private carriage because only the Postal Service has a universal pickup and delivery network to gather and distribute the thinly spread international letters.

In view of these special considerations affecting the international postal monopoly, we respectfully suggest to the Subcommittee that it consider the public interest in ending the outdated monopoly o ver international letters.

Many, but not all, of the considerations which are peculiar to international document delivery also apply to the delivery of letters to and from Alaska, Hawaii, and the Territories. Postal Service to Pago Pago and Fairbanks is just as bad as to Hong Kong or Paris. As a result, businesses in these outlying parts of the United States are today largely dependent upon private carriers for the

delivery of documents from "the Lower Forty-Eight" or "the Mainland." These markets are relatively insignificant for the Postal Service, but good communications are vital for the people who live there. We suggest, therefore, that letters to and from points outside the continental United States should be treated as "international" letters and exempted from the postal monopoly as well.

III. THE POSTAL SERVICE'S HARASSMENT OF PRIVATE CARRIERS AND THEIR CUSTOMERS (CONTINUED).

DHL and our customers have experienced many threatening visits, phone calls, and letters from postal inspectors similar to those described in previous testimony.

In addition, we would like to bring to the Subcommittee's attention several other methods by which the Postal Service uses the postal monopoly laws and regulations to harass private carriers and their users. They include the following: threats of substantial, but mythical, "back-postage" fines; inspectors's use of detailed questionnaires to users of private carriers; unauthorized searches of private businesses, unauthorized disposal of seized letters, and an absurd, dual interpretation of the postage required under the "postage paid" exception to the monopoly.

A. MYTHICAL "BACK-POSTAGE" FINES

Invariably, postal inspectors call to mailers' attention the following provision in the postal regulations dealing with the postal monopoly:

> [T]he Postal Service may require any person or persons who engage in, cause, or assist [activity prohibited by the private express statutes] to pay an amount or amounts not exceeding the total postage to which it would have been entitled had it carried the letters between their origin and destination.

39 CFR 310.5(a) (19791. The prospect of paying back postage for all items sent by private carriers is a strong deterrent against using private carriers, particularly for those who send many documents internationally where postal rates are very high.

This "back-postage" fine, however, appears to have been invented out of thin air by the Postal Service in 1974; Congress has never even considered, much less authorized, such a fine. Both the Attorney General of the United States and the Solicitor for the Post Office Department have explicitly remarked upon the absence of any such fine in the postal laws. In 1918, the Post Office Solicitor advised the U.S. attorney for the New York City as follows:

> *"Are there an grounds, statutory or otherwise, upon which the Government may maintain a civil action for postage?*" . . . . This question seems to be answered by the old opinion of Attorney General Nelson (in 4 Cps. A.G. 3491, in which it was held that *letters transported by private carriers can not be charged postage* and that "all that the Department is competent to do

> is to enforce the penalties to which all unauthorized carriers of letters on the mail routes are by law subjected." The Attorney General proceeds: "This is the remedy, and the only remedy, provided by law; and, however inefficient it may prove in practice, it is not competent to the Executive to pursue any other."
>
> I know of no change in the law since Attorney General Nelson rendered this opinion which would change the conclusion.

6 Ops Sol POD 619 (19181 (emphasis added).

Postal regulations notwithstanding, there has been no change in the relevant postal laws since this postal solicitor's opinion was written.

B. INSPECTORS' USE OF DETAILED QUESTIONNAIRES

Previous witnesses have already described to the Subcommittee how postal inspectors have "encouraged" citizens to use Express Mail. Inspector Greene in New York City has added a new dimension to this program by using the Inspection Service's stationary to send out detailed form questionnaires to those who might possibly be using private carriers. Inspector Greene's letters demand the following, to quote verbatim:

1) the name(s) and addresses) of the private courier services being used;
2) detailed description(s) of the materials being carried;
3) the destinations) of this material;
4) the frequency of its carriage; and
5) the average weight per shipment of the material being carried to each destination.

A copy of one such letter is Appendix A of this testimony.

While we do not know exactly how many such letters have been sent out, we do know that we have received many complaints about the Postal Service's apparent demand for an accounting of all private business correspondence. Inspector Greene's questionnaires are especially disturbing in light of the clear evidence that the inspectors are in close contact with the postal marketing personnel. Indeed, Inspector Greene's questionnaires have more the appearance of marketing surveys than legitimate law enforcement inquires.

C. UNAUTHORIZED SEARCHES OF PRIVATE BUSINESSES

The authority of postal inspectors to search for letters carried in violation of the postal monopoly is stated in 39 USC 603 (1970)

> Sec. 603. Searches authorized
>
> The Postal Service may authorize any officer or employee of the Postal Service to make searches for mail matter transported in violation of law. When the authorized officer has reason to believe that mailable matter transported contrary to law may be found therein, he may open and search any—
>
> (1) Vehicle passing, or having lately passed, from a place at which there is a post office of the United States;

(2) Article being, or having lately been, in the vehicle; or

(3) Store of [sic] office, other than a dwelling house, used or occupied by a common carrier or transportation company, in which an article may be contained.

It seems obvious from the precise manner in which this statute is drafted that the Congress was careful to avoid granting postal inspectors wide ranging authority to invade the privacy of citizens. Similarly, postal inspectors are only authorized to seize illegally carried letters "on board any vessel or on any post road." (39 USC 604, quoted above).

Clearly, section 603 does not authorize postal inspectors to conduct general searches of the premises of companies other than common carriers and transportation companies. Nonetheless, we have been informed of many instances in which postal inspectors have taken advantage of mail room managers' unquestioning respect for police authority to undertake broad searches of the mail rooms and shipping departments of private businesses.

D. UNAUTHORIZED DISPOSAL OF SEIZED LETTERS

Under our system of laws, the Government may not take property from a citizen without due process of law. This basic principle is implemented in 28 USC 2493 (1970) which declares, "All property taken or detained under any revenue law of the United States . . . shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States."

Despite the fundamental nature of this Congressional statute, the Postal Service, without authority of the courts, disposed of letters seized by the Customs Service over a two-week period in September 1976 by giving them to the addressees in return what it deemed to be postage due. While this procedure was expedient, the results were that fines due the U.S. Treasury were collected by the U.S. Postal Service, the district court was deprived of jurisdiction over the matter, and the businessmen accused of violating the postal monopoly unknowingly lost their opportunity to protest their innocence.

E. DUAL INTERPRETATION OF THE POSTAGE REQUIRED UNDER THE "POSTAGE-PAID" EXCEPTION TO THE MONOPOLY

Under 39 USC 601(a) (1970), a letter may be sent by private means if the sender pays the Postal Service for not carrying the letter by affixing the postage that "would have been charged on the letter if it had been sent by mail."

The Postal Service's approach to this requirement for international letters is curious, at best. For letters from the United States to a foreign country, the Postal Service interprets section 601(a) to mean that the sender should affix full international postage, i.e., the amount that would have been charged *at the point of origin* if the outbound international letter had been mailed. For inbound international letters, however, the Postal Service takes another approach. The Postal Service does not charge or collect any money on letters

mailed into the United States from a foreign country. Nevertheless, the Postal Service maintains that senders should affix domestic postage on all privately carried inbound international letters. This second interpretation appears based on the distinctly different concept that the "postage that would have been charged" is the amount that would have been charged *for carriage through U.S. territory*, rather than the amount that would have been charged at the point of origin.

In short, the Postal Service interprets the same statutory phrase in section 601(a) in two entirely different ways depending upon whether the privately carried letters are coming into or going out of the country. With this remarkable gambit, the Postal Service claims the right to two different taxes from a single Congressional authorization.

This absurd result was carried to its logical extreme when, on July 7, 1978, the Postal Service's lawyers announced that the Postal Service was entitled to full international postage on privately carried letters that merely passed through the United States on their way from one foreign country to another!

CONCLUSION

DHL urges this Subcommittee to recommend legislation along the lines of H.R. 3669 or H.R. 4082. We suggest that, in addition to a basic exemption for time-sensitive letters, the legislation should also respond to the special needs of international commerce and to the many reasonable calls for a clarification of the monopoly generally.

Thank you for this opportunity to present our views.

PART 2

EXCESS BAGGAGE TARIFFS

CHRONOLOGY

23 Dec 1977	Pan Am files tariff to limit acceptance of baggage.
12 May 1978	CAB orders cancellation of Pan Am tariff.
5 May 1978	DHL presentation to CAB on courier industry.
25 Jul 1978	Pan Am files courier bag tariff.
18 Aug 1978	CAB rejects Pan Am courier bag tariff for lack of justification.
24 Oct 1978	Airline Deregulation Act enacted.
10 Nov 1978	Pan Am refiles courier bag tariff.
2 Jan 1979	CAB suspends Pan Am courier bag tariff for investigation but indicates acceptable formula
17 Dec 1979	Pan files new courier bag tariff.
27 Feb 1980	CAB approves Pan Am courier bag tariff.
Jul 1981	DHL statement to Senate committee on unjust discrimination.
5 Aug 1981	CAB approves Pan Am limits on noncourier bags (never implemented).
19 Oct 1981	Court of Appeals rejects DHL appeal of CAB courier bag order but orders investigation into average weight per courier bag.
24 Feb 1983	CAB approves Pan Am courier bag tariff based on average courier bag weight of 30 kg.
21 Oct 1982	CAB rejects first IATA baggage tariff.
3 Mar 1983	CAB rejects second IATA baggage tariff.
19 Jan 1984	CAB rejects third IATA baggage tariff.

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Overview: Excess Baggage Tariffs

Everyone save one complainant, DHL Corporation, appears to be reasonably satisfied with Pan American's effort to equitably resolve the baggage problem.

- Pan American World Airways (1978)

In the early days, international delivery services were almost wholly dependent on their ability to transport urgent documents and parcels as the baggage of courier passengers on regularly scheduled passenger airlines. Pan American World Airways, the premier international airline, led efforts to restrict or surcharge courier use of excess baggage services. By appeal to the U.S. Civil Aeronautics Board, DHL and the international couriers blocked anticourier baggage tariffs for more than two years. Ultimately, as U.S. airline deregulation dissolved regulatory controls over the airlines, the Civil Aeronautics Board and courts permitted airlines to discriminate between couriers and other passengers. Even so, the surcease gave rapidly growing couriers a critically important period in which to gain sufficient commercial heft to negotiate with airlines on more nearly even terms.

Couriers and Airline Baggage Services

Courier dependence on the airline baggage system resulted from both the low volume of urgent international documents and the absence of an entirely suitable service offering from international airlines. The volume of urgent documents and parcels commerce did not justify use of dedicated aircraft on international routes until the mid to late 1980s, and dedicated aircraft remained the exception rather than the rule on most routes until the mid 1990s. Outside of the commercial airline system, there was no way to move things around the world quickly, yet commercial airlines offered no service expressly designed for the rapid movement of time-sensitive things. International airlines offered

three types of transportation services: for passengers, freight, and mail. Freight service was a byproduct of passenger service. A passenger could arrive immediately before departure, claim a reserved seat, and exit the aircraft immediately on arrival. In contrast, airlines required shippers to tender cargo well before flight departure, did not guarantee carriage on a given flight, and released shipments to consignees well after arrival. Limitations of international freight airline service were reinforced by customs procedures. Customs authorities provided immediate clearance for passengers but highly irregular clearance for cargo. The other air transportation service for the movement of things, mail service, was available only to official post offices.

By buying an international airline ticket for a courier passenger, the courier company acquired the right to use the premium services created for passengers for the transportation of urgent documents and parcels. Strong, flexible shipping bags—similar to duffle bags or mail bags—were designed to hold up to seventy pounds of documents and parcels, the weight limit for passenger baggage set by airlines. A color coding scheme for courier bags quickly evolved: green for DHL, yellow for Skypak, and so forth. On an average flight, an "on-board courier" would accompany from one to several dozens of courier bags. Courier bags were packed by the courier company and presented with the courier passenger at the airline check-in counter. On arrival, courier company employees would collect the courier bags from the baggage belt or carousel. The courier passenger would either declare to Customs that the courier bags contained only nondutiable business documents or present documentation prepared by the courier company. In this system, on-board couriers were usually volunteers not professional travelers. The only obligations of an on-board courier were reliability and tolerable respectability. International airline tickets were often distributed free to courier company employees and their parents and friends. For small, struggling courier companies, free international travel was an important benefit for mostly youthful employees.

From the standpoint of a producer of air transportation, it would seem that couriers should be considered ideal customers because demand matched almost exactly the characteristics of supply. An essential attribute of courier service was regularity. Courier companies dispatched on-board couriers on the same flights each day in both directions regardless of the volume of traffic. Moreover, couriers tendered substantial quantities of dense,[1] easily handled cargo. Nonetheless, airline executives resented the rapid growth of courier services. Executives in the passenger department of the airline were unhappy with the confusion and delay caused by passengers with great quantities of

[1]Airlines generally sold air transportation for cargo by weight but large jet aircraft usually ran out of cargo space before the weight of cargo exceeded the aircraft's carrying capacity. Hence, all other things being equal, cargo that was relatively heavy per unit of volume was especially remunerative.

baggage. Executives in the cargo department deplored the fact that the passenger department was getting credit for transporting what was, in their view, premium cargo. Too often a top airline official, waiting for his bags after a long flight, would watch multiple courier bags being disgorged by baggage handling equipment and calculate to himself the discrepancy between the extravagant rates that brash young couriers charged for transportation of, say, thirty one-pound envelopes and the piddling amount that he, an experienced airline executive, charged for transportation of one thirty-pound passenger bag.

The rise of international couriers coincided with a radical revision in airline baggage charges. The introduction of jet aircraft that stimulated international courier service also changed the nature of airline economics. While payloads of piston aircraft were limited by the amount of weight the aircraft could transport, jet aircraft could typically carry all of the passengers and cargo that could be boarded. In other words, jet aircraft were "space-limited" not "weight-limited." As the Civil Aeronautics Board, regulator of the U.S. aviation industry, explained:

> The significance of the space-limited nature of today's aircraft is that changes in space, rather than changes in weight, have the greatest impact on the cost of service. As we have stated elsewhere, "[a]ir carriers, in providing scheduled passenger service for the public, are dealing with the sale of a product; this product is essentially space in an aircraft. . . . In sum, the carriers' product is cubic feet of space and the price must be related to that product."[2]

In March 1976, the Board completed the *Excess Baggage Case*, a four-year investigation into the implications of the new aviation economics for an airline passenger's "free" baggage allowance and excess baggage charges. The Board held that existing international baggage allowances and excess baggage charges were unjust and unreasonable and therefore unlawful. To substantiate this result, the Board compared the existing baggage rate, 1 percent of the first class fare per kilogram, with the cost of transporting economy passenger baggage, about 11.92 percent of the economy fare, divided by 17.5 kilograms, the average amount of checked baggage per economy passenger. The result of this division was a rate of 0.7 percent of the economy fare per kilogram, manifestly substantially less than the prevailing excess baggage charge.[3] On this basis, the Board ordered all international airlines to cancel their baggage tariffs for flights to and from the United States. The Board's decision in the *Excess Baggage Case* split the worldwide system of airline baggage charges into two subsystems. Baggage charges for flights in and out of the United States were based on the number of bags, or pieces, tendered while baggage charges elsewhere were based on the weight of the baggage tendered and

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[2]Order 76-3-81 at 4 (Feb 25, 1976) (Docket 24869, Baggage Allowance Tariff Rules in Overseas and Foreign Air Transportation).

[3]Ibid, 8.

therefore much higher.

FIRST PAN AM EXCESS BAG TARIFF

When the Board's decision went into effect in late 1977, baggage revenues from U.S. flights fell substantially—i.e., to reasonable levels—and international airlines began looking for a way to circumvent the Board's rule. On December 23, 1977, Pan American World Airways, the leading U.S. international airline, filed a new tariff for passenger baggage with the Civil Aeronautics Board. The tariff was "designed to discourage the carriage of inordinate amounts of excess baggage." In justification, Pan Am explained:

> Pan American has been experiencing continuing problems with respect to the volume of excess baggage that passengers present at check-in time. Because of volume and weight restraints, Pan American has been unable to board all of the baggage tendered. . . . A few passengers are using passenger baggage provisions for the shipment of large numbers of items, such as household goods and commercial articles, which are more appropriately freight and thus inconveniencing the majority of passengers.[4]

Under the new tariff, after the first two bags (transported as part of the service purchased for a passenger fare), Pan Am proposed to limit the existing excess baggage rate to the first two excess bags and to impose a 200 percent surcharge beginning with the third excess bag (300 percent on flights to Africa).

DHL complained that the Pan Am baggage tariffs were unjustly discriminatory in violation of the Federal Aviation Act and unreasonably high in contravention of guidelines established in the *Excess Baggage Case*. The Board agreed and suspended the tariffs. In particular, the Board found that Pan Am had not shown that there was, in fact, an operational problem caused by the volume of excess baggage tendered.

> the proposed increases . . . could have a severe impact on passengers. The carrier makes no attempt to support the increases on the basis of costs of service. Pan American supports its proposal by a survey undertaken at one terminal for a consecutive period of eleven weeks. In our opinion, this survey alone does not support or justify such substantial increases at New York or throughout the carrier's system.[5]

Further investigation revealed that Pan Am's baggage loading problems arose almost exclusively from a handful of flights from New York to Africa. The Board concluded that Pan Am had failed to establish a cost basis for the tariffs or to justify system-wide application. The Board further noted Pan Am's new bag rate was roughly equivalent to the general freight rate for a 35-kilogram bag, but Pan Am had made no showing that the average excess bag weighed

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[4]Letter from R.L. Carlson, Staff Vice President, Marketing Analysis and Pricing, Pan American World Airways to Civil Aeronautics Board dated Dec 23, 1977, at 1-2, Docket No 31948.

[5]Order 78-2-70 at 2 (Feb 13, 1978).

35 kilograms.[6] Accordingly, on May 12, 1978 the Board ordered Pan Am to cancel the suspended tariffs.[7]

Meanwhile, on April 10, United Airlines filed a baggage tariff for primarily domestic air transportation that provided for carriage of two bags at no extra charge, four bags at a nominal charge of $6, and additional bags at a rate of $24. The new element in this tariff was the provision for carriage of additional bags at $24 each instead of the previous limit of four excess bags. To reinforce the points it was making in the Pan Am case, DHL took the unorthodox step of filing a "complaint" in support of the tariff. DHL pointed out that United had failed to offer cost justification for the proposed $24 per bag charge, but after analyzing comparable freight rates, DHL argued that the United rates were reasonable and should not be suspended. Following the reasoning of DHL, the Board dismissed the complaint.[8]

On May 5, 1978, the young DHL executives made an extraordinary presentation to the five members of the Civil Aeronautics Board. Concerned that Board members had no actual knowledge of courier services, DHL sought and received permission to explain the history and organization of DHL, details of courier operations, and the economic role of couriers in international commerce (nor did DHL overlook the desirability of employing a blond cutie from the New York station to flip the charts.[9]) The presentation was well received; one Board member proclaimed it the best he had seen from any company in the industry.

SECOND AND THIRD PAN AM EXCESS BAG TARIFFS

Pan Am remained determined to increase excess baggage rates. After off-the-record negotiations between Pan Am and DHL ended without agreement, in July 1978, Pan Am filed a second round of excess baggage tariffs. The second set of tariffs proposed to treat courier baggage differently from baggage received from noncourier passengers. In the courier bag tariff—a courier was defined as "a person accompanying a shipment tendered by one or more shippers"—the charge for baggage was calculated by multiplying the total weight of courier baggage by 130 percent of the General Commodity Rate for freight shipments of less than 300 kilograms, i.e., the highest such rate. For noncourier baggage, Pan Am proposed to levy a 100 percent surcharge on excess bags beginning with the fifth excess bag, a significantly lower increase compared to the earlier proposal. The second set of Pan Am baggage proposals was summarily rejected by the staff of the Civil Aeronautics Board for lack of cost justification.[10]

On November 10, 1978, Pan Am filed a third round of excess baggage

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[6]Order 78-3-149 (Mar 31, 1978).
[7]Order 78-5-72 (May 12, 1978).
[8]Order 78-5-30 (May 5, 1978).
[9]The author later married the cutie from New York and has lived happily ever after.
[10]Rejection Notices B-8585, B-8586, B-8608 (Aug 18, 1978) and B-8607 (Aug 31, 1978).

tariffs. The third version of tariffs was identical the second. In justification, Pan Am raised the decibels of argumentation rather than the quality of evidence. With respect cost justification, Pan Am conceded that it had none; its purpose was merely to limit the scope of the *Excess Baggage Case*:

> For international markets, Pan American concedes that it is impossible to cost justify its proposed surcharged excess baggage rates in a strict sense, confronted with the Board's conclusions in the Baggage Allowance case, and has not attempted to do so. Pan American has frankly stated the level was established at amounts which should deter abuse of the baggage piece system.[11]

Pan Am also condemned DHL for failing to cooperate with its efforts to resolve these "problems":

> everyone save one complainant, DHL Corporation (DHL), appears to be reasonably satisfied with Pan American's effort to equitably resolve the baggage problem. . . . DHL remains unsatisfied with virtually any change in the status quo and continues to cling fervently to its absurd notion that distinguishing among consumers who rely upon the cargo capacity of air carriers is objectionable. . . . these are people who are in business to transport, on a regular or ad hoc basis, articles that are, under any fair definition, something other than personal effects. Nevertheless, for their own reasons of economic self-interest, these people use the passenger baggage system of direct air carriers to pursue their profit-making business.[12]

If the Board failed to permit the new tariff, threatened Pan Am, "Pan American's remaining approach to remedy its baggage problems will be to impose outright limits on the quantity of baggage which will be permitted to accompany a passenger o the same flight."[13]

The Board's response to Pan Am's third excess baggage tariff was influenced in part by larger events. On October 24, 1978, the United States adopted legislation deregulating the domestic airline system and prescribing abolition of the Civil Aeronautics Board after four years.[14] As the Board put, the new act mandated that "we place greater reliance on the market place where possible"[15] in the regulation of domestic air transportation. The Board's responsibilities in international air transportation were largely unchanged by the act.

In response to the proposed courier bag rates for domestic air transportation, the Board concluded "we should not continue to insist on strict cost justification as we have in the past, but should allow the competitive

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[11]Letter from R.J. McKay, Director-Pricing, to Civil Aeronautics Board, dated November 10, 1978, at 15.

[12]Ibid, 7-8.

[13]Ibid, 17.

[14]Airline Deregulation Act of 1978, Pub L 95-504, 92 Stat 1705.

[15]Order 79-1-6 at 4 (Jan 2, 1979).

market place to determine if the charges are too high."[16] The Board therefore rejected DHL's complaint against Pan Am's proposed increases in domestic courier baggage rates. Although it found Pan Am's stated justification for the higher rates unconvincing, the Board permitted Pan Am's domestic courier bag tariffs to become effective. The primary effect of this decision was to allow large increases in courier bag charges in the west coast to Hawaii routes. While many carriers served the west coast-Hawaii market, entry into international air transportation remained restricted by international aviation agreements. For practical reasons, the only night departures from the west coast to Hawaii were flights ultimately destined for international points, and the only flights suitable for transportation of urgent business records were night flights.

On reconsideration, the Board refused to consider whether the special characteristics of courier traffic justified special consideration of a courier bag tariff: "the west coast-Hawaii markets are highly competitive, so any danger of charging rates substantially in excess of costs is significantly diminished."[17] The Board likewise waved aside DHL's suggestion of unlawful discrimination between couriers and noncouriers:

> The Act allows the establishment of reasonable rate classifications. While Pan American's distinction may be viewed as unreasonable and unjust by couriers, it may with equal persuasion be viewed as legitimate attempt to isolate that class of shipper most typically responsible for the tender of above-average baggage weight.[18]

In regard to Pan Am's proposed increases in international courier bag rates, the Board concluded that the new bag rates exceeded the guidelines of the *Excess Baggage Case* and that Pan Am had failed to explain why. Inconsistently, the Board also questioned the fairness of discrimination between couriers and noncouriers:

> these proposed increases have not been justified as the Board previously requested and we do not believe that sharply increased charges should be permitted without complete justification.
>
> The complainant makes an allegation of discrimination with respect to couriers vs. other passengers. We find it hard to differentiate the problem as caused by multiple-baggage pieces tendered by couriers vs. similar amounts of similar materials that are tendered by, for example, an employee on a business trip. Pan American does not clearly indicate how this distinction is to be made.
>
> The carrier admits that the problem is aggravated in certain selected markets, particularly to Africa and South America. By its own data, such punitive charges are not necessary in all markets.

The Board therefore suspended the rates and ordered an investigation. However, the Board went on to indicate that it was sympathetic to the

[16]Ibid.
[17]Order 79-6-147 at 2 (Jun 22, 1979).
[18]Order 79-6-147 (Jun 22, 1979).

"increased costs apparently caused by the typically heavier weight courier bags." Therefore, said the Board, it would be receptive to a tariff for courier bags on international routes derived by applying the formula of the *Excess Baggage Case* to average weight of courier bags instead of the average weight of all excess bags.

The Board's proposal to use a weight ratio to derive a courier bag charge from the typical bag charge approved in the *Excess Baggage Case* was manifestly incorrect. Since, as noted above, the *Excess Baggage Case* concluded "changes in space, rather than changes in weight, have the greater impact on the cost of service" and DHL estimated that courier bags occupied about 43 percent more space than ordinary passenger bags, the justifiable surcharge for courier bags, if any, appeared to be 43 percent. In contrast, a weight-only ratio would imply apply a 170 percent surcharge on a 32-kilogram bag since 32 kilograms is 2.7 times 12 kilograms, the weight of a typical passenger bag as determined in the *Excess Baggage Case*. In short, on a route on which the *Excess Baggage Case* implied a $100 charge for ordinary excess baggage and, arguably, a $143 charge for a courier bag and similar bags, the Board was saying that it would be receptive to tariff filing of $270 per courier bag.

The Board's investigation into appropriate courier baggage rates for international air transportation began in July 1979.[19] In a prehearing conference held on October 3, 1979, DHL and Pan Am notified the Administrative Law Judge that they had agreed on a compromise tariff. On October 24, Pan Am repudiated this agreement. On November 29, 1979, the Administrative Law Judge, over Pan Am's objections, ordered production of data demonstrating the costs incurred in carrying courier bag. Pan Am responded by withdrawing the contested tariffs and moving to cancel the investigation.

FOURTH PAN AM EXCESS BAG TARIFF

On December 17, 1979, Pan Am filed a fourth set of excess baggage charges for courier bags. Pan Am's new tariff established rates for courier bags equal to 0.7 percent of the economy fare multiplied by 30 kilograms (66 pounds). By way of justification, Pan Am declared, without evidence, that the average weight of courier bags is 30 kilograms and noted that a weight-based surcharge for courier bags was precisely the approach recommended by the Board in its order suspending the third set of tariffs. On February 27, 1980, the Board agreed and dismissed the complaint of DHL.[20]

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[19]Order 79-7-39 (Jul 6, 1979). The Board's investigation in the suspended portions of the third set of Pan Am baggage tariffs was consolidated with other similar proceedings into the *Increased Excess Charges in Overseas and International Air Transportation Proposed by Pan American World Airways, Inc.* Docket 36063.

[20]Order 80-2-148 (Feb 27, 1980). Likewise, in Order 80-4-54 (Apr 10, 1980), the Board dismissed DHL's complaint against a similar courier bag tariff by British Airways.

APPEAL OF COURIER BAG TARIFF TO CONGRESS AND COURTS

DHL and another courier company, Gelco, appealed the Board's decision to the Court of Appeals. The couriers maintained that the Board erred in two respects. First, argued the couriers, the Board allowed the airlines to establish a tariff that unjustly or unreasonably discriminates between couriers and other passengers who tender large amounts of baggage. Second, the courier bag tariff permitted by the Board was unreasonably high because it was derived from the approved charge for average excess bags using a weight factor.

DHL also appealed to Congress which was reexamining certain elements of the Airline Deregulation Act, primarily with an eye towards shortening transition provisions.

Chapter 6 reproduces a statement by DHL on aviation policy and unjust discrimination submitted to the Senate in July 1981 while its appeal of the Board's orders was pending before the Court of Appeals. In this statement, DHL traces the history of federal restrictions on unjust discrimination in the transportation sector beginning with establishment of the Interstate Commerce Commission in 1887. In this statement, DHL tried to persuade the Senate Subcommittee on Aviation that the Board had incorrectly interpreted unjust discrimination provisions of the Federal Aviation Act and that, more generally, a federal prohibition against unjust discrimination should be retained in American transportation law despite the impending demise of the Civil Aeronautics Board. A legal restriction on unjust discrimination was, however, strongly opposed by the Board and major airlines, and DHL's proposal was rejected by the subcommittee.

On October 19, 1981, the Ninth Circuit Court of Appeals ruled on the couriers' appeal. On the first point, the court held that the Board did not abuse its discretion in allowing discrimination between couriers and noncouriers because the purpose of travel was different:

> The CAB and Pan Am respond that typical passengers and couriers do not receive similar services. Couriers receive a unique freight service with handling advantages enjoyed by passengers. Moreover, the carrier's transport of a passenger's baggage is incidental to the passenger's own transportation. By contrast, transport of courier baggage is the primary service purchased. . . . the CAB did not abuse its discretion in determining that couriers and passengers are not similarly situated.[21]

On the second issue, the mathematics of deriving a reasonable charge for courier bags, the Court deferred to the technical expertise of the Board:

> the CAB approved a flat rate for excess baggage by multiplying the weight of the average passenger bag by the approved formula. This same process was applied to courier bags. Assuming the average courier bag weighs 2.7 times the weight of the passenger bag, or 30 kilograms, that courier bags

[21] *DHL Corp v CAB*, 659 F2d 941, 946 (9th Cir 1981).

> could be charged approximately 2.7 times the rate for passenger baggage. The couriers argue that this is impermissible because the tariff is based solely on weight.
>
> The courier's argument only follows if in approving the formula the CAB did not take into account the space utilized by a piece of baggage. In the *Excess Baggage Case*, . . . [g]iving the CAB its due deference regarding "technical knowledge," we believe the CAB adequately considered space utilization in reaching its formula. Thus, when that formula is applied using a weight factor it accounts for space.[22]

BOARD APPROVAL OF COURIER BAG TARIFF

DHL immediately asked the Board to clarify to the court that the resulting charge for courier bags does not, in fact, take into account space in the manner prescribed by the *Excess Baggage Case*.

> The Court's opinion is incorrect as a matter of mathematics. Even if the excess baggage charge derived in the *Excess Baggage Case* takes into account space (a point we do not contest), applying a "weight factor" to a "per kilogram rate formula" equivalent to the "cost-related charge" does not yield a charge for a courier bag which "accounts for space" occupied by courier bags. Mathematically, a space/weight charge for a typical bag must be multiplied by a space/weight factor—not a weight-only factor—in order to yield a space/weight charge for a non-typical bag.[23]

DHL's mathematical logic was incontestable. Using a weight-only factor to adjust a space-based charge expressed in terms of weight almost doubled the resulting charge per courier bag. The Board was unmoved. It rejected DHL's petition, noting that "when applied to the average courier bag, this formula produces a higher rate for courier bags which is reasonable, if not mathematically correct."[24]

At the same time, pursuant to the order of the Court of Appeals, the Board initiated an investigation into average weight of courier bags. On February 24, 1983, the Board approved Pan Am's original proposal to use 30 kilograms as the average weight per courier bag. Although the evidentiary record was questionable, the Board again cited the spirit of deregulation and gave Pan Am the benefit of the doubt:

> Pan American has produced sufficient data to demonstrate that its use of 30 kilograms as the average weight of a courier bag is not unreasonable.

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[22]659 F2d at 949. The court agreed with couriers are two minor points. First, the court found that the courier bag tariff unjustly discriminated against couriers by denying couriers the "free bag allowance" accorded other passengers. Second, the court found the Board should not have assumed that the average courier bag weighs 30 kilograms without evidence. The court remanded the case to the Board for further consideration of these points.

[23]"Petition of DHL Corporation for Declaratory and Other Relief and for Issuance of a Statement of Clarification to the U.S. Court of Appeals," CAB Docket No. 40249 at 2 (Nov 16, 1981).

[24]Order 82-4-18 at 3 (Apr 1, 1982).

> Although the data are not as precise as we would require if we were prescribing fare levels, they are adequate to justify individual carrier tariff-filing. Morever, we believe that it is consistent with the Congressionally-mandated polities of deregulation to permit carriers a greater degree of discretion in their pricing decisions than we have allowed in the past.[25]

Thus, the Civil Aeronautics Board gave final approval to what was, in effect, a 150 percent surcharge on courier use of airline excess baggage services.

IATA NONCOURIER EXCESS BAG TARIFFS

Having split off the courier opposition, in February 1981 Pan American resumed its efforts to limit baggage services for noncourier passengers. It proposed to reduce the maximum weight per bag from seventy to fifty pounds, to reduce the number of "free" bags allowed economy passengers from two to one, and to require economy passengers to ship excess bags as cargo (without guarantee of transport on same flight as the passenger). DHL blocked this proposal on a legal technicality. Pan Am revised and refiled the tariff.[26] In August 1981, the Board allowed a second version of this tariff to go into effect over the objection of DHL and a consumer group.[27] Despite winning Board approval, Pan American never implemented this baggage tariff due to the possibility of chasing passengers to other airlines. Instead, Pan Am sought to organize an industry limitation on excess baggage in a July 1982 meeting of the International Air Transport Association (IATA) in Geneva.

In August 1982, IATA asked the Board to grant immunity from the antitrust laws for an agreement among airlines restricting baggage services. The proposed IATA baggage tariff was complex. In essence, in addition to the normal charge for an excess bag, it would have applied an additional excess bag charge to any bag which (i) exceeded the third excess bag, (ii) weighed more than 50 pounds or (iii) exceeded specified dimensions. A large sixth excess bag weighing 51 pounds could thus incur a quadruple excess bag charge. It was unclear whether the IATA baggage tariff was meant to supercede the courier tariff. If so, the effect on a twenty-bag shipment by DHL would be a tripling of baggage charges. DHL and several other couriers opposed the IATA tariff, as did the Aviation Consumer Action Project, a group representing aviation consumers.[28] On October 21, 1982, the Civil Aeronautics Board rejected the IATA tariff because of the absence of cost justification for the scheme of surcharges:

> We are gravely concerned about . . . about the reduction in the maximum weight allowance and the double-, triple-, and quadruple-charging of some

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[25]Order 83-2-91 at 2 (Feb 24, 1983).

[26]Pan Am dropped the requirement that excess bags of economy passengers be submitted to the cargo terminal and limits the free baggage allowance only for discount economy passengers.

[27]Order 81-8-91 (Aug 5, 1981).

[28]Concern over IATA's efforts to limit excess baggage rights was one reason why DHL invited other couriers in 1983 to form the International Courier Conference.

> passengers' baggage. Although Pan American has assured us that couriers using its services would not be subject to the proposed provisions, they could have a staggering effect on other passengers. . . . IATA has also failed to explain why a passenger's sixth checked bag should be charged at twice the rate of an identical fifth checked bag.[29]

Although Pan Am denied the applicability of the new tariffs to courier bags, the couriers believe that the proposed tariffs would apply in some markets and would establish a precedent for further restrictions on courier bags. [30]

IATA tried twice more, each time opposed by the couriers and consumers. On March 3, 1983, the Board rejected a second version of the IATA tariff when Pan Am refused to produce cost justification.[31] On January 19, 1984, the Board rejected a third and final IATA attempt to win Board approval for limiting passenger baggage services. [32]

COMMERCIAL DEVELOPMENTS

In net effect, DHL and other couriers delayed application of excessive courier bag charges for more than two years and blocked entirely even more severely restrictive practices. Although, the express industry ultimately failed to persuade the government of the injustice of allowing economic discrimination against couriers in airline markets characterized by restricted competitive options, the couriers' partial success was crucial to development of the industry. Growing at 30 to 50 percent per year, the couriers by 1982 were better positioned to bargain directly with individual airlines. In that year, couriers transported about 12.5 million kilograms of courier shipments from North America and Europe, including a large fraction of all transatlantic excess baggage.[33] Pan Am, originally DHL's major supplier, lost most of its courier business. Moreover, the airlines' own express small parcel services were proving unsuccessful, lessening their incentive to discriminate against courier shipments. Growth in the express industry was also beginning to make feasible the operation of express aircraft on some routes, relieving the couriers' dependence on commercial airlines. In 1985, Federal Express became the first express company to operate dedicated aircraft across the Atlantic.

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[29]Order 82-10-85 (Oct 21, 1985). The Board's concern about a 100 percent surcharge on 50 to 70 pound passenger bags may be contrasted with the Board's receptivity to a still larger surcharge on courier bags assumed to weigh 66 pounds (30 kilograms).

[30]The Board did not understand whether the proposed tariffs would apply to couriers either. *See* Order 83-1-72 (Jan 19, 1983).

[31]Order 83-3-20 (Mar 3, 1983).

[32]Order 84-1-74 (Jan 19, 1984).

[33]In 1983, DHL retained an economic consultant with experience in the airline industry, Cresap, McCormick, and Paget, to prepare a study to demonstrate to airlines the growing importance of the courier industry and propose ways to improve commercial relations. This study was ultimately sponsored by the International Express Carriers Conference and released in 1984.

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DHL Statement on CAB Sunset (1981)

I. Introduction

The bills to advance the sunset date of the Civil Aeronautics Board proposed by the Board (H.R. 3562 and S. 1426) and the Department of Transportation (H.R. 4065 and S. 1425) fail to address a hastily drawn, almost accidental, provision in the Airline Deregulation Act of 1978—the provision abolishing the prohibition against unjust discrimination in domestic aviation on January 1, 1983. This provision originated in conference and was contrary to the bills approved by both houses of Congress.

DHL wholeheartedly supported the 1978 act, which was essentially a repudiation of federal controls on entry into the domestic airline industry.[1] Likewise, we fully support the gist of the pending bills, to terminate, as soon as practicable, all regulation of the domestic aviation by an independent federal agency.

Abolition of all legal restraints on unjust discrimination is, however, a different matter. The prohibition against unjust discrimination is not a minor sidelight of U.S. transportation law. It is the central core, the reason that federal regulation of interstate transportation was begun in 1887. Of course, experience has revealed serious defects in the governmental tool chosen, the

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DHL Corporation, "Statement of DHL Corporation" in *Early Sunset of the Civil Aeronautics Board: Hearings Before the Subcommittee on Aviation of the Senate Committee on Commerce, Science, and Transportation*, 97th Cong, 1st Sess, 555 (1981). The Appendix is omitted.

[1]DHL Corporation and its affiliates today comprise the world's largest international air courier system. We participated actively in the Ad Hoc Committee for Airline Regulatory Reform, our legal counsel serving as Executive Director. As explained more fully below, our interest in and knowledge of the unjust discrimination provision stems from certain instances in which we feel that the air couriers have been unjustly discriminated against by certain airlines. We believe, however, that the issue of unjust discrimination is a fundamental one, transcending our particular problems, and we have tried to present it to the Committee in this light.

independent regulatory agency. And granting a federal agency the additional power to control market entry has turned out proven to be totally inappropriate. But the original goal—to impose a measure of justice on an all pervasive transportation infrastructure that displayed tendencies toward extreme injustice—was, and still is, a goal worthy of the most careful consideration by Congress. Unlike most of the regulatory mission, it is not a idea rendered insupportable by subsequent economic analysis.

It appears that neither the Board nor DOT, nor perhaps any other witness, will present the Committee a full briefing of the implications of abolishing the unjust discrimination provision. This is understandable. In part, it is because the ill effects of abolishing the unjust discrimination prohibition will fall most heavily on the disorganized and unsophisticated, those least well represented in government. In part, the aviation industry—indeed, the entire transportation industry—has lived with the unjust discrimination prohibition for so long that few today can appreciate fully the consequences of its demise. And, in part, it is due to the fact that the insights of economics, which now dominate governmental thought after being too long ignored, cannot supply answers to questions of justice.

In this statement, we have tried to remedy this omission fairly and objectively. After first describing the current statutory mechanism for restraining unjust discrimination, we recount the origin of the unjust discrimination to show exactly why it was enacted in the first place. We then review the applications of this provision by the Interstate Commerce Commission, the Board, and the courts—a review that illustrates both the practices that would have occurred but for the legal prohibition and the sense of justice that has pervaded American transportation law. Next, we describe how the Board has attempted to abolish the unjust discrimination provision administratively and analyze the deficiencies in its explanations for doing so. We point to signs that, as a result of the Board's disinclination to intervene, the airline system is becoming more and more unjustly discriminatory. Lastly, we suggest an amendment to the pending bills whereby the current law of unjust discrimination may be retained, but in a manner which furthers the drive toward an early and complete termination of the Board. In essence, we propose that the current unjust discrimination provision immediately be rendered enforceable in precisely the same manner as the somewhat similar Robinson-Patman Act.

II. THE STATUTORY SCHEME PROHIBITING UNJUST DISCRIMINATION

Section 404(b) of the Federal Aviation Act of 1958, as amended, embodies the basic statutory prohibition against unjust discrimination:

> No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect

> whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice in any respect whatsoever.

This bare prohibition is amplified by certain provisions of § 403(b)(1) and (2). Section 403(b)(1) forbids individual rebates or refunds and requires the carriers to adhere to public tariffs filed at the Board. Section 403(b)(1) goes on to list certain classes of rebates or discounts of which Congress approves. These include those for airline employees and their relatives, persons injured in aircraft accidents and attending physicians, ministers, retired persons sixty years of age or older, and handicapped persons. Section 403(b)(2) was added in 1975. It prohibits forwarders from paying airlines or charging shippers more or less than the tariffs filed by the airlines for the air transportation of property.

As a practical matter, the method by which the unjust discrimination prohibition is enforced is the tariff filing mechanism established in § 403(a):

> Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it. . . .

Airlines are generally required to give thirty to sixty days notice of changes in their tariffs. § 403(c)(1). This advance notice gives the larger, better organized groups an opportunity to ask the Board to consider whether the tariff is unjustly discriminatory. The Board's duty to investigate such a complaint is set forth in § 1002(a):

> If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of . . . the Board to investigate the matters complained of. Whenever . . . the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without a hearing.

If, after a hearing, the Board concludes that a tariff is unjustly discriminatory, it is authorized to alter the tariff to eliminate the injustice or to cancel it. §§ 1002(d)(1) (interstate transportation of persons, all types of overseas air transportation), (d)(2) (interstate air transportation of property), (d)(3) (interstate transportation of property), and (f) and (j) (foreign air transportation). Pending a decision, the Board may suspend a possibly unjust domestic (i.e., interstate or overseas) tariff for as much as 180 days; foreign air transportation tariffs may be suspended as much as 365 days. §§ 1002(g), (j). The Board's decision regarding a complaint of unjust discrimination may be appealed to any U.S. Court of Appeals. § 1006(a).

It should be noted that, once the Board has allowed a tariff to become effective, the statutory scheme omits two remedies usually accorded injured parties (including plaintiffs under the Robinson-Patman Act). First, a person who has paid a tariff subsequently adjudged unjustly discriminatory has no right to recover damages or the unlawful overcharges from the airline. Second,

the complainant is denied access to his local federal district court. The only forum in which a person can challenge the lawfulness of a charge made under an existing tariff is the Civil Aeronautics Board in Washington, D.C.; this restriction is a substantial burden for those living in the western States.[2]

III. ORIGIN OF THE UNJUST DISCRIMINATION PROHIBITION

A. LEGISLATIVE HISTORY OF THE CIVIL AERONAUTICS ACT

The unjust discrimination provision in the Federal Aviation Act has not been changed since it was enacted in the original Civil Aeronautics Act of 1938. The leading account of the legislative history of the act is *Civil Aeronautics Act Annotated*, written in 1939 by Charles S. Rhyne. Mr. Rhyne, a Washington lawyer, knew personally the legislators and industry representatives who contributed to the 1938 act. Regarding the purpose of the unjust discrimination prohibition, Mr. Rhyne wrote:

> In the Congressional debates the . . . provisions relating to tariffs and rates were not discussed, possibly because it was felt that their wording in the light of the Interstate Commerce Act experience with similar provisions was sufficiently clear and unobjectionable. One seeking insight into the purpose of these provisions must therefore look to the court decisions construing the Interstate Commerce Act, or if there are no such decisions to the legislative history of that Act [p. 124]

Clearly, the reason for applying the unjust discrimination provision of the Interstate Commerce Act to the airlines was to forestall the discriminatory practices which had marked the railroad industry.

B. LEGISLATIVE HISTORY OF THE INTERSTATE COMMERCE ACT

The Interstate Commerce Act of 1887 grew out of what many members of the public, many shippers, and many railroads believed were intrinsic difficulties in unrestricted competition both between the railroads and between the shippers who sought favorable rates from a given railroad. The act was the direct result of the seminal report of the Senate Select Committee on Interstate Commerce, 49th Congress, 1st Session, usually known as the "Cullom Committee Report."

The Cullom Committee Report is a thorough, thoughtful, and sensitive analysis of the railroad industry, comparable to the excellent work by this Committee and the Senate Judiciary Committee in the recent re-examination of federal entry controls in the aviation industry.

The primary conclusion of the Cullom Committee was as follows:

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[2]The courts are so uneasy with a denial of these basic remedies that an anomaly has arisen. Where a person is claiming that a non-discriminatory tariff has been applied in a discriminatory manner, he may sue in local federal district court and may collect damages under the same unjust discrimination prohibition by which the tariffs themselves are judged.

> [T]he paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities or particular descriptions of traffic. The underlying purpose and aim of the [committee's bill] is the prevention of these discriminations, both by declaring them unlawful and adding to the remedies now available for securing redress and enforcing punishment, and also by requiring the greatest practicable degree of publicity as to the fees, financial operations, and methods of management of the carriers. [pp. 215-16]

The Cullom Committee did not condemn all "discriminations," or rate differentials. The committee recognized that the economic characteristics of railroads required some discrimination in order to maximize the output and social benefit of the industry. The committee distinguished among three types of discrimination: (1) commodity discrimination, (2) personal discrimination, and (3) geographic discrimination.

Discrimination among commodities was recognized by the committee to be just within reasonable limits. According to the committee, such discrimination is necessitated by the fact that the "actual costs" (what we would call "direct costs") of transportation were only about 35% of the railroads' total costs (or "fully allocated costs"). The railroads pointed out that if all commodities were required to make the same contribution to the 65% of costs that were fixed, the resulting prices would be prohibitive for bulk commodities such as coal. The committee agreed that such a result would be unfortunate and unworkable and concluded that each commodity should make a "proportionately fair contribution towards the sum total of the fixed charges [p. 185]." The committee suggested that, for a given commodity, the greater proportion of the final price to the consumer composed of railroad transportation costs, the less contribution that commodity ought to make to the fixed costs of the railroad.

Discriminations between persons, on the other hand, were held to be never just, even though they were rampant. The committee's report declares:

> Differences in rates between commodities of a similar character are often unavoidable and justifiable, as has been shown, but no excuse can be offered for any discrimination in the charges made by a common carrier as between persons similarly situated for whom a like service is performed under similar circumstances. This is the most flagrant and reprehensible form of arbitrary discrimination. . . . [Such discrimination] prevails so generally that it has come to be understood among business men that the published tariffs are made for the smaller shippers and those unsophisticated enough to pay the established rates; that those who can control the largest amounts of business will be allowed the lowest rates; that those who, even without this advantage, can get on "the inside," through the friendship of the officials or by any other means, can at least secure valuable concessions; and that the most advantageous rates are to be obtained only through

> personal influence or favoritism or by persistent "bulldozing." [p. 189]

The committee then addressed the specific, recurring question of whether some personal discrimination is justified as a concession to large shippers. In general, large shipper concessions were held to be unjust because they distorted competition between buyers of rail transportation:

> Whenever rates are fluctuating and not alike to all, it is the rule that some portions of the commercial community obtain secret advantages over the remainder. When unjust discrimination is practiced by the carrier, success in business depends more upon favoritism (if nothing worse) than upon intelligence, integrity, and enterprise. The effect is demoralizing in the extreme. Business is conducted upon a false basis, false standards of commercial honor are erected, and a premium is offered to corruption. Worst of all, the advantages of unjust discrimination are, as a rule, enjoyed by those who least need outside aid, and the inevitable effect of this indefensible practice is to build up the larger dealer and crush out the smaller, to foster monopoly, and, in short, to encourage the existing tendency, already too strong, towards the concentration of capital and the control of commerce in the hands of the few. [p. 198]

The committee did recognize the justice of cost-based discounts for large shippers. For example, it noted that less-than-carload rates should be higher than carload rates because less-than-carload shipments required additional handling and, perhaps, the transportation of partially empty cars. The committee did not believe, however, that discounts for multiple carload shipments were just, reasoning that one car and several cars cost the same to transport on a per car basis. The committee concluded that such big customer discounts could be tested, and would fail, under a general prohibition against personal discrimination.

The final category of discrimination was geographic discrimination, or "discrimination between places." Despite the "universal complaint" against geographic rate differences, the committee found itself unable to condemn them outright. The committee recognized that the rate of transportation from A to B might be higher than the rate from A to C, an equal distance, because the A to B line was more expensive to build, or operated at a lower volume, or enjoyed less competition than the A to C line. The committee also recognized that at some point geographic distinctions are unjust. The committee therefore proposed a flexible standard on geographic discrimination, outlawing only "undue or unreasonable" discrimination.

Following the analysis of the Cullom Committee Report, the Interstate Commerce Act prohibited personal discrimination in all forms (§ 2) and "undue or unreasonable" commodity or geographic discrimination (§ 3(1)) and required the public posting of tariffs (§ 6). 49 USC 2, 3(1), 6, respectively.

C. ADMINISTRATION OF THE INTERSTATE COMMERCE ACT, 1887-1938

As Mr. Rhyne points out, the drafts of the Civil Aeronautics Act of 1938 had available not only the text and legislative history of the Interstate Commerce Act, but numerous examples of the application of that act by the ICC and the courts. As it happens, an extremely comprehensive and authoritative study of theory and practice of federal railroad rate regulation was completed in 1936, just as Congress began deliberations on the aviation bill. This was volume 3-B of Interstate Commerce Commission by I.L. Sharfman, a professor of economics at the University of Wisconsin.

In enforcing the absolute prohibition against personal discrimination (Interstate Commerce Act § 2), the Commission strictly applied the "principle of equality," that is that "identical movements of traffic of substantially similar character should be charged precisely equal rates." Sharfman at 733. In an early case, the Commission declared unlawful the common practice of offering discount fares to land explorers and settlers who bought railroad land. Similarly, mileage tickets offered to commercial travelers were declared unlawful even though there was no doubt that mileage tickets offered to all would have been lawful. The Commission did not accept the justification that commercial travelers should be given discounts because they are large buyers or because they generate freight for the railroads. In a series of cases, the Commission also prohibited limiting group discounts—so-called "party rates"—to amusement companies and like organizations, holding that there was "no distinction of circumstance and condition between the carriage of 10 actors and 10 farmers." The Commission specifically held that the fact that generally available group discounts might not be low enough to attract poor actors did not justify exclusion "of beet weeders, of oyster shuckers, of hop pickers, of coal miners." While cost-justified group discounts were permissible, they must be offered to the pubic generally.

Most of the Commission's efforts to prohibit unjust discrimination against persons were applied in the field of freight, rather than passenger, transportation. The Commission generally banned attempts to discriminate between freight based upon the differences in origin, ultimate destination, contemplated use, or in the character of the shipper or consignee. The fact that coal was to be used for manufacturing rather than something else did not justify a manufacturers' discount; nor did the fact that coal was shipped by another railroad or the fact that a commodity shipped out of the city had entered the city via the same carrier. The Commission also held that the fact that a forwarder did not own the good tendered by him did not serve as a just basis for excluding the forwarder from carload discount rates available to large shippers. This last judgment was emphatically upheld by the Supreme Court: "The contention that a carrier . . . can make the mere ownership of goods the test . . . in fixing the charge . . . is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of

shippers as to demonstrate the unsoundness of the proposition by its mere statement." *I.C.C. v Delaware, L. & W.R. Co.*, 220 U.S. 235 (1911). The Commission also enforced the Cullom Committee's disposition against volume discounts for multiple car, or train load, shipments.

While the Commission had little tolerance for personal discrimination, it viewed commodity and geographic discrimination with considerable flexibility, reflecting the more flexible "undue or unreasonable" standard of § 3 of the Interstate Commerce Act. Sharfman summarized and criticized the Commission's approach to these more acceptable types of discrimination as follows:

> Most [Commission] determinations have involved issues not subject to the simple principle of equality. They have concerned the essential reasonableness of the ratings and rates on particular commodities and the commodity movements, the fairness of the relative treatment of unlike commodities and of different hauls of the same commodity. . . .
>
> [M]uch latitude must be allowed the carriers to establish rates and their relationships with an eye to developing traffic and drawing it to them. What limits the Commission should impose upon managerial discretion, and how they should be applied under particular circumstances, are baffling questions. . . .
>
> In default of strict cost standards for determining how high individual rates might be permitted to go, the Commission early adopted the expedient of asserting that charges should not exceed the value of the service; and it has sometimes looked to the profits of shippers, or to the prosperity of industries, or to the freedom with which traffic appeared to move, in order to determine whether rates were more than service was worth. While these considerations have never been conclusively disavowed by the Commission as tests of fair maximum rates, their inherent defects seem to have been sensed sufficiently to relegate them to a minor role. Reasonable maxima have been arrived at largely by resort to pragmatic tests in which the assumed propriety of already existing rates has played a significant and sometimes a dominant part. Charges maintained by carriers voluntarily have been regarded as being presumptively upon a sufficiently high level. . . . More significantly, other rates than the ones at issue, if possessing sufficient similarity . . . have afforded bases of comparison which have generally been decisive in effecting adjustments. Where, in such comparisons, the transportation features of commodities have been at issue, importance has been attached to the value of the goods as an indication of their ability to bear charges, as well as to such elements of the cost of carriage as loading characteristics, risks incurred, and special services required, together with volume of movement. . . . [C]ost has also been the necessary guide in determining whether charges voluntarily fixed by carriers to meet competition are so low as to burden other traffic, through failure to cover out-of-pocket expenses or assignable general outlays.
>
> . . . For the relationship of rates to raise directly an issue of unlawfulness, commercial competition, in the view of the Commission, must exist

> between the affected traffic movements; and for a finding of undue prejudice to follow, it must be shown further that those to whom the relationship is unfavorable are injured by it in their business dealings. Basically, and apart from these conditions, the approval or condemnation of a rate relationship per se rests upon a comparison of traffic movements in terms of those same factors which govern decisions as to reasonableness. Findings in this sphere have applied much more frequently to the relationships between different hauls of the same commodity than to those between different commodities, both because commercial competition is more likely to exist between the traffic movements and because carrier competition is more likely to have created an abnormal adjustment of rates.
>
> . . . Considering the entire rate structure, however, it appears that carriers have enjoyed great latitude in fixing rates to encourage traffic and to divert it from rival carriers. . . . [I]n a number of important particulars the processes and the reasoning of the Commission are open to question. . . . There is much evidence that the Commission has yielded to the temptation, always present under such circumstances, of placing principal stress upon those elements in a problem which are most easily grasped and measured, though these characteristics may constitute no index of their importance. Departures from absolute equality, where like services call for equal rates, have seemingly been attacked with greater vigor than departures from relative equality, where differences in service call for correspondingly different rates, despite the fact that from the standpoint of a sound rate structure deviations of the latter character are essentially no less offensive than those of the former. . . . Value of service, so-called, has received a mandatory recognition in the relative treatment of different commodities not accorded to it in adjustments between hauls; and in part at least the reason has doubtless lain in the adventitious circumstance that commodity values have afforded an easy index of ratepaying ability. Cost of service, on the other hand, has seemingly received diminished emphasis as a rate-making factor because of the difficulty of ascertaining it, although this consideration is clearly irrelevant in defining the relative importance of the standards of rate control. . . . Nor has the Commission been sufficiently explicit that the ability of traffic to move provides no proper upper limit in fixing rates, except in the clearly unacceptable monopoly sense which may actuate carrier behavior.

A review of the history of the unjust discrimination provision in the railroad industry is useful for two purposes. First, it provides a considered national judgment, arrived at through fifty years of interaction between Congress, the Commission, and the courts, on the standards of justice applicable to interstate transportation. Presumably, Congress had in mind this same concept of justice when, in 1938, it enacted § 404(b) of the Civil Aeronautics Act. Second, it provides a catalog of undesirable practices in which, but for the legal restraints, the railroads would have engaged.

IV. THE UNJUST DISCRIMINATION PROHIBITION IN AVIATION PRIOR TO 1978

While the transportation of freight dominated the railroad business, in aviation the primary business has been the transportation of passengers. The majority of unjust discrimination cases have arisen over proposed discounts to selected groups of passengers, that is, matters of "personal discrimination." Disputes over geographic discrimination have arisen in only a few instances, primarily involving "common fares" to and from west coast and Hawaiian points; they will not be considered in this paper. Claims of commodity discrimination have arisen primarily in the case of certain time-sensitive or difficult to handle cargo such as animals, flowers, etc.; they will be discussed at the end of this section.

Prior to about 1961, the Board followed a policy based upon a conservative interpretation of the anti-discrimination provisions of the Act. Consciously echoing § 2 of the Interstate Commerce act, the Board held that:

> There are three conditions precedent to a finding of unjust discrimination: (a) The services to which the reduced fares would apply are like, and contemporaneous with, services to which standard fares apply; (b) the services pertain to the transportation of like traffic; and (c) the circumstances and conditions under which the reduced and standard-fare services are rendered are substantially similar.

Summer Excursion Fares, 11 C.A.B. 218 (1950). In short, "a reduced fare must be reasonably open to all who apply, free of any restriction based upon the passenger's mission, business, or status." *Capital Group Student Fares*, 26 C.A.B. 451, 453 (1958). The Board "would permit departure from the 'rule of equality,' and thus validate a discriminatory fare, only when an extraordinarily important and serious business interest of the carrier or of the air carriers generally was involved." *Free and Reduced Rate Transportation Case*, 14 C.A.B. 481, 483 (1951). Promotion of traffic, expectation of profit, or a probable increase in net revenues were not factors which, standing alone, would justify otherwise unjust discrimination. *Group Excursion Fares Investigation*, 25 C.A.B. 41, 46 (1957); *Capital Group Student Fares*, 26 C.A.B. 451, 453 (1958).

In a series of cases beginning in 1961, the Board shifted its interpretation of the unjust discrimination prohibition in response to the declining financial fortunes of the airlines (domestic trunk carriers' return on investment declined from 7.12% in 1959 to 2.79 in 1960 and 1.00 in 1961). Modifying the traditional rule of equality, the Board decided to utilize "a more liberal approach to [the unjust discrimination prohibition] to assist the carriers in their efforts to promote additional traffic . . . and improve the financial position of the airline industry."

In July 1963, a CAB Administrative Law Judge summarized this new policy in the following terms:

> The Board's more liberal attitude has become apparent through its action in allowing to become effective proposals such as those permitting free transportation for group travel developers and tour conductors; reduced fares for persons over specified ages; youth fares; standby fares for military personnel traveling on furlough and military dischargees; "Visit U.S.A." area fares; and special fares in connection with advertised air tours. As is evident from a perusal of these orders, the common thread running through virtually all of the actions authorizing wider use of reduced fares has been the Board's preoccupation with the adverse financial climate affecting the industry, the urgent need for development of substantial additional traffic and revenues, and a consideration of the extent to which the proposed fares would meet the objective of substantial traffic promotion. [footnotes omitted]

American Airlines, Inc., Proposed Reduced Fares for Former Employees, 38 C.A.B. 670, 676 (1963).

Even under the Board's more liberal policy, however, many discounts were deemed unjust. The Board refused to allow a 40% discount restricted to teachers, a 50% discount restricted to former employees, or a proposal to charge both coach and first class passengers the same fare on certain night flights. *Frontier Teachers Tariff*, 39 C.A.B. 615 (1964); *American Airlines Proposed Reduced Fares for Former Employees*, 38 C.A.B. 670 (1963); *Delta Off-Peak Coach Fares*, 39 C.A.B. 377 (1963).

The Board's "preoccupation with the development of substantial additional traffic and revenues" instead of the rule of equality was condemned in the late 1960's in two decisions of the U.S. Courts of Appeals: *Trailways of New England, Inc. v C.A.B.*, 412 F2d 926 (1st Cir 1969) and *Transcontinental Bus Systems, Inc. v C.A.B.*, 383 F2d 466 (5th Cir), *cert. denied* 390 U.S.920 (1967). In both cases, bus companies complained against certain airline discount plans as unlawfully discriminatory, and in both cases the Board dismissed the complaints without hearing. These cases contain the best judicial discussion of the application of the unjust discrimination prohibition to aviation.

In *Trailways*, the airline tariff at issue was the "family fare," providing a 25% discount for the spouse and 50% discounts for the children of the passenger. The First Circuit, Chief Judge Aldrich writing for the court, began by emphasizing that the prohibition against unjust discrimination is a fundamental legal principle:

> [N]ot only is the right to be treated fairly and nondiscriminatorily by a common carrier an expression of the pervasive precept of fairness between government and governed that runs through American jurisprudence, it is one derived from the common law of common carriers. [412 F2d at 931 (footnote omitted)]

Chief Judge Aldrich then specified the elements of a prima facie case of unjust discrimination and held that the complaint had satisfied those elements:

> Given the clarity of the content and the effect of the family fares in practice, the complaining parties' burden [of establishing a prima facie case] was satisfied by describing their general terms and characteristics. First, petitioners established an exceptionally large discount in tariff for service very similar to normal service. Second, on its face the tariff was restricted to a class of travelers based on social factors such as age and status, not on transportation related factors such as cost-savings. . . . Finally, as to importance, the records of the Board show that the fares are prevalent throughout the entire industry, thus presenting a prima facie case of significant injury and impact. [412 F2d at 932-3 (emphasis added)]

The *Trailways* court concluded that, having established a prima facie case, the complainant was "entitled to the investigation sought in the complaint," 412 F2d at 936, unless the Board's order of dismissal "sufficiently answered the negative aspects of the family tariff," 412 F2d at 933. The court recited the Board's justifications for its dismissal of the tariff complaints and rejected them as "little more than generalizations of principles, unsupported by underlying facts warranting either their invocation or their applicability to the apparent discriminatory aspects of the family fare." 412 F2d at 936. The court remanded the case to the Board for investigation.

In the *Transcontinental Bus* case, the Fifth Circuit reviewed the Board's dismissal of complaints against the youth fares, youth standby fares, and military standby fares. The court's scholarly opinion, delivered by Judge Gewin, discusses the historical development of the prohibition against unjust discrimination in transportation and the application of the basic principle, the "rule of equality," to air transportation:

> Sections 403(b) and 404(b) [49 U.S.C. 1373(b), 1374(b)] provided in general terms, that airline traffic, both passenger and cargo traffic, is to be treated equally by the air carriers. The sections are designed to insure that rates and services are offered on an equal basis to all who seek to use the air carriers. They were intended to protect the traveling public and were designed to effectuate the "rule of equality" in air transportation.
>
> The granting of preferential and discriminatory rates in an indiscriminate manner was one of the abuses, among others, which gave rise to the passage of the Interstate Commerce Commission Act. . . .
>
> [The policy sections, 49 USC secs. 1302, 1482(e)] when read in the context of the statute as a whole make clear, however, that equality of treatment is paramount and that the factors are to be weighed in light of that pervasive requirement. Thus, the Board has recognized and held that . . . increased revenue produced by a tariff will [not] justify an otherwise unjustly discriminatory tariff. . . .
>
> The rule of equality is the very core and essence of the fare structure in the transportation industry, and it should not be rendered a meaningless phrase by use of spurious justifications for unjustly discriminatory rates. [383 F2d at 474-75, 481, 484, 485 (emphasis added, footnotes omitted)]

Against this legal background, the Fifth Circuit upheld the Board's

allowance of military standby fares noting that they met "the needs of the national defense" and responded to competitive discounts offered by the bus companies. 383 F2d at 487. The court reversed and remanded the Board's allowance of both youth fares, however. In dismissing the complaints, the Board had concluded, inter alia, "that approval was consistent with the Board's policy of allowing airline management to exercise its discretion more freely." 383 F2d at 487-88. The court rejected this argument holding that the youth fare was "predicated solely on the status of the traffic, and is unrelated to transportation." 383 F2d at 489. The court also held that "it is doubtful, in view of the specific statutory language prohibiting unjust discrimination . . . , that promotion alone is a sufficient justification for an otherwise unjustly discriminatory rate." 483 F2d at 490.[3]

The *Transcontinental Bus* and *Trailways* decisions prompted a reconsideration of the Board's unjust discrimination prohibition culminating in Phase 5 of the *Domestic Passenger Fare Investigation*, 63 C.A.B. 38-168 (1973) ("DPFI-5"). The standards adopted in DPFI-5 are not entirely clear. The Board seemed to say that a discount fare is just if it depends upon restrictions which any person can meet by voluntary decision, such as a 7-day advance notice restrictions. Restrictions which depend upon "status"—characteristics which the passenger cannot change, such as age or family status—are unjust even if the resulting discrimination makes some positive net contribution to the carrier's revenues, a contribution which would indicate that the discrimination benefits the regular fare passengers as well as the discount passengers. On this latter basis, the Board held unlawful youth and family fare discounts ranging from 33% to 67%. The Board seemed to leave open the possibility that discrimination based upon status and providing very substantial net revenue might be justified but only if it could be demonstrated that nondiscriminatory fares cannot be fashioned to produce the same benefits. 63 C.A.B. at 68-68, 91-98 (1978).

In the field of air freight, the issue of unjust discrimination has been less active. A few examples will suffice to illustrate the major issues. The Board decided that a carrier may not offer discounts for large multi-container shippers unless the differential is cost-justified and that a carrier may not offer a non-cost justified discount to shippers who ship to a number of points in one tender. *Container Rates for B-747 Aircraft Proposed by Continental Air Lines*, C.A.B. (Order 71-7-155, July 27, 1971); *Revised Aggregate Rates Proposed by WTC*

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[3]As both the *Trailways* and *Transcontinental Bus* decisions make clear, the "rule of equality" is not peculiar to aviation law, or even transportation law, but rather embodies a basic precept of justice which permeates all laws dealing with commerce. *See, e.g., I.C.C. v Baltimore & O.R.R. Co.*, 145 U.S. 263 (1892) (discussing the origins of the rule of equality in the Interstate Commerce Act); *F.M.B. v Isbrandtsen Co.*, 356 U.S. 481 (1958) (rule of equality in maritime law); *American Trucking Ass'n, Inc. v F.C.C.*, 377 F2d 121 (DC Cir 1966), *cert. denied* 386 U.S. 943 (1967) (rule of equality in communications law); Robinson-Patman Act, 15 USC 13 (1976) (rule of equality applied to the sale of goods).

Air Freight, 61 C.A.B. 169 (1973). Carriers may not exclude various perishable items -flowers, fruits, vegetables, live animals and meal -from their small parcel express services. *Domestic Air Freight Rate Investigation*, Docket 22859, Order 78-4-100 (April 19, 1978).

V. THE UNJUST DISCRIMINATION PROHIBITION AND THE AIRLINE DEREGULATION ACT OF 1978

The Airline Deregulation Act of 1978 ("ADA") was considered and acted upon by both Senate and House committees as a measure designed primarily to relax federal controls on market entry. The major debates were over proposals to accomplish this end: "automatic market entry," "dormant authority," and placing the burden of proof on those opposing new entrants. Relaxation of price level controls and the small town air service guarantee provisions were essentially corollaries to this central proposition.

The act also reenacted the Board's power to cancel domestic fares if they were found to be within the "zone of flexibility" but unjustly discriminatory. ADA § 37(a) (adding paragraph § 1002(d)(4) to the Act). The Senate Commerce Committee's report stated that this reenactment was indicative of its approval of the preceding administrative and judicial interpretations of the unjust discrimination prohibition:

> Paragraph 1002(d) continues the Board's power to determine that rates, fares, charges, and rules and practices affecting them, are unlawful because they are unjustly discriminatory or unduly preferential or prejudicial. The committee believes that current Board case law defining unlawfully discriminatory, preferential, and prejudicial carrier prices and practices are generally satisfactory. [S. Rept. No 95-631 at 109 (1978) (emphasis added)]

The House bill had no corresponding provision. The House bill did, however, contain a section abolishing the Board's authority to enforce all provisions of the Federal Aviation Act, including the unjust discrimination prohibition. The statutory prohibition against unjust discrimination remained a statutory duty of the carriers, however, because it was not repealed. Although the legislative history does not contain an explanation,[4] it appears that the legal effect of the House bill would have been to create a private right of action to enforce the unjust discrimination provision. See *Court v Ash*, 422 U.S. 66 (1975).

Very few, including those in the Carter Administration, expected the "sunset" provision to survive the conference. The conference committee, however, did indeed report a bill containing a substantially revised version of the House-passed sunset provision. The conference bill passed both houses in

[4]The effect of the sunset provision on the applicability of this provision to the unjust discrimination was not discussed in the House committee report. *See* HR Rept No 95-1211 at 22 (1978). No word of debate was addressed to this section in the House consideration of the bill. *See* House Comm. on Public Works and Transportation, 96th Cong, 1st Sess, *Legislative History of the Airline Deregulation Act of 1978* at 815 (1979).

the last days of the 95th Congress without debate on the implications of the revised sunset provisions.

Under the conference committee's sunset section, the prohibitions against unjust discrimination contained in § 403 and § 404 are abolished on January 1, 1983, insofar as they apply to interstate and overseas aviation. Abolished at the same time is § 1002(d), the section setting out the Board's general power and duty to hold unlawful discriminatory rates and fares in interstate passenger transportation and interstate and overseas property transportation. § 1601(a)(2)(B). However, the following powers and duties of the Board are not abolished: the power and duty to hold unlawful discriminatory rates for the interstate transportation of property, § 1002(d)(3); the power and duty, described in § 1002(d)(4) (pertaining to the statutory zone of fare flexibility), to hold unlawful discriminatory interstate and overseas passenger fares; and the Board's power and duty to hear and promptly determine a complaint against an unjustly discriminatory joint fare filed by a civic party. Even though these powers are never abolished, the Board itself is abolished on January 1, 1985, two years after the abolition of § 403 and 404. § 1601(a)(4).

Obviously, the conference committee did not have an opportunity to consider carefully the matter of the unjust discrimination. If the gist of the conference committee bill is, as commonly thought, to terminate the statutory prohibition against unjust discrimination in domestic aviation, then the conference bill is totally at odds with either the private right of action created by the House-passed bill or the reenactment clause (§ 1002(d) (4)) in the Senate bill.

VI. CAB ANNOUNCES ABOLITION OF THE RULE OF EQUALITY, MAY 1980

A. POLICY STATEMENT 93 (MAY 1980)

As discussed above, the courts and the Board have held that Congress enacted the unjust discrimination provision in the Federal Aviation Act to "effectuate the 'rule of equality' in the air transportation industry." *Transcontinental Bus*, 383 F2d at 475. In Policy Statement 93 ("PS-93"), adopted May 22, 1980, the Board proclaims that "the rule of equality is no longer applicable to the airline industry." Instead, PS-93 drastically narrows the meaning of both "unjust" and "discrimination."[5]

According to PS-93, "discrimination" is to be defined as "the act of charging different customers prices that differ by varying proportions from the costs of serving them." This definition is considerably narrower than the meaning that the courts have always attributed to the term "unjust

[5]By its terms, PS-93 is limited to interstate and overseas air transportation. The preamble to the rule makes clear, however, the Board's intent to apply this rule to foreign air transportation as well.

discrimination" in the context of the Federal Aviation Act and similar acts. The courts have ruled that the term "discrimination" means "the charging of different rates to different shippers or passengers afforded the same service [or] the offering of special services to only a select patron or group of patrons." See *Trailways*, 412 F2d at 933 & n 15; *Transcontinental Bus*, 383 F2d at 486 & n 29; L.A. Sullivan, *Antitrust* 681 (1977).

PS-93's redefinition of the term "discrimination" is very significant. If "unjust discrimination" is understood in this new sense, then the standard which would apply to a tariff is: "Are different purchasers charged different prices that (i) differ by varying proportions from the respective costs of serving the purchasers and (ii) establish a price differential which is also "unjust" is some additional sense? This is substantially different from the standard that emerges from the interpretation of "discrimination" traditionally employed by the Board and the courts: "Are different purchasers charged different prices that are "unjust" either (i) by virtue of the fact that the prices differ by varying proportions from their respective costs or (ii) by virtue of some other standard of justice?" Clearly, PS-93 uses the term "discrimination" far more narrowly than interpreted by the courts or intended by Congress.

In addition to narrowing the scope of "discrimination," PS-93 changes and narrows the meaning of "unjust." No discrimination is to be held to be "unjust" unless the complainant can demonstrate that "there is a reasonable probability that the rate will result in significant economic injury to passengers or shipper." This requirement erects a very high burden of proof barrier for the complainant since, as the Board itself has noted, "in the case of passengers it is rarely possible to establish actual damage, nor is this required to support a finding of preference and prejudice as between passengers." *Hawaiian Common Fares Investigation*, 10 C.A.B. 921, 929 (1949). Furthermore, even if the complainant can demonstrate significant economic injury, the discrimination will not be held to be "unjust" if the carrier can demonstrate that "actual and potential competitive forces [can] reliably be expected to eliminate the undesirable effects of discrimination within a reasonable period."

In truth, as several parties commented at the time, PS-93 virtually abolishes the prohibition against unjust discrimination from the Federal Aviation Act. Most telling is the Board's announcement that "status fares," which were held by the Board and courts to be the paradigm of unjust discrimination, will no longer be found unjustly discriminatory unless they violate a statute in addition to the unjust discrimination provision. Clearly, if unjust discrimination is restricted to violations of some other law, then the unjust discrimination provision adds nothing and is, in itself, meaningless.

B. THE RATIONALE FOR PS-93

The Board's rationale for adopting PS-93 is contained in three documents: the Notice of Proposed Rulemaking, PSDR-58 dated April 6, 1979, a staff memorandum dated January 4, 1980, and the Policy Statement itself. A careful

examination of the Board's reasons for adopting PS-93 reveals that it did not consider the issues involved carefully. Indeed, the deficiencies of the administrative rulemaking process used to reconsider the rule of equality stand in marked contrast to the thorough Congressional investigations which led to the adoption of the rule of equality in 1887 and to the legislative repeal of entry controls in domestic aviation in 1978.

PSDR-58 begins by noting that the airlines were filing tariffs that were "questionable under the criteria by which we have judged the presence of unlawful discrimination, prejudice and preference," citing one specific instance of proposed personal discrimination, a proposal for discounts for spouses (p. 3). The Board then summarized its view of the relationship between discrimination and competition as follows:

> Where rigid controls over price and entry previously assured discriminatory discounts fares a more or less permanent place in the national airline fare structure, we perceive the continuing pervasiveness of such fares as a temporary transitional phenomenon. [A]s the cartel begins to break down . . . such [unjustly discriminatory] efforts should yield diminishing returns and all classes of traffic will reap benefits from the new policies. [p. 7 (emphasis added)]

To support the proposition that increased competition will eliminate unjust discrimination, the Board pointed to the history of the "Super-saver" discounts. Although Super-saver fares did not constitute unjust personal discrimination under the standards of DPFI-5, the Board seemed to feel that they were unjustly discriminatory under traditional standards because they were thought to be not cost-justified. Moreover, Super-saver fares were viewed as a clear case of unjust geographic discrimination because they were offered in only a few markets. To support its conclusion that Super-saver type discounts were a "temporary transitional phenomenon," the Board noted that competitive pressures had forced extension of the fares to more markets and a loosening of the restrictions on use of the fares.

PSDR-58 then continues, in a contradictory vein, that allowing unjustly discriminatory status fares might "hinder the breakdown of oligopolistic pricing." To illustrate this point, the Board returns to the cited case of personal discrimination—the "spouse fare"—and points out that its rejection of this fare led to adoption of a less discriminatory "companion fare."

Finally, PSDR-58 points to the repeal of the unjust discrimination provision on January 1, 1983, as grounds for phasing out the prohibition prior to that date.[6] As shown above, however, the legislative history reviews that the

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[6]The conference committee report cautioned the Board against acting beyond the scope of the legislation and in accordance with its own, perhaps differing, ideas regarding the appropriate timetable for deregulation:

> This new charter is intended as a legislative mandate to the CAB both as to the direction and policy of aviation regulation and also, it should be noted, *the limits of such policy. In short, Congress expects the deregulation of the aviation industry to*

repeal of the unjust discrimination provision did not represent a considered Congressional judgment.[7]

Thus, PSDR-58 was grounded on a case of apparent geographic discrimination which was corrected by the market, a case of personal discrimination which was not, a perception that discriminatory fares were a transitory phenomenon, and a statutory pro vision born in a hasty conference committee report. On these bases, PSDR-58 proposed a rule to relax restrictions against all kinds of discrimination.

The nine-page staff memorandum of January 1980 concludes that much of the analysis of PSDR-58 was incorrect. The memorandum focuses on the Super-saver type discount which now was seen to be neither discriminatory (in the sense of being not cost-based) nor transitory.

The staff's conclusion that the Super-saver fares were cost-based was explained as follows:

> Except for the requirement by business travelers that service be provided on a daily basis, the carrier could consolidate its flights into several per week, and thereby utilize the more efficient [large aircraft], while offering tickets to all travelers at a uniform price. The preferences of the business travelers are what stand in the way of this cost-saving consolidation, and in return business travelers are properly required to pay a premium. [p. 5 (footnotes omitted, emphasis added)]

Moreover, far from being a temporary phenomenon, it was discovered that the discriminatory fares were a permanent characteristic of competition.[8] The staff memo observes that, contrary to previous preconceptions, "significant scale economies do exist in the typical city-pair market" and that "the current price structure bears a striking resemblance to the economist's theoretically ideal pricing." P. 3. Of course, as any introductory economics text teaches, scale economies allow the seller to impose monopolistic pricing, in essence, discriminating among buyers by charging each in proportion to how desirous he is to buy air transportation.[9] The memorandum goes on to note that a carrier

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> *move in accordance with this legislation and not in accordance with the, perhaps, differing concepts of some members of the CAB.* [H.R. Rept. No.HR Rept No 95-1211, 95th Cong., 2d Sess. at 4 (l978) (emphasis added)]

[7]In announcing PS-93, the Board also argued that a looser interpretation of the unjust discrimination provision is required by the fact the Board cannot suspend an unjustly discriminatory fare which is within a statutorily created zone of reasonableness. P. 4 & n 5. However, as noted above, although the Board may not suspend a fare within the zone of reasonableness, it may alter the rate "to the extent necessary to correct such discrimination." § 1002(d)(3) (interstate and overseas) and §§ 1002(j)(6) (foreign).

[8]It appears that part of the reason for this mistake is the PSDR-58 reflects a misapplication of the distinction between "persistent" and "sporadic" discrimination, a distinction that is found in current economic literature on price discrimination. *See* R.A. Posner *The Robinson-Patman Act* 12-15 (1976). Sporadic discrimination is thought to be beneficial because it is allows "cheating" by cartel members, and hence breakdown of cartel price fixing. It would seem, however, that this benefit of sporadic discrimination is available only through the mechanism of secret rebates, not publically announced discounts such as Super-saver.

[9]One of the best known and most articulate expositions of the "economist's ideal" price

who discriminates between buyers, charging each "what the traffic will bear," will gain a competitive advantage against a non-discriminatory carrier. Hence, such discrimination will be a permanent feature of competition.

Having discovered that competition produces discrimination, the memo concludes that discrimination must be desirable because it indicates that "competition is alive and well [p. 5]." This is obviously circular reasoning. In demonstrating that competition does not serve as a check upon discrimination, unjust or otherwise, the memorandum has proved the need for legal restrictions on unjust discrimination.

The staff memorandum then unconsciously shifts to another, more defensible view of justice. It holds that the coach fare passengers are not discriminated against unjustly if the discount fare passenger is paying enough to cover marginal costs and make a contribution toward common costs, thereby allowing a reduction in the coach fare. In other words, if the passenger paying the higher price is benefitted by the discount, he cannot complain of unjust discrimination. The memorandum concludes that the Super-saver fares may be justified on this ground. This standard of justice was not, however, incorporated in PSDR-58.[10]

The final rule, PS-93, is essentially the same as proposed in PSDR-58 despite the fact that the staff memorandum largely undercut the reasoning of PSDR-58. While PS-93 no longer claims that discrimination will be transitory, it makes much of the fact that some geographic discrimination facilitates price experimentation, an argument which does not address the personal discrimination which is the primary concern of the unjust discrimination prohibition.

C. SOME FUNDAMENTAL CONSIDERATIONS

These various Board analyses strongly imply a central, but unspoken, premise that essentially unlimited discrimination is desirable in some demonstrable economic sense. The January 1980 staff memo, for example,

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structure is W.J. Baumol and D.F. Bradford, "Optimal Departures from Marginal Cost Pricing," 60 *American Eco. Re*v 265, 277 (l970). More precisely, the Baumol-Bradford theorem may be summarized as follows: If an industry faces marginal costs below average total costs over the relevant price range, then "social utility" is maximized if the product is priced to distinguishable sets of customers according to the inverse of the customers' demand elasticity for the product, provided (1) that for all sets of customers the ratio between the markup over marginal cost and their demand elasticity is the same and (2) the total revenue earned does not exceed the seller's costs (including reasonable profit).

[10]Nor is it a completely satisfactory solution to the problem of justice. In writing about the various economic approaches to price discrimination (later used in the rationale for PS-93), Professor Alfred Kahn wrote, "The kind of rate making that would be permissible under even these restrictive rules would almost certainly still strike the reader, the rate payer, and most regulatory commissions as outrageously discriminatory." He concludes: "Public economic policies are not, cannot and should not be framed on the basis of 'purely economics' considerations alone. Economic institutions are in the last analysis only means to ultimately noneconomic goals." 1 *Economics of Regulation* 14, 148 (l970).

suggests the desirability of various possibly discriminatory fares by noting approvingly that they approach the "economist's theoretically ideal pricing."

In fact, notwithstanding the long academic study of price discrimination, no economic rule has gained universal acceptance even among economists. Some are concerned about the inherent unfairness of all of the proposed principles. Others focus on the fact that many of the proposed principles depend upon measuring quantities which are unmeasurable and inadministrable, thus permitting unlimited discrimination as a practical matter. See 1 A. Kahn, *Economics of Regulation* 142-50 (l970). Yet other economists question whether the main theoretical benefit of monopolistic discrimination, increased output, is realizable in practice due to the necessary imperfections of real-life price discrimination. See R.A. Posner, *Antitrust Law* 64-65 (1976).

If there were no legal or competitive restraints on discrimination, most economists would suggest that the rational and omnipotent monopolist (or cartel) would adopt the Baumol Bradford price structure (footnote 9, above). The Baumol-Bradford rule, however, depends, at bottom, on the premise that what is "just" is what is economically efficient. This approach views consumers "as a collectivity and avoids interpersonal comparison." Cf. R.H. Bork, *The Antitrust Paradox* 395 (l978) (discussing price discrimination under the Robinson-Patman Act). In other words, some individuals should have less if others receive enough more so that the total "utility" of society is increased.

In contrast to this "utilitarian" doctrine, modern legal theory holds that government is legitimized only by the consent of the individuals governed and that the "justice" dispensed by the government should be limited to those rules which the individuals would probably have consented to before entering civil society. See John Rawls, *A Theory of Justice* (l971). Reflecting similar "contractual" thinking, the U.S. Constitution holds federal legislators accountable to the popular vote, thus sharply limiting the degree to which the government may deviate from the people's general sense of justice.

Given our Constitutional framework, it is eminently reasonable that Congress and the courts have applied the "rule of equality" to the Nation's transportation infrastructure, thus implicitly rejecting the utilitarian approach which underlies much of the economic criticism. The individual citizen is, of course, concerned first with just treatment for himself rather than optimal utility for the society a whole. The "rule of equality" protects the citizen from being charged all that the traffic will bear (as the Baumol-Bradford principle would tend to allow) and against irrational or vindictive sellers (as PS-93's laissez-faire approach would allow). The rule applies to all purchasers since any person may one day find himself in urgent need of air transportation or forced to deal with a greedy, but short-sighted air carrier.

The "rule of equality" represents a sound (although not necessarily perfect) jurisprudential approach, consistent with Western legal theory, even though economists have been able to demonstrate for more than a hundred years that some social efficiency, in some sense, may have been sacrificed in

the process. Indeed, even the patron saint of airline regulatory reform, Alfred Kahn, would not argue that the economically ideal solution is necessarily the wisest or most just solution.

VII. SIGNS OF INCREASING DISCRIMINATION

Developments in the last few years strongly suggest that, absent legal restrictions, the aviation industry will indeed be marked by increasing discrimination which is unjust and unreasonable, at least judged by the standards of justice and reasonableness that America has historically recognized.

As we have seen, the root cause for imposition of the rule of equality on the Nation's transportation system was that, as the Cullom Committee noted, "The advantages of unjust discrimination are, as a rule, enjoyed by those who least need outside aid, and the inevitable effect of this indefensible practice is to build up the larger dealer and crush out the smaller."

In the airline industry, the "larger dealers" are beginning to obtain special discounts. The most outrageous example is the General Services Administration. In July, 1980, GSA demanded and received a 35% discount from certain airlines premised, apparently on the mere fact that GSA is a large buyer of tickets. There is no difference between the service given the GSA passenger and the service given the regular coach passenger, nor is there any enforceable obligation upon GSA to buy a minimum number of seats. See Order 80-7-63 (July 9, 1980). Similarly, an airline has recently agreed to members of the Airline Passengers Association a 25% discount. Similarly, several airlines have announced programs whereby they will give free tickets to passengers after they have flown a certain number of miles on their airlines. This is tantamount to a 5 to 10% discount for large customers. Indeed, one airline has recently announced that it will give a 1000-mile credit to all holders of American Express cards merely because they hold such cards and other carries have granted a 5000-mile bonus to those who signed up for their "frequent flyer" program by a certain date.

The other side of discounts for large customers is extremely high rates for a few selective customers who either do not have enough market power to insist upon reasonable rates or, for one reason or another, have no choice but to take specific airline flights.

The clearest example of this phenomenon is the courier bag tariff filed by certain airlines.[11] A "courier" is a passenger who holds himself out to the public to transport shipments and who is accompanying such shipments. Generally, couriers carry time-sensitive documents such as checks, bills of lading, blueprints, and intra-corporate records. Under the courier bag tariff, the bags which the courier is carrying for others will not be accepted as part of the

[11]It was, of course, preparation for litigation over the courier bag tariff that prompted our research into the law of unjust discrimination upon which this statement is based.

normal baggage allowance, and each bag is assessed a charge about double the excess baggage rate.

To understand the magnitude of the discrimination, consider the total fare that would have been paid by a lawyer and a courier, both of whom were traveling on December 1, 1979 on Pan Am flight 1 from Los Angeles to Tokyo carrying one suitcase of clothes and three boxes of books and papers dealing with upcoming litigation. The lawyer would have paid the passenger fare ($502) and two excess bag charges (2 x $55 = $110) for a total of $612. The courier, taking the same plane and carrying the same documents for the same law firm would have paid the passenger fare ($502) and three courier bag charges (3 x $108 = $324) for a total of $826. Thus, the courier would pay 195% more for the carriage of identical baggage on the same plane between the same two points; this increase in the excess baggage charge is equivalent to a 74% increase in the passenger fare.[12]

The same trends appear to be developing in the air cargo industry. At least one airline has installed a 10% multicontainer discount, a discount necessarily restricted to large shippers. Meanwhile, the rates for small or inelastic customers—shippers of live animals, human remains, and items requiring guaranteed next-flight service—were increased dramatically, by as much as 100%. Some carriers have also introduced substantial increases for small shipments of general freight. See Office of Air Transportation, U.S. Department of Transportation, "Domestic Air Cargo Deregulation: A Preliminary Review" (June 15, 1979 & "Update," July 1980).

A recent case points up an example of another kind of discriminatory treatment of customers which may be expected in the unrestricted marketplace.[13] An airline in the New York to San Juan all-cargo market was found to have unjustly discriminated in favor of certain freight forwarders in the allocation of cargo containers. As a result, three forwarders controlled all of the airline's best freight capacity for the period of seven and a half years. In deference to threatened action by the Board, the airline agreed to discontinue this practice, but this restraint vanishes upon the repeal of § 404(b).

The abolition of the unjust discrimination provision also carries the

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[12]The Board refused to hold a hearing on whether the courier baggage tariff is unjustly discriminatory. The Board held that the courier baggage tariff appears to be cost justified because of the higher average weight of courier bags. The Board, however, had received only undocumented assertions as to the weight of courier bags and, more fundamentally, had no reason to believe that an increase in weight implied a proportional increase cost, given the fact that space, not weight, is the primary causative factor in air transportation. The Board did not explain why couriers should be distinguished from other passengers who carried similar amounts of similar baggage, nor why courier bags should be disallowed from the normal baggage allowance. *See* Orders 79-1-6 (Jan 2, 1979); 79-1-178 (Jan 18, 1979); 79-6-147 (Jun 22, 1979); 80-2-148 (Feb 27, 1980); and 80-4-54 (Apr 10, 1980). The Board's orders dismissing complaints against the courier bag tariff are now being reviewed by the U.S. Court of Appeals for the Ninth Circuit.

[13]The airline agreed to a consent order specifying non-discriminatory allocation procedures and assessing a $50,000 fine; it did not admit or deny the factual or legal allegations of the complaint. See Order 81-4-116 (Apr 17, 1981).

potential for problems in areas now being reviewed by the Board. For example, the end of all regulation of interlining and joint fares coupled with the end of the prohibition on unjust discrimination will apparently benefit large carriers and injure small carriers and their customers because interlining carriers stand in much the same relation vis-a-vis one another as purchasers and sellers of air transportation. The same effect should occur at "congested" airports. The larger carriers, with larger aircraft, may be able to gain a more than economically justified preference in landing rights. Yet another prospect is secret rebating if the Board adopts "maximum fares" or the statute proceeds to abolish the requirement for tariff filing.

VIII. CONCLUSIONS AND A PROPOSED SOLUTION

As the courts have said, "The rule of equality is the core and essence of the fare structure in the transportation industry." The primary reason for the institution of federal regulation of interstate transportation was Congress's determination to end personal discrimination, the sort of discrimination reached by the rule of equality. By 1938, the rule of equality was universally accepted and applied automatically to the new aviation industry. While personal discrimination was barred absolutely, Congress, in 1887, like the Board in 1980, realized that geographical and commodity discrimination were in some instances desirable and should be allowed unless "undue or unreasonable."

The prohibition against unjust discrimination embodies a conclusion of justice, not economics. The essential idea is simple: the transportation infrastructure is so pervasive and so important to the Nation's commerce that it should not be become a vehicle whereby "big guys" gain greater than cost based advantages over "little guys," whether by secret rebates, restricted discounts, guaranteed priority, special services, or any other means. Economics demonstrates that, absent legal restraints and faced with competitive pressures, it is rational for transportation companies to discriminate against persons due to the relatively high proportion of common and fixed costs and the non-inventoriable nature of the transportation services. But economics cannot determine at what point discrimination, benefitting one group at the expense of another, violates "the pervasive precept of fairness that runs through American jurisprudence."

The Board's pronouncement, in May 1980, that "the rule of equality is no longer applicable to the airline industry" exceeded the legal authority of the Board. This is a matter for Congress, not the Board, to decide. The Board's explanation of why it abolished the unjust discrimination rule is superficial and unpersuasive.

The current law, which repeals the unjust discrimination prohibition as of January 1, 1983, does not represent a considered judgment of Congress. On the contrary, it resulted from a hasty conference committee report that, in this respect, contravened the expressed will of both houses of Congress.

We urge Congress to retain the unjust discrimination prohibition in

domestic aviation for now. We do not oppose changes in § 404(b), but we do suggest that reform of the unjust discrimination raises very difficult and fundamental questions which should be addressed in a Congressional inquiry as careful and thorough as that devoted to the lifting of entry controls in 1978.

Retention of prohibition against unjust discrimination need not stand in the way of sunsetting the Board. On the contrary, given the Board's disinclination to enforce the unjust discrimination provision, we propose that the Board's jurisdiction over unjust discrimination cases be sunset immediately and replaced by an enforcement mechanism similar to that used to enforce the Robinson-Patman Act.

In Appendix A, we have included a draft amendment to the pending bills to accomplish these ends. While the committee is undoubtedly familiar with the general enforcement mechanism of the Clayton Act/Robinson-Patman Act, a few points require special comment.

First, the proposed amendment retains the current law, with its limited judicial and administrative gloss. It does not extend the Robinson-Patman Act to the sale of transportation services. The Robinson-Patman Act itself carries a heavy freight of complex and sometimes misguided interpretations. See R.A. Posner, *The Robinson-Patman Act* (1976).

Second, the regulation of price levels and the regulation of price discrimination are essentially separable concepts, but they also can become to some extent intertwined. Even under S. 1426 as modified by the proposed amendment, the Board (later the Secretary) will retain authority to cancel tariffs which are "unjustly or unreasonably" high. In order to provide a reasonably complete separation of functions, subsection (c) of the proposed amendment eliminates references to "unjustly discriminatory, or unduly preferential, or unduly prejudicial" in § 1002, the section setting out the grounds upon which the Board may cancel a tariff. Further, in the language amending § 404(b), the courts (or the Federal Trade Commission, as appropriate), are given authority to review de novo any legal or factual findings of the Board to the extent necessary to make an independent determination on the issue of unjust discrimination. Under the amendment, however, the Board retains the power, under § 1002(h), to divide joint fares and rates in a just and equitable manner.

Third, subsection (d) repudiates the Board's Policy Statement 93, which purports to repeal the rule of equality. As discussed in detail above, PS-93 is inconsistent with the Congressionally mandated prohibition against unjust discrimination. The only alternative to repealing PS-93 outright is a thorough Congressional reexamination of the whole issue.

Fourth, although the gist of the sunset legislation is to terminate administrative control over the domestic aviation industry, the proposed amendment sunsets the Board's authority to regulate unjust discrimination in both the domestic and international areas. We believe that dividing authority for enforcement of domestic and international discrimination would prove

impracticable and that the sound reasons for leaving enforcement up to the courts applies in international as well as domestic cases.

Fifth, the proposed amendment repeals § 403(b)(2). This pro vision was added by § 8(a) of International Air Transportation Fair Competitive Practices Act 1974, Pub L 93-623, 88 Stat 2102, for reasons which are unclear. If the direct air transportation business is subject to the unjust discrimination prohibition, it seems to us unnecessary to extend this prohibition to the reselling of direct air transportation.

Finally, the proposed amendment does not touch upon the tariff filing and the anti-rebating provisions of § 403(a) and (b). Whether or not the direct carriers should continue to file tariffs is a close and difficult question. On balance, we believe that they should, because the filing of tariffs appears to discourage unjust discrimination. If, however, the tariff filing requirement is terminated, the second, third, and fourth sentences of paragraph § 403(b)(1) should, in order to retain the current law of unjust discrimination, be reenacted as a new subsection § 404(c). These sentences constitute exceptions to the general prohibition against unjust discrimination and should logically be included in § 404 instead of § 403.

Part 3

U.S. Customs Restrictions

CHRONOLOGY

19 Jan 1977	N.Y. Customs narrows definition of "intangibles" and holds only customs brokers, not couriers, may clear commercial imports.
18 Aug 1977	N.Y. Customs threatens to move couriers out of the passenger terminal.
Spring 1978	N.Y. Customs restricts import of U.S. blueprints.
30 May 1978	N.Y. Customs holds showdown meeting.
14 May 1980	Assistant Commissioner's report concludes courier operations are legal.
19 Jun 1980	Customs opens new inquiry into legality of couriers.
29 Dec 1980	Customs accepts legality of couriers and establishes new procedures.
29 May 1980	Effective date for new courier procedures.
14 Jul 1980	H.R. 4134 introduced by chairman of House subcommittee to protect customs brokers.
10 Dec 1982	H.R. 5170 introduced, slight revision of H.R. 4134.
27 Jul 1982	H.R. 6867 reported by House committee, protects couriers and makes U.S. blueprints intangible.
22 Sep 1982	H.R. 6867 approved by House.
12 Jan 1983	Public Law 97-466 enacted.

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Overview: U.S. Customs Restrictions

Obviously, we are confronted here with two groups of brokers; one which has the business, and one which does not.

- A. DeAngelus, Assistant Commissioner, U.S. Customs (1980)

As in most industrialized countries, customs brokers in the United States strongly opposed the rise of international couriers. By its nature, courier service depended on very rapid customs clearance with minimal cost per transaction. Customs brokers, private companies licensed by the Customs Service to prepare documentation for customs clearance, made their living from complex procedures justifying large fees per transaction. Customs officials, especially in the port of New York City, had a long history of questionably close relationships with brokers. In applying antiquating customs laws to international couriers, Customs officials too often evinced more concern for the interests of brokers than the needs of U.S. international commerce. After several years of debate, Customs reluctantly recognized the commercial role of couriers, and Congress intervened to reform other customs procedures crucial to the conduct of international courier operations.

Customs Law and Couriers

In the 1970s, laws applicable to the entry of goods into the United States were still based largely on concepts developed for importation of cargo on sailing ships. In the nineteenth century, as a ship arrived in port, a person importing goods would go to a "customs house" located near the dock, present evidence of ownership of the goods—such as a bill of lading (a copy of the contract for carriage listing the goods carried) or an invoice (a list prepared by the seller listing the goods sold)—and, under oath, declare to the Customs collector the nature of the goods imported. If the collector considered it necessary, he would physically inspect the goods to verify the declaration of

the importer. The importer would then pay applicable duty before taking away the goods. When improvements in overland transportation allowed importers to move their places of business away from ports, importers appointed agents to declare the nature of imported goods and prepare customs documentation. Not anyone could act as an agent. Only customs "brokers" licensed by the Customs Service were authorized to act for distant importers. The ritual of customs clearance was time consuming, slowed by the need to complete detailed documentation and to accommodate the office hours of Customs officials and brokers.

In contrast to this traditional model, couriers presented Customs authorities with large quantities of very small shipments, each having little or no associated duty. The economic value of the transportation service derived not from the fact that goods were moved from one place to another but from the *speed* of transport. Checks, business records, advertising proofs, samples, and spare parts were much less useful or valueless if delivered late. Hence, customs delays and costs threatened the very reason for courier transport. Moreover, courier shipments, unlike mute cargo, were accompanied by a person exercising possession over the goods transported and demanding immediate clearance without complex documentation.

The evolution of international courier services dismayed Customs officials and brokers alike. Customs facilities in the baggage hall of an airline terminal were often poorly suited to inspection of a courier passenger with twenty or more large bags, each filled with multiple small shipments. Courier passengers were sometimes unfamiliar with of the nature of shipments carried and the details of relevant customs law. In many countries, the public nature of baggage inspection deprived Customs officials of unofficial payments that had become customary in the clearance of cargo. Customs brokers were even more unhappy because couriers threatened to reduce or eliminate highly profitable customs brokerage fees chargeable for clearance of large numbers of small cargo shipments.

RESTRICTIONS ON COURIER SERVICES

When stretched to apply to non-traditional services like courier services, customs laws proved highly ambiguous. Statutory and regulatory provisions were interpreted and administered differently in different ports. Brokers urged Customs officials to crack down on couriers, resolving doubts in favor of protecting the historic privileges of brokers. In the port of New York City, Customs officials were listening. Three legal issues in particular presented fundamental impediments which threatened the viability of international courier service.

The most fundamental issue was the right of make entry, i.e., the right to prepare documentation and present shipments to Customs for clearance. Some customs brokers took the position that an on-board courier is not entitled to present his courier bags for clearance in the same manner as other airline

passengers. According to this view, a courier service is a freight forwarding company; hence, courier shipments should be cleared in the cargo shed like other cargo. Moreover, customs brokers argued, as a freight forwarder, the courier should be viewed a "nominal consignee," i.e., someone who receives goods only for onward transportation to "ultimate consignees," referring to the persons or organizations to whom the courier ultimately delivers shipments entrusted to it. A "nominal consignee," it was said, had no legal right to declare and clear goods through Customs. Each "ultimate consignee" must clear his shipment separately by appointing a licensed customs broker as his agent. So interpreted, customs law would render international courier service virtually impossible.

A second issue related to the procedure for clearing business records. "Business records" described the great majority of what couriers were then transporting. Under customs law in effect in 1970, business records were classifiable under section 870.l0 of the Tariff Schedules of the United States (TSUS), which prescribed nondutiable status for:

> records, diagrams, and other data with regard to any business, engineering, or exploration operation conducted outside the United States, whether on paper, cards, photographs, blueprints, or other media.

Although non-dutiable, business records were still technically subject to "informal entry" requirements which included declaration of the details of the sender, the addressee, the value of the shipment, and so forth. In practice, Customs officials in most ports considered business documents without intrinsic value to be, like mail, akin to *intangibles*. According to Headnote 5 of the Tariff Schedules, certain things—such as currency, securities, electricity, and corpses—were considered "intangible" and thus wholly outside the scope of customs clearance procedures. Intangibles could be imported without declaration and entry; Customs required only sufficient information to demonstrate that the items in question were indeed intangible.

In early 1977, New York Customs authorities issued a ruling declaring that business records were not intangibles but "commercial importations" which could only be cleared by a customs brok er, not by a courier.

> Items not so exempted [as intangibles] have sometimes mistakenly been presented for treatment as exempt. Examples of these are, but not limited to, magazine layouts, photographs, commercial art, advertising copy, and similar printed matter. These are not "intangibles," and when imported as commercial transactions whether or not unconditionally free of duty are subject to all pertinent requirements in the Customs Regulations including proper invoices, packing lists and appropriate entry, prior to Customs examination and delivery authorization. . . . Further, when a shipment does not consist wholly of intangibles, if the party presenting to Customs documentation for the shipment is not a licensed Customshouse broker or

> his authorized employee, the party must be specifically authorized to do so.[1]

In August 1977, citing "numerous incidents of delays and disruptions of the orderly crew and passenger process in the passenger terminals involving shipments by couriers," Customs adopted new procedures which called into question the right of couriers to clear business documents and urgent parcels as baggage in the passenger hall. If shifted to the cargo shed, the regulations stated explicitly "commercial shipments . . . can only be cleared by a Customs Broker, or the Importer of Record or his designated representatives who have the power of attorney."[2]

A third issue raised by international courier services related to importation of blueprints and other engineering drawings. The business records classification, § 870.10, was available only for business records relating to "any business, engineering, or exploration operation *conducted outside the United States*." In spring 1978, New York Customs officials began to enforce a perverse interpretation of § 870.10, ignored by other ports, according to which blueprints or other engineering documents produced by *foreign* engineering firms were entitled to duty free status but blueprints produced by *American* engineering firms were not. As explained by Customs Headquarters in confirming this interpretation:

> if the drawings or blueprints are solely the product of original professional effort done abroad, they are properly classified under item 870.10, Tariff Schedules of the United States (TSUS), free of duty. However, if any portion of the professional effort is done by United States professionals, whether this occurs in the United States or [abroad], they are properly classifiable under item 273.55, TSUS, dutiable at 4 percent ad valorem.[3]

One Customs official soberly maintained that the duty on a set of American engineering blueprints would be 4 percent of the total value of the project divided by the (unknowable) number of copies extant.

New York Customs' restrictions on the importation of blueprints and other engineering drawings created enormous difficulties for both couriers and U.S. engineering and petroleum firms. At this time, American engineering and petroleum companies and the U.S. Corps of Engineers were engaged in extremely large construction projects in the Middle East, some valued in the tens of millions of dollars. As one large U.S. engineering company explained,

> The unimpeded flow of time-sensitive documents both to and from our offices abroad are essential to our operations. Any delay in the receipt of these documents would severely impede our operations abroad and once again give the edge to our foreign competitors. Drawings, plans, business documents of all kinds are essential to any of our bids for foreign projects

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[1]New York Informational Pipeline No 235 (Jan 19, 1977).

[2]Memorandum to couriers, airlines, and other concerned from Area Director, J.F. Kennedy Airport on processing of private couriers arriving at JFK Airport Area (Aug 18, 1977).

[3]Letter to unknown party from Harvey B. Fox, Director, Entry Procedures and Penalties Division, U.S. Customs, dated Jun 7, 1978.

> and must be delivered in the most expeditious manner to our Home Office in order for us to function efficiently.[4]

On May 30, 1978, there was a showdown meeting in the offices of New York Customs officials at JFK Airport relating to all courier issues. Representatives of the major international couriers attended; DHL took the lead. The meeting broke up in disagreement, and DHL asked Congress for legislative guidance.

In September, New York Customs assessed DHL for a penalty allegedly misdeclaring the blueprints of an American engineering company as nondutiable under § 870.10. DHL declined to pay and invited Customs to prosecute. Customs did not accept DHL's invitation. Nonetheless, Customs effectively closed the port of New York to couriers carrying American engineering documents and severely limited other sorts of courier operations.

RIGHT TO MAKE ENTRY

To resolve these long simmering problems, in February 1980, Customs Headquarters in Washington dispatched Assistant Commissioner for Commercial Operations Alfred DeAngelus to the port of New York. He met with customs brokers and observed courier operations. DeAngelus also consulted with the Chief Counsel of Customs on legal questions raised by the brokers. In his May 14, 1980, report, DeAngelus observed that the couriers employed brokers for clearance of appropriate items and concluded, "Obviously, we are confronted here with two groups of brokers; one which has the business, and one which does not." DeAngelus reviewed the legal questions relating to courier operations and agreed with the couriers: "There is, per se, nothing illegal, based on our interpretation of the regulations, with courier practices in New York." DeAngelus recommended that Customs issue regulations to validate courier operations generally and to correct certain operational problems found in New York, primarily, commingling of items subject to different sorts of customs treatment.

Customs Headquarters suppressed the DeAngelus report[5] and, in June 1980, published a notice in the *Federal Register* seeking public comment on the legality of on-board couriers and couriers' use of simplified entry procedures. The notice declared:

> . . . members of the importing community have raised the following questions:
>
> (1) Should the bags or pouches imported by "on board" couriers be treated as the accompanying baggage of the individual courier?

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[4]Letter from D. J. Boccalero, Manager of Traffic, M. Parsons Company, to Commissioner of Customs dated Aug 13, 1980, in response to Customs' June 1980 courier inquiry, described below.

[5]A copy of the DeAngelus report was obtained only after intervention by Senator Lloyd Bentsen of Texas acting at the request of a large engineering company adversely affected by Customs' anticourier campaign.

> (2) May a courier service designated as the consignee of merchandise brought or shipped to the United States by the courier service employee file a formal or informal entry in its own name? . . .
>
> (3) May a courier service which is not the consignee of the merchandise and has not been authorized in writing by the consignee, execute a power of attorney designating a broker to make entry?
>
> These questions have arisen in response to certain problems encountered during the processing of courier sacks, including the inadequacy of passenger processing facilities to clear these sacks at airports, inaccurate or improper documentation or declarations, and commingling of a wide variety of merchandise. It has also been alleged the courier services may be operating in violation of certain laws administered by the Postal Service. This allegation has been referred to the Postal Service for comment.[6]

Obviously, this inquiry was unsympathetic to the couriers. Indeed, Customs' attorneys privately assured counsel for the couriers that there was no reason to file comments: a policy adverse to the couriers had already been decided.

Chapter 8 reproduces comments filed by DHL in response to the Customs notice. DHL defended the legality of courier operations in detail in order to create a record for subsequent appeal to the courts. DHL also led a courier industry campaign that prompted dozens of customers—shipping lines, engineering companies, international banks, etc.—to protest the proposed anticourier policy. The overwhelming customer support for courier services proved unexpectedly successful.

On December 29, 1980, the Customs Service reversed course. In a Manual Supplement, Customs established new procedures suited to the needs of courier traffic. Most importantly, the Manual Supplement explicitly recognized the legal right of couriers to clear shipments entrusted to them for carriage:

> Courier services offer overnight delivery of articles from abroad. Typically, they import intangibles such as currency and securities, business records, commercial drawings and similar articles of nominal value. Depending upon the value and type of article, entry may be effected by means of a baggage declaration, an informal or formal entry, or a combination thereof. Intangibles are exempt from entry.
>
> Courier services may import their shipments as unaccompanied cargo or as baggage accompanying a courier service employee. This latter type of shipment typically consists of 10-15 duffle bags containing a large number of individually addressed envelopes and parcels. Courier services, in some cases, do not fully and accurately describe articles in their shipments, and sometimes incorrectly claim that articles are free of duty or are intangibles.
>
> Certain customhouse brokers question the legal right of couriers to clear the shipments they import because they are not licensed to transact Customs business on behalf of importers.

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[6] 45 FR 41565 (Jun 19, 1980).

> On June 19, 1980, we published a notice in the Federal Register inviting comments from the public concerning Customs handling of courier importations. After careful consideration of those comments and the applicable provisions of law and regulation, we reached the following legal conclusions:
>
> A. A courier service, by virtue of possession of baggage, may clear it through Customs by means of a baggage declaration, to the extent authorized by section 148.23(c), Customs Regulations.
>
> B. If a courier service qualifies as the consignee under 10 USC 1483, the courier service may file informal or formal entries in its own name or may, by a power of attorney, authorize a customhouse broker to make entry. . . .[7]

The Manual supplement went on to provide that Customs authorities will clear intangibles and business records transported by courier in the passenger area of an airport and other items in the cargo area on an expedited basis. The scheduled effective date for the Manual Supplement was March 1, 1981, although the effective date was later delayed until May 29, 1981.[8]

BUSINESS RECORDS AND BLUEPRINTS

Although the Manual Supplement confirmed the right of couriers, as "nominal consignees,"to clear courier shipments, it did not resolve other legal obstacles faced by international couriers. In early 1982, DHL asked the U.S. Trade Representative to take up these issues with Customs. Although the Trade Representative made some inquires, these efforts were overtaken by events in Congress.

On July 14, 1981, Representative Bill Frenzel introduced H.R. 4134 at the request of customs brokers. In essence, H.R. 4134 sought to prevent couriers from providing customs clearance for commercial goods that they transported; couriers would be required to hire a licensed broker to provide such services. To sweeten the pill, Frenzel proposed to classify "time sensitive correspondence" as an "intangible," thereby excluding much of what couriers transported from entry procedures required for commercial goods. Frenzel explained his purpose by criticizing the Manual Supplement ruling which

> states that courier services may file informal or formal customs entries in their own name and therefore become a nominal consignee eligible to make entries on behalf of others by showing a carrier's certificate or duplicate bill of lading for merchandise about to be entered into this country. At the same time, customs law states that informal or formal customs business can only be transacted by a licensed broker—unless a person enters his own merchandise. Under the new ruling, it may be possible for nearly anyone to provide broker services as a consignee, but without becoming licensed. . . . While the ruling appears in this instance to refer only to courier services as nominal consignees, I believe it could easily be extended to other unlicensed

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[7]Manual Supplement No 3254-01 (Dec 29, 1980).
[8]46 FR 24069 (Apr 29, 1981) (TD 81-108).

> broker services such as banks, ships, railroads and freight forwarders, and perhaps others as well. . . .
>
> My bill amends the Tariff Act of 1930 so that a nominal consignee cannot misuse his technical status as consignee to enter merchandise in his own name. Since this would appear to affect courier services when entering time-sensitive business materials, the bill also adds "time-sensitive correspondence" to the list of materials which are defined as "intangibles" requiring no entry procedure through customs. In this respect, much of the business documents that courier services bring into this country would be facilitated by avoiding normal customs entry inspections. On the other hand couriers would not be allowed to make informal or formal entries, which they were never intended to handle, on behalf of others without a brokers license.
>
> Finally, the bill specifies that carriers cannot knowingly certify an unlicensed party as owner or consignee or agent in order that such party could conduct customs business on behalf of another. . . .[9]

After reassuring discussions with Frenzel's staff, DHL decided not to actively oppose H.R. 4134 provided two seemingly non-controversial points could be clarified. One issue proved to be noncontroversial in fact. DHL noted that the phrase "time sensitive correspondence" had no technical meaning. Since Frenzel's intent was to simplify entry of business documents, DHL suggested that the definition of business records in § 870.10 should be substituted for the non-technical phrase "time-sensitive correspondence" in the amended description of "intangibles." There was no objection to this clarification.

The second point was more difficult. DHL was very concerned about the rights of the "nominal consignee," i.e., the person designated by the airline (on the "carrier's certificate") as authorized to take delivery of the goods after Customs inspection. DHL was willing to accept a requirement that a nominal consignee must retain a customs broker to prepare the documentation for entry of commercial goods, but DHL wanted to make sure that the broker was clearing the goods on behalf of the nominal consignee and not on behalf of the "ultimate consignees." This distinction was critical to speedy and economical customs clearance of urgent parcels. If the broker was acting as the agent of the courier company, as nominal consignee, the broker could make one consolidated entry for all parcels under authority of a power of attorney granted by the courier. If, on the other hand, the broker was legally acting as agent of "ultimate consignees"—persons to whom the parcels were addressed—DHL would be required to obtain a power of attorney from each addressee and assign the powers to a customs broker before the shipments could be cleared. In addition to producing unacceptable delay, brokerage fees would be greatly multiplied. As drafted, H.R. 4134 seemed to limit the rights of the nominal consignee to such an extent that it was unclear whether the nominal consignee

[9]127 Cong Rec 15690 (remarks), 15696 (introduction of bill) (97th Cong, 1st Sess).

could act as principal of the customs broker. DHL and other couriers insisted on a clear statement that the nominal consignee could be named on the carrier's certificate and retain the customs broker. Representatives of the customs brokers agreed initially on this point and then reneged. Negotiations broke down in late November. On December 10, 1982, Representative Frenzel introduced H.R. 5170, a revision of H.R. 4134, that conferred intangible status on all business records classifiable under § 870.10 but left unclear the rights of the courier as nominal consignee.[10]

At this point, DHL decided to become active in the legislative process. DHL organized the courier industry and demanded not merely revision, but enlargement, of H.R. 5170. DHL took the position that the bill should both protect the rights of the nominal consignee and resolve persistent problems encountered in importing American engineering blueprints and drawings. To address the latter point, DHL urged that in transferring the text of § 870.10 to the "intangibles" definition under Headnote 5 the text should be revised to declare explicitly that blueprints and engineering drawings of American firms were within the scope of the provision. On May 17 and 26, 1982, the House Subcommittee held hearings on a large number of customs and tariff bills, including H.R. 5170.

Chapter 9 reproduces DHL's submission to Congress on H.R. 5170. In this statement, DHL explained for the record the position that it was advocating behind the scenes to Customs and Congress.

On July 27, 1982, the chairman of the Trade Subcommittee, Representative Sam Gibbons, introduced a new bill, H.R. 6867, that embodied the Trade Subcommittee's conclusions with respect to the various bills considered in the May hearings. H.R. 5170 was revised and inserted as section 201 of H.R. 6867. The revised version redrafted provisions of H.R. 5170 relating to the right of couriers to arrange for customs clearance. As revised, it was clear that a courier would continue to be named as "consignee" by the air carrier transporting courier bags and therefore the courier would have the right to designate a customs broker (as "importer of record"). The broker would then make a consolidated entry of courier bags for the account of the courier, rather than separate entries for the account of individual "ultimate consignees." Section 201 of H.R. 6867 also made clear that intangible status was to be accorded to blueprints and engineering drawings even if produced by American engineers.[11] The couriers' arguments had been accepted.

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[10]127 Cong Rec 30766, 31026 (remarks).

[11]In reporting HR 6867 to the floor of the House, the full Ways and Means Committee revised the section dealing with blueprints and other engineering documents so that the amendment had the effect of striking the phrase "conducted outside the United States." The effect was to enlarge the scope of the provision so that it covered not only the work of American and foreign engineering firms relating to projects outside the United States (the thrust of the original version of HR 6867) but also to work relating to projects inside the United States. HR Rep 97-837, 97th Cong, 2d Sess, 19 (1982).

The House passed H.R. 6867 on September 22 and sent it to the Senate. As the 97th Congress was about to expire, the Senate Finance Committee held hearings immediately and approved the measure without significant change in the courier provisions. The remaining legislative steps were easily taken and, on January 12, 1983, President Reagan approved Public Law 97-446, a general customs bill that included the courier provisions as section 201.

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DHL Comment in Courier Service Inquiry (1980)

By notice in the Federal Register of June 19, 1980, the Commissioner of Customs requested public comments on certain legal questions concerning the activities of courier services. 45 FR 415654, 56221. DHL Corporation, an air courier company, hereby responds.

The public notice requested that comments address three specific questions. In Part I, we do so. In Part II, we discuss the policy considerations which, we suggest, should guide Customs in the interpretation of any ambiguous or unclear statutory terms. Part III summarizes our comments. Part IV sets out a petition for an opportunity to respond to others' comments.

I. The Three Specific Questions Raised

In these comments, we shall presume that all items carried by couriers are either "intangibles" or "business records," i.e., falling within the scope of Headnote 5 or TSUS 870.10, respectively. These two classifications comprise the vast bulk of what is handled by courier services and include all the material carried by DHL's "courier service." DHL also handles other articles but only as a completely separate service. We do not know what other courier services transport.

(1) "Should the bags or pouches imported by 'on board' couriers be treated as accompanying baggage of the individual courier?"

The bags or pouches of a courier should, of course, be treated by Customs as the baggage of the accompanying courier because that is exactly what they are. Courier bags are carried by the airlines as baggage. They differ in no

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DHL Corporation, "Courier Services; Invitation to the Public to Comment [45 FR 41565 (Jun 19, 1980)]: Comments of DHL Corporation and a Petition for an Opportunity to Respond to Comments of Others" (Sep18, 1980) (submission to U.S. Customs Service).

material respect from any other baggage. Like most baggage, courier bags are generally non-dutiable. Like most baggage, courier bags are usually of such low value that they qualify for informal entry.[1] Like the bags of many other non-courier passengers, courier bags contain documents which the passenger is carrying for business purposes at the request of his employer.

The inclusion of business related items in the baggage of a passenger, courier or non-courier, is, however, immaterial to the customs law. Customs regulations explicitly allow the inclusion of such items in one's baggage. 19 CFR 148.5 (1979). Customs' authority to issue such regulations is very clear. 19 USC 1498(a)(6)(1976). From the standpoint of the Customs law, there is no distinction whatsoever between a passenger who is a lawyer accompanying ten boxes of documents to be used in an upcoming trial and a passenger who is a courier hired by the lawyer's firm and accompanying the same ten bags of documents for use in the same upcoming trial.

We must point out that the precise legal question raised here has been addressed by the Chief Counsel of Customs and lawyers in the Office of Commercial Operations. Their conclusions were reported in a May 14th report by the Assistant Commissioner for Commercial Operations to the Deputy Commissioner. The Assistant Commissioner wrote, at page 4,

> May a courier's baggage be regarded as his, even though it consists of separate parcels and envelopes addressed to multiple consignees, thereby permitting the courier to clear merchandise through a baggage declaration? *Yes. The possession of the merchandise is evidence of his right to make a baggage declaration*. [emphasis added and omitted]

On May 16, 1980, the Deputy Commissioner approved the report of the Assistant Commissioner. Since the law has not changed since this report, there is no basis whatsoever for coming to a different conclusion in this inquiry.

There is only one area in which couriers and other travelers with large numbers of bags may be said to be different from some non-courier passengers. It is true that courier passengers are, more often than non-couriers, members of the group of passengers who are accompanying more than the average number of bags. Since it clearly takes a customs inspector more time to inspect a large number of bags than a small number, it might be said that passengers with large numbers of bags—both courier and non-courier—cause more than their "fair share" of congestion at customs clearance. Therefore, it would be reasonable to ask couriers and other passengers with large amounts of baggage to clear their baggage separately from other passengers. Not only does DHL

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[1]Customs regulations permit an informal entry of baggage whose value is less than $250. 19 CFR 143.21(c) (1979), applied to baggage by 19 CFR 148.5 (1979). Under T.D. 55851 (Mar 7, l963), nominal value shall be used to value "business machine punch cards, blueprints, charts, microfilm, photographs, or other media representing or communicating business or personal records, professional or technical data or other information, [etc.]."—i.e., the type of items carried by couriers (at least by DHL). The nominal value is "wholesale unprocessed or unused" price for the quantity involved.

not object to such "separate but equal" treatment, but has generally offered to pay overtime to customs inspectors so that clearance of DHL's material will impose no burden whatsoever on the normal inspection process.

(2) "MAY A COURIER SERVICE DESIGNATED AS THE CONSIGNEE OF MERCHANDISE BROUGHT OR SHIPPED TO THE UNITED STATES BY COURIER SERVICE EMPLOYEES FILE A FORMAL OR INFORMAL ENTRY IN ITS OWN NAME?"

Section 1483(1) states that "All merchandise imported into the United States shall be held to be the property of the person to whom the same is consigned." Section 1483(2) states that "A person making entry of merchandise under the provisions of (h) or (i) of 1484 of this title . . . *shall be deemed the sole consignee* thereof." Section 1484(h) states that "Any person certified by the carrier bringing the merchandise to the port at which entry is made to be the . . . consignee of the merchandise . . . may make entry thereof.

If a courier is "designated as the consignee" (as the question states), then the courier is, obviously, "certified by the carrier bringing the merchandise to the port to be the consignee." Hence, the courier is authorized to "make entry" under section 1484(h). If a courier does make entry under 1484(h), then, under 1483(2), such courier is the "*sole consignee*" of the courier bags entered and, under section 1483(1), the bags can be "held to be the property" of no other person.

DHL does, in fact, enter its bags under section 1484(h).[2] Therefore, under customs law, DHL is "the sole consignee" of such bags and such bags are "held to be the property" of DHL.

Numerous cases amply demonstrate the applicability of section 1483 to freight forwarders (and couriers are merely specialized freight forwarders, 14 CFR part 296). *Top Form Brassier Mfg. Co. v United States*, 342 F Supp 1167 (Cust. Ct. 1972), *Wilmington Shipping Co. v United States*, 52 Cust. Ct. 650 (1964), *Hersey of Canada, Ltd. v United States*, 60 Cust. Ct. 942 (1968), *Wedemann & Godknecht, Inc. v United States*, 370 F Supp 1400 (Cust. Ct. 1974).

In *Top Form*, the plaintiff, a Canadian company, sold the goods in question to American Brassiere Company. Entry was made by Beacon Shipping Company in its own name on a carrier's certificate. Beacon was the forwarding company which brought the goods through customs and delivered them to American Brassiere. At the request of American Brassiere, Top Form filed for a reappraisement of the seven entries that were made, and, when denied that reappraisement, brought suit against U.S. Customs. Customs' motion to dismiss was granted on the grounds that only the consignee has the

[2]More technically, a customhouse broker, acting as DHL's agent, enters courier bags under 1484(h). Entry by an agent is provided for by section 1484(a) and use of a customhouse broker as an agent is provided for in section 1641(a).

right to seek judicial redress, and that the consignee in this case was Beacon, the forwarder who had made entry. The court declared:

> [W]here goods are entered by an importer as nominal consignee for the account of the 'actual' owner or ultimate consignee, and no owner's declaration and superseding bond are filed pursuant to section 485(d) and Customs Regulation, section 8.18(d), then, by virtue of sections 483, 484, and 485, *it is not the 'actual' owner or ultimate consignee but the importer of record who is liable for the duties who is the consignee under the tariff laws*.

342 F2d at 1170 (emphasis added).

Wilmington Shipping involved a similar set of facts. The foreign seller and shipper, United Plywood, was denied the right to file a reappraisement appeal on the grounds that it was not the consignee for customs purposes. The court found the consignee to be Wilmington Shipping Company, the forwarder who had made entry and to whom the notices of appraisement were given. With regard to the determination of which interested party should be properly considered the consignee, the court stated:

> Only a statutory obligation for the payment of duties has any relevancy for such purpose. The role of the appellant [Wilmington Shipping] in entering the merchandise on the carrier's certificate and on its own declaration as consignee and in taking possession of the merchandise upon its release from customs custody makes it solely responsible to the government for the payment of duties on such merchandise.

The *Wilmington Shipping* court explained the reasoning behind this position by quoting from *Baldwin v United States*, 113 F 217, 218 (2d Cir 1902), *cert. denied*, 184 U.S. 700 (1902):

> *The government is not called upon to hunt up any ultimate consignee*, when there is a primary consignee to whom the goods are sent, and who himself presents the invoice, makes the entry, receives the bill of lading, and gets the goods; thus being himself their importer.

52 Cust. Ct. at 655 (emphasis added).[3]

On July 17, 1978, DHL was sent a "Notice of Penalty or Liquidated Damages Incurred in Demand for Payment," with regard to an entry that DHL's customhouse broker had made at JFK Airport on June 27, 1978. While we continue to believe that this notice was based upon an improper reading of the law (a point never resolved by the courts), nonetheless, it is obvious that if DHL can be held to be responsible for misdeclaring a courier bag, then it likewise must have been authorized to declare it in the first place.

Again, we must point out that the precise question raised by the Customs notice was addressed by the Chief Counsel of Customs and the lawyers of the Office of Commercial Operations. Again, they answered the question is the affirmative, just as we have. The May 14th report of the Assistant

[3][Unused footnote number]

Commissioner summarized their conclusions, at page 4, as follows:

> May a courier make a formal or informal entry or appoint a broker to make the entry? Yes, under certain circumstances. If the courier service has been named the consignee, or is the holder of a bill of lading or of an air waybill endorsed by the consignee therein named so that it is deemed to be the consignee under 19 U.S.C. USC 1483, formal or informal entry could then be made by the courier service in its own name. . . . *There is, per se, nothing illegal . . . with courier practices in New York.*

Since the law has not changed since this report, there is no reason whatsoever to question the correctness of its conclusions.

(3) "MAY A COURIER SERVICE WHICH IS NOT THE CONSIGNEE OF THE MERCHANDISE AND HAS NOT BEEN AUTHORIZED IN WRITING BY THE CONSIGNEE, EXECUTE A POWER OF ATTORNEY DESIGNATING A BROKER TO MAKE ENTRY?"

In all cases, DHL is the consignee of bags carried or shipped by DHL. Therefore, DHL offers no comment upon this question.

II. POLICY CONSIDERATIONS

In the interpretation of any statute, the administering agency has a certain degree of discretion to interpret ambiguous or unclear terms. In exercising this discretion, an agency is to be guided by the general public interest. While DHL does not believe that there is any ambiguity or unclarity in the relevant statutes, we here set forth the public interest considerations applicable to the questions raised in the event the Commissioner concludes that it is necessary to exercise such interpretative discretion.

Congress has emphatically declared that "It is important for the national interest of the United States that both the private sector and the Federal Government place a high priority on exports, which strengthen the Nation's economy." Export Administration Act of 1979, Pub L 96-72, § 2 (50 USC app. 2401(2)). What the United States sells to the rest of the world is high technology goods and services. As the Senate Subcommittee on International Finance reported recently,

> *Technology is a key factor in U.S. exports* and has contributed strongly to U.S. export growth. Technology intensive products, as measured by R&D input, account for approximately 40 percent of U.S. exports. By contrast, R&D-intensive exports comprise only 28 percent of the total exports of Germany, Japan, France and the U.K. *Our continued export competitiveness is clearly tied to our advantage in technological innovation and the production of high technology goods.*

126 Cong Rec S 5934 (daily ed. May 29, 1980).

The export of U.S. technical services is a relatively small but especially important portion of this export flow. Services appear to be generating increasing trade surpluses, notwithstanding the overall trade deficit of the U.S.

Moreover, the U.S.'s expert advisers tend to stimulate the purchase of other U.S. goods and services. For example, constructors estimate that about 50% of the [value of] a contract award eventually returns to the U.S. *See* U.S. Department of Commerce, International Trade Administration, *Current Developments in U.S. International Service Industries* at 4 (March 1980). Some indices of the growth of exported goods and services are shown in Tables 1 and 2. Perhaps most fundamentally, the quality of American experts abroad contributes disproportionately to the world's confidence, or lack of confidence, in American leadership.

Table 1. Indices of the increase in U.S. international trade, 1960-1979 (billions of dollars)

	1960	1970	1975	1978	1979
Export of goods and services	$29	$66	$155	$221	$286
Balance on goods	$5	$3	$9	($34)	($34)
Income from direct investment	$4	$8	$17	$26	$38
U.S. capital invested abroad	$5	$9	$40	$61	$63
Income from construction, insurance, communications, and other services	$0.6	$1.3	$2.9	$4.3	$4.5

Source: U.S. Department of Commerce, Bureau of Economic Analysis, *Survey of Current Business*, Table 1, lines 1, 9, 11, 37, 76 (Jun 1979 & Mar 1980).

Table 2. Indices of the increase in the export of U.S. services, 1970-1978 (billions of dollars)

	1974	1975	1976	1977	1978
U.S. advertising firms, foreign billing (% of total bills)	$2.5	$2.9	$3.4	$4.1	$5.2
- % of total	46%	49%	48%	49%	51%
U.S. banks, assets in foreign branches	$141	$163	$194	$228	$306
U.S. constructors, foreign contracts	$11.7	$21.8	$15.6	$15.9	$18.3
- % of total	16%	31%	26%	22%	23%
U.S. films, foreign rentals	$0.30	$0.37	$0.36	$0.34	$0.58
U.S. receipts from foreign tourists	$4.8	$5.6	$6.7	$7.2	$8.5
U.S. shipping, value carried in foreign trade	$22	$22	$26	$28	$31

Source: U.S. Department of Commerce, International Trade Administration, *Current Developments in U.S. International Service Industries*, Tables 4, 7, 10, 18, 19, 20 (Mar 1980).

For the American businessman abroad—whether establishing a foreign branch bank, managing an overseas construction project, or selling

sophisticated aircraft—good communications to and from the United States is absolutely vital. Perhaps more than any other economy, the widely dispersed American international economy requires the best possible communications channels. Outbound international telephone calls, for example, increased from 12.9 million in 1970 to 40.2 million in 1976 to 50.6 million in 1977. Outbound international telexes increased from 6.7 million in 1970 to 26.3 million in 1976 to 31.9 million in 1977.

Like the international telecommunications services, courier services offer a communications service which is vital to the success of American business abroad. The spectacular growth of couriers in the last decade demonstrates the importance of their role to U.S. international commerce. More than any other other country in the world, the United States has a strong national interest promoting the free, unfettered international flow of time-sensitive commercial documents.

Wisely, Congress has already recognized this truism. In l963, by Public Law 87-455, Congress amended the Tariff Schedules to exempt from duty:

> Records, diagrams, and other data with regard to any business, engineering, or exploration conducted outside the United States, whether on paper, cards, photographs, blueprints, tapes, or other media. [TSUS 870.l0]

As stated by the author of this provision, the Senate Finance Committee, the purpose of this provision was as follows:

> *The amendment would clarify a situation putting a burden on business firms with overseas branches . . . Data with regard to business, engineering, or exploration operations collected abroad and brought back to the United States for consideration by the executives of a firm may be subject to various rates of duty* depending upon more of the type of material upon which the data are recorded than on the content or meaning. These records are not saleable, their customs valuation is frequently in doubt, *and delays and uncertainties are troublesome for business firms as well as for the Federal Government*. [emphasis added]

S Rept No 1318, 87th Cong, 2d Sess (1962).

This exemption for business documents was clearly enacted by Congress to facilitate America's international business by permitting the free flow of business documents. The overriding importance of this exception is underscored by Headnote 1 to Schedule 8 which states that "any article which is described in [TSUS 870.10, *inter alia*] is classifiable in said provision if the conditions and requirements thereof . . . are met" *regardless* of whether the item might also be classifiable in another classification of the Tariff Schedules.

Again, during the last few years, Congress has acted to prevent another possible impediment to the fastest possible flow of international business documents. When the U.S. Postal Service expanded its claim of monopoly to include all sorts of business documents, businessmen, especially international businessmen, complained to Congress. Extensive hearings in the Senate House

and House followed.[4]

One of the most articulate statements, submitted by the Arabian American Oil Company ("Aramco"), detailed how couriers support U.S. efforts to compete in the world market:

> The United States is one of the major sources of supply of the sophisticated equipment required by the Saudi Arabian government. This requires a constant exchange of commercial and legal documents, blueprints, technical information, shop drawings, shipping papers, export declarations, and financial data and documents between Aramco headquarters in Arabia and our offices in Houston [Texas, U.S.A.].
>
> Postal service between Dhahran, Saudi Arabia, and Houston, Texas, often takes as much as three or four weeks. Obviously no business can be conducted on that schedule. The great variety of messages, documents, and technical information which are transmitted between Aramco and [its subsidiaries] makes it extremely difficult, if not impossible, to classify each piece to determine which must be considered letters . . . and which are beyond the scope of the so-called postal monopoly. . . .
>
> To participate in the ambitious modernization program undertaken by the Saudi Arabian government, we must compete with the other major sources of supply, principally Japan and Western Europe, to provide the material, supplies and machinery required. If we are able to operate more efficiently and reduce unnecessary expense, our competitive position will be enhanced considerably. We believe that the [private carriage of commercial documents] is thoroughly consistent with the President's general deregulatory philosophy and with his policy of encouraging the developement of [U.S.] export trade to reduce [U.S.] balance of payments deficit. . . .

The Senate committee reported a bill which virtually exempted international couriers from the postal monopoly. *See* S Rept No 95-1191, 95th Cong, 2d Sess 17-21 (1978). And the conclusions of the House subcommittee chairman were expressed in the following words:

> I want to thank you for being with us today. . . . Until [you and other witnesses] brought up this question of the overseas problem, and the difficulty you have and the millions [of dollars] that are at stake—that are dependent upon timely delivery of documents—, this [matter] was just so foreign to us that we were not aware of it, and *now we see it as a real problem that has to be approached and has to be taken care of*. [emphasis added]

In the end, legislation was averted only because the Postal Service finally got the message. In October 1979, the Postal Service adopted regulations specifically exempting time-sensitive documents from the postal monopoly. 44

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[4] *Hearings on H.R. 7700 Before the Subcomm. on Energy, Nuclear Proliferation, and Federal Services of the Senate Comm. on Governmental Affairs*, 95th Cong, 2d Sess (1978); *Hearings on the Private Express Statutes before the Subcomm. on Postal Operations and Services of the House Comm. on Post Office and Civil Service*, 96th Cong, 1st Sess (1979).

FR 61178-61182 (1979), *codified at* 39 CFR 320.6).

Thus, the strong national interest in facilitating the international trade of the United States by permitting the free flow of time-sensitive commercial documents is both very clear and specifically recognized by Congress.

On the other hand, it would appear that no national interest would be served by delaying couriers and increasing the paperwork burden on couriers and their customers—the result of answering the questions posed differently than we have suggested. Couriers now enjoy the relatively simple documentation requirements and speedy treatment afforded all airline passengers. Increased documentation will in no way add to the revenues of the United States. (Neither DHL, nor any other courier, objects to reasonable inspection procedures to prevent the undeclared import of any significant amount of dutiable items). Nor is increased documentation necessary for the purposes of governmental statistics.[5]

Finally, it should be pointed out that the concept of a "consignee of merchandise" is inappropriate to documents falling within Headnote 5 or TSUS 870.10. What is really being carried is information, not merchandise. The medium, usually paper, has virtually no intrinsic value. The courier is acting at the order of the sender (the "exporter") and not at the order of the receiver (the "importer"). The receiver may not know the information is being brought to him and may not even want it. Nothing of intrinsic value is being delivered and, in general, the physical "merchandise" is irrelevant to the delivery of the information. For example, if a courier copied all the documents "imported," delivered the copies to the receiver, and sent "the merchandise" back to the sender, delivery would still be complete in most cases. The ultimate receiver of the information, therefore, may be someone entirely different from the person who finally receives the paper or "merchandise" carried by the courier.[6] The inapplicability of traditional customs' concepts to courier bags arises because a courier is primarily a communications company not a importer of "merchandise." (Indeed, one result of customs' procedures which would impede the free flow of information sent by courier would be to increase the amount of information sent by telex or telephone.)

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[5]Since couriers are in the communications business, requiring detailed records would, at some point, amount to disclosing exactly when any businessman or governmental official "talks" to any other via couriers, the primary means of conveying international business documents. Obviously, such a worldwide "mail cover" directed against the international business and governmental community would raise grave First Amendment problems.

[6]To give an example of the inapplicability of traditional customs' concepts to courier bags, consider the case of a check being sent by an American worker abroad for deposit in his bank. In many cases, a courier will carry a letter containing such a check to a company mail room, which, in turn, delivers the letter to the Postal Service, which delivers it to a second addressee (the worker's bank), which, in turn, sends the check, perhaps via the Postal Service again, to the bank upon which it is drawn.

III. SUMMARY

The law is very clear that a courier's bags are indeed baggage and should be so treated by Customs. The law is also clear that a courier service is entitled to enter items for which it is designated the consignee on the carrier's certificate or the airwaybill. After extensive legal and field investigations, the Assistant Commissioner of Customs so concluded and there is no reason whatsoever to question the correctness of his report.

More fundamentally, the national interest of the United States requires a free, unimpeded flow of commercial information into the nation, including information carried by couriers. As Congress has recognized, "It is important for the national interest of the United States that both the private sector and the Federal Government place a high priority on exports, which strengthen the Nation's economy." What the U.S. sells abroad today obviously demands the fastest and most reliable communications possible. Congress has emphasized the need for a free, unfettered flow of business communications both in its handling of the customs law and the postal monopoly law. Any resolution of the posed questions that would introduce delays and added costs into America's courier service would clearly be contrary to the best interests of the United States.

IV. PETITION FOR AN OPPORTUNITY TO RESPOND TO OTHERS' COMMENTS

As the June 19, 1980 notice states, the instant inquiry is result of allegations by "members of the importing community." An article appearing at page 36 of Air Cargo Magazine (July 1980) expands upon this statement, stating that the public notice was the result of a May meeting between Customs and members of New York's JFK Airport Customs Brokers Association, the National Brokers and Freight Forwarders Association, and an attorney of the firm of Serko and Simon. The article quotes the Assistant Commissioner, Mr. DeAngelus, to the effect that Customs "had not yet heard the couriers' response to the allegations." The public notice did not provide a complete statement of the "allegations" of the various complainants nor of the legal theories or cases supporting their point of view. Nor has DHL ever been apprised in any other manner of a complete statement of allegations made against couriers by the complainants involved. It is therefore impossible for DHL to respond fully to these allegations.

It appears from the issues raised in the public notice that Customs' acceptance of the allegations made the "members of the importing community" may greatly damage or destroy DHL's business. Given the grave danger to couriers raised by these questions, couriers should have the opportunity to review a comprehensive statement of the allegations and a chance to respond. We presume that the "members of the importing community" will file such comprehensive statements as comments in this preceding. Therefore, DHL

hereby petitions the Commissioner as follows: If U.S. Customs does not decide to adopt the May 14th Assistant Commissioner's report on the basis of the first round of comments filed in this proceeding, then DHL requests that Customs provide a 45-day period for the filing of detailed responses to any comments filed pursuant the original June 19, 1980 notice.

9

DHL Testimony on H.R. 5170 (1982)

DHL Corporation, and its affiliates, comprise the world's largest international courier system. DHL currently provides rapid and reliable delivery of time-sensitive financial papers, bills of lading, blueprints, marketing reports, intracorporate memoranda, data processing and other business information to approximately 100 American cities and 190 foreign cities in 80 countries.

DHL strongly supports the basic purpose of H.R. 5170, "to expedite the international transmission of business documents." We would like to commend Congressman Frenzel for his farsighted and responsible efforts to simplify and expedite the transportation of international business documents.

The most important provision of the bill is contained in section 1, which would amend the list of so-called "intangibles" by adding the things currently listed under item 870.10 of the Tariff Schedules. Item 870.10 provides for duty-free entry for the following:

> Records, diagrams, and other data with regard to any business, engineering, or exploration conducted outside the United States, whether on paper, cards, photographs, blueprints, tapes, or other media.

Item 870.10 was enacted by Congress in l963, by Public Law 87-455. The purpose of this exemption for business documents was to facilitate America's international business by permitting the free flow of business documents. As stated by the originator of this provision, the Senate Finance Committee, the purpose of this provision was as follows:

> *The amendment would clarify a situation putting a burden on business firms with overseas branches. . . . Data with regard to business, engineering, or exploration operations collected abroad and brought back to the United*

James I. Campbell Jr., DHL Corporation, "Statement of James I. Campbell Jr."in *Miscellaneous Tariff and Trade Bills: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 97th Cong, 2d Sess, 360 (1982).

> *States for consideration by the executives of a firm may be subject to various rates of duty* depending upon more of the type of material upon which the data are recorded than on the content or meaning. These records are not saleable, their customs valuation is frequently in doubt, *and delays and uncertainties are troublesome for business firms as well as for the Federal Government*. [emphasis added]

S Rept No 1318, 87th Cong, 2d Sess (1962).

Although business documents are duty-free, importation may still be slowed by the need for a formal or informal declaration. Some customs agents, for example, insist that each bag of documents include a packing list indicating the name of the consignee, shipper, country of origin, value, and a description of the merchandise. Since all business documents are duty-free, such information does not increase the revenues of the United States. On the contrary, since "time is money" such detailed documentation can impose substantial costs on American businesses doing business overseas.

H.R. 5170 would remedy these remaining difficulties by redesignating 870.10 documents as "intangibles," like currency and electricity, instead of "articles of merchandise." Under this amendment, business documents would no longer be declarable. Customs officials would, of course, retain the right to inspect documents to make sure that they are, in fact, documents. The only change that would be effected is that the importer would no longer be obliged to prepare a document declaring what documents he is importing.

This is a wholly desirable improvement in the law. It will certainly cause no loss of revenue to the United States. Moreover, we can think of no public policy reason, consistent with the First Amendment, to support continued collection of detailed information regarding who imports what kinds of business documents from which sources. On the other hand, H.R. 5170 will clearly make it significantly easier for U.S. companies to conduct their international business. As the Congress has declared that "It is important for the national interest of the United States that both the private sector and the Federal Government place a high priority on exports, which strengthen the Nation's economy." Export Administration Act of 1979, Pub L 96-72, § 2 (50 USC app. 2401(2)). For an exporter of highly technical services and products, one key to expanding exports is the removal of unwarranted barriers to the flow of financial, marketing, and engineering information.

Although we strongly support the purpose of section 1, we would like to point out two technical difficulties which, although minor, are potentially very important to the individuals affected.

The first point involves the administrative interpretation of Item 870.10 by the Customs Service. In a series of opinions, Customs has somehow arrived at a completely wrong-headed interpretation of the application of Item 870.10 to drawings and blueprints. Customs has ruled that:

> Generally, if the drawings or blueprints are solely the product of original professional effort done abroad, they are properly classified under item

> 870.10, . . . free of duty. However, if any portion of the professional effort is done by United States professionals, whether this occurs in the United States or [a foreign country], they are properly classifiable under item 273.55, TSUS, dutiable at 4 percent ad valorem.

Letter to unknown party from Harvey B. Fox, Director, Entry Procedures and Penalties Division, U.S. Customs Service, dated June 7, 1978, reference number ENT-1-01 R:E:E, 305792 K.

Clearly, the effect of Customs's current administrative interpretation of Item 870.10 is to protect foreign engineering companies against their American competitors. This directly contradicts Congress' intention as explained by the Senate Finance Committee report quoted above.

If Congress reenacts the language of Item 870.10 in light of this administrative interpretation, the court may rule that Congress has adopted this unfortunate statutory construction. *See Haig v Agee*, U.S., 101 S.Ct. 2766, 2778 (1981); *NLRB v Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974); *Zemel v Rusk*, 381 U.S. 1, 12 (1965).

To remedy this situation, H.R. 5170 should contain an explicit repudiation of this misinterpretation of Item 870.10. One solution would be to add a new subsection to section 1, as follows: "(3) Paragraph (e) of general headnote 5, as amended by this section, shall be deemed to include any drawing or blueprint which pertains to any thing which is to be manufactured or constructed outside the United States, regardless of the nationality of the author of the drawing or blueprint. Any contrary administrative rulings by the Customs Service are hereby declared invalid."

The second technical problem with section 1 of H.R. 5170 involves the applicable rule of construction. Under current law, Item 870.10 benefits from a liberal rule of construction. Headnote 1 to Schedule 8 which states that "any article which is described in [TSUS 870.10, *inter alia*] is classifiable in said provision if the conditions and requirements thereof . . . are met" *regardless* of whether the item might also be classifiable in another classification of the Tariff Schedules. This sectional headnote excludes Item 870.10 from the more restrictive general interpretative rules established by general headnote 10. While the rule of construction might not make a difference in very many cases, it could be very important in those few cases in which it is applicable. To ensure that all of the current scope of Item 870.10 is transferred to general headnote 5, we suggest adding a new subsection to section 1 of H.R. 5170 restating the gist of sectional headnote 1 to Section 8, as follows: "(4) Anything which may be classifiable in paragraph (e) of general headnote 5, as amended by this section, shall be so classified without regard to the interpretative rules set forth in general headnote 10." [1]

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[1]These two suggestions result in some awkwardness in the resulting general headnote 5. It would be simpler to recast section 1 of H.R. 5170 as providing for a new general headnote 5a, as follows:

Sections 2 through 5 of H.R. 5170 pertain to the question of who may prepare and file the documents for articles being entered under the requirements of section 484 of the Tariff Act of 1930 (19 USC 1484). The gist of the proposed changes is to prohibit any person from performing this task except the owner, the ultimate consignee, and a customhouse broker licensed under section 641 of the Act (19 USC 1641). The purpose, as we understand it, is to prohibit a courier or other freight forwarder from making entry of articles.

Under current law, a courier or other freight forwarder is allowed to make entry in a situation in which he has shipped articles to himself, for example, where ABC Forwarding Company in London ships articles to ABC in New York. In such cases, the courier or other freight forwarder would be listed on the airwaybill or bill of lading and hence would be entitled to make entry on a carrier's certificate. See sections 483, 484(h) of the Act, 19 USC 1483, 1484(h). In practical terms, this practice permits couriers and other freight forwarders to compete with customhouse brokers in the business of preparing and filing entry declarations for other persons who cannot be present at importation.

DHL Corporation has no desire and no present intention of offering services which are competitive with the services which customhouse brokers provide in connection with the entry of dutiable articles. DHL voluntarily employs licensed customhouse brokers to assist in the clearance of dutiable items and will continue to do so regardless of whether compelled by law.

Nonetheless, we must point out that barriers to any form of competition should not be enacted lightly. There may be sound reasons for using the licensing procedures for brokers as a means of accrediting persons qualified to offer such brokerage services to the public. There seems to us very little public benefit from using the licensing procedures as a means of limiting competition artificially. If a shipper chooses to allow his courier or freight forwarder to make entry for him, realizing that the courier or forwarder is not accredited by the Customs Service, why should he not have this option? Surely the inexperienced members of the public will always employ customhouse brokers accredited by the Service and, on the other hand, the experienced shippers can assess for themselves the risks of dealing with an unaccredited courier or other freight forwarder. Furthermore, it must be remembered that, under current law, the forwarder has a strong incentive to declare imported articles correctly, for

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5a. *Intangible communicative media*—For the purposes of headnote 1, records, diagrams, and other data with regard to any business, engineering, or exploration conducted outside the United States, whether on paper, cards, photographs, blueprints, tapes, or other media are not articles subject to the provisions of these schedules. This headnote shall be deemed to include any drawing and any blueprint which pertains to any thing which is to be manufactured or constructed outside the United States, regardless of the nationality of the author of the drawing or blueprint. Anything which may be classifiable in this headnote shall be so classified without regard to the interpretative rules set forth in general headnote 10.

he is liable for fines or penalties in the case of mis-declaration. In view of these considerations, it seems to us doubtful whether it is necessary to change a system which has worked satisfactorily for decades.

These general considerations aside, DHL anticipates that sections 2 through 5 of H.R. 5170 will cause no operational problems for it if one point can be clarified in the legislative history of the bill. As we understand it, a courier is a "duly authorized agent of the actual owner or consignee" (page 2, lines 22-23) since the courier is hired by either "the owner" (i.e. the shipper) or the "consignee" (i.e., the addressee). Therefore, a courier may continue to be named on a carrier's certificate *even though the courier would no longer thereby have the right to make entry of articles entrusted to him.* According to section 4, a courier would be a "nominal consignee" and therefore, under section 2, a courier named on a carrier's certificate would still be required to retain a customhouse broker to make entry.[2]

We believe that it is important that the courier continue to be named on the carrier's certificate because it simplifies the procedures for broker selection and fortifies the courier's position in the transaction. It is then clear that the broker is working for the courier instead of the owner or ultimate consignee. The alternatives present unnecessary difficulties. If the owner were required to name the broker it would have to do so, as a practical matter at the time of the pickup, perhaps forty-eight hours prior to entry into the United States. Even allowing for the fact that the courier can recommend a broker to the owner, this procedure could result in delays if for any reason the named broker is unable to provide immediate clearance of the time-sensitive articles. The better procedure is, of course, to allow the courier the flexibility to select a broker at any time up to the actual moment of entry into the United States. Similarly, unnecessary delays may result if the ultimate consignee is required to select the broker. The ultimate consignee may not know the brokers in the port of entry and, indeed, may not even know the article is being sent to him until notified by the courier.

Thank you this opportunity to testify and for taking into consideration our comments.

[2]The testimony of Mr. Sigmund Shapiro, representing various customhouse brokers, would alter instead of clarifying this idea of H.R. 5170. Section 7 of the replacement bill proposed by Mr. Shapiro would eliminate the courier or forwarder from the carrier's certificate thus leaving unclear his right to retain a broker to clear articles.

Part 4

European Postal Monopolies

CHRONOLOGY

24 Jun 1980	French post office requires international couriers to pay postal monopoly fee.
27 Jul 1981	British Telecommunications Act 1981 authorizes minister to suspend postal monopoly.
15 Oct 1981	U.K. minister suspends postal monopoly for letters carried for more than UK£ 1.00.
12 Nov 1981	French post office declares international courier operations will be limited to Paris.
23 Jun 1982	French post office cancels DHL courier agreement for service to all of France.
Jun 1982	BIPE study on international courier service in France.
16 Sep 1982	German post office demands couriers qualify offer by reference to postal monopoly law.
13 Jun 1983	European Commission begins inquiry into couriers and postal monopolies.
18 Dec 1984	German post office accepts international couriers.
14 June 1985	Irish post office orders cessation of international courier operations in Ireland.
22 Oct 1985	Rally of 400 courier customers in Paris.
14 Nov 1985	French minister accepts international couriers.
Nov 1986	Italian post office demands monthly payment from international couriers in lieu of stamp tax.
20 Feb 1987	Ireland accepts international couriers.
21 Apr 1988	Danish prosecution of TNT Skypak.
4 Mar 1989	Italy ends stamp tax on international couriers.
20 Dec 1989	Commission rejects Dutch postal law limiting scope of market for courier services.
1 Aug 1990	Commission rejects Spanish postal law excluding international couriers from under 2 kg market.

10

Overview: European Postal Monopolies

Pour faire respecter un monopole qu'elle tient de Louis IX, la poste n'hésite pas à jouer le grand jeu.

- *Le Monde* (1982)[1]

European post offices, led by the French, fought fiercely to block the invasion of international courier services in the 1980s. At first, DHL defended the industry with low key, nationally-based, public policy initiatives. In 1983, a European Commission inquiry converted disparate national debates into a Europe-wide legal and policy issue. Leading couriers joined to form the International Courier Conference and over the course of a decade persuaded the Commission and Member State governments to accept the right of international couriers to operate without imposition of special taxes or other legal restrictions.

At the beginning of this period, international couriers were negligible entities compared to the post offices of Europe. Most international couriers were based in English-speaking countries. Outside of the United Kingdom, the largest courier, DHL, had no more than forty employees in any European city, almost all drivers. Courier executives were usually former operations supervisors; few spoke any language but English. Couriers had no access to the halls of government or "the Establishment." In 1983, couriers transported about 4 million international shipments in Europe. In contrast, in one year, European post offices handled 2,200 million cross border postal items, an amount representing less than 4 percent of their total business. In each country, the national post office was one of the largest employers in the nation and a

[1]Rough translation: "The Post Office does not hesitate to play the big game in order to enforce the monopoly granted to it by King Louis XI." In 1464, King Louis XI restricted the activities of international messengers employed by the University of Paris and organized a system of royal messengers that carried only governmental letters.

politically powerful governmental agency. So the games began.

BRITISH £1 RULE, 1981

The first European government to address the issue of private carriage of urgent documents was that of the United Kingdom. The focus of the government was primarily domestic rather than international postal policy. In the late 1970s, the quality of British postal service was in decline, prompting calls for repeal of the postal monopoly. In March 1980, the Monopolies and Mergers Commission reported on British Post Office operations in inner London and recommended, among other things, that delivery of urgent letters be exempted from the postal monopoly.[2] In May 1980, British voters turned the Labor Party out of power and installed a Conservative government led by Margaret Thatcher.

On 19 July 1980, as part of a program of deregulation and reform, the Thatcher Government announced a proposal to separate the telecommunications and postal functions of the Post Office. The proposed bill also granted the appropriate minister authority to suspend the postal monopoly to permit certain kinds of delivery. The British Telecommunications Act 1981 was enacted in July. On October 15, 1981, the minister used his new authority to suspend the postal monopoly for conveyance of letters by courier services costing £1.00 or more. The term of the suspension ran to December 31, 2006. It was anticipated that over this period the suspension would serve to exempt an ever larger percentage of letters from the monopoly due to a gradual increase in postage rates.

Although liberalization of courier services in the United Kingdom was crucial for the international courier industry, its persuasive effect on the European continent was limited. No continental government was as supportive of competition and liberalization as Thatcher England. On the continent, unlike in the United Kingdom (and earlier, in United States), there was no movement to carve out an exemption from the postal monopoly to permit private carriage of urgent documents generally. In continental Europe, international couriers were obliged to seek a special exemption for their services alone.

FRANCE AND GERMANY, 1982-1983

Prior to 1982, international couriers encountered a variety of questions, objections, and taxes in European countries. In several, post offices asserted that international couriers violated postal monopoly laws but took no action to stop them. In Italy and Switzerland, under long standing laws, couriers paid a tax to the local post office equivalent to domestic postage. In June 1980, the French post office, La Poste, forced DHL to sign an agreement under which DHL paid La Poste a fee for each courier shipment. The amount was equal to

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[2] *The Inner London Letter-Post* (1980) at 89. *See also* M. Corby, *The Postal Business 1969-1979: A Study in Public Sector Management* (Kogan Page: London, 1979).

about 15 percent of the postage rate for La Poste's express mail service, Postadex.

Serious trouble began in late 1981. In November, La Poste insisted on amending the fee agreements with couriers to specify "only shipments collected in Paris for foreign destinations are covered by this agreement. . . . Transportation between Paris and the provinces must be entrusted to the post office." In effect, all France outside of Paris was to be closed to international courier service. Alone among international couriers, DHL refused to comply. In June 1982, La Poste cancelled existing agreements that authorized courier services on the "whole territory" of France. Thereafter, postal inspectors, aided by French customs authorities, periodically raided DHL's offices, seized shipments, and harassed DHL's customers.

Meanwhile, in Germany, in September 1982, the German federal post office, the Bundespost, declared that courier services would be considered in violation of the postal monopoly unless couriers amended their advertisements to state that they would decline items tendered in violation of the postal monopoly law. In April 1983, the Bundespost relented slightly, agreeing that "the transport of information and messages will not fall within the reservation of transport [of the Bundespost] where the Post is not able to service their clients." At the same time, the Bundespost stated firmly that it anticipated that express mail service would soon attain a quality sufficient to permit re-application of the monopoly to international services.

Prior to 1983, the only express company on the continent to offer systematic resistance to the postal monopoly was DHL. Other couriers lacked the resources and political sophistication needed to oppose the government. At a time when the word "lobbying" was unused in respectable legal circles in Europe, challenging government policy was regarded as unthinkable. Leading public relations firms declined to work on a policy campaign inimical to the interests of the post office. Industry trade associations, where they existed, were dominated by local messenger companies who resisted even the preparation of economic studies that would make the case for greater competition in the delivery services sector. Necessarily, DHL modified its approach to policy advocacy to suit circumstances on the continent. Policy presentations by DHL officers were replaced with policy studies by independent experts. Legal analysis took second place to market surveys and economic exposition. The first task was to explain the international courier industry and its economic role in locally credible terms.

The first, and ultimately most important, market survey in Europe was completed in France in June 1982. DHL retained a semi-official research institute, Bureau d'Informations et de Prévisions Économiques (BIPE), jointly funded by industry and the French government, to explain the role of international couriers in the national economy. BIPE's researchers, however, were unaccustomed to analyzing an industry, like the international courier industry, that hardly existed. Few customers of couriers appreciated fully the

role that courier services played in their activities. Conceptualization of this role became a collaborative effort by BIPE researchers, DHL's creative French lawyers, and DHL's officers.

The BIPE report, *Impact des Services en Courrier International Sur L'activité des Entreprises Françaises*, described in detail the flow of time-sensitive documents in eight major, export-oriented industries—aircraft manufacture, maritime transportation, agriculture, engineering, data processing, electrical equipment, petroleum, and banking—and explained how delays and uncertainties in document transmission would lead to inefficiency. The BIPE study made clear that export-oriented companies in France were heavily dependent on international courier services, especially for service to developing countries, and that the activities of such companies would be hurt substantially if international courier services were confined to the Paris area.

> As the economic environment has changed, an extremely diversified demand has arisen for new international communications services, in particular as regards the movement of time-sensitive documents.
>
> Industries whose activities are export or import oriented are the major initiators of such requirements. They believe that the conduct of their activities depends to a significant degree on the existence of satisfactory courier services. . . .
>
> It is the smallest of enterprises, and hence those with the least infrastructure abroad, which would be affected the most by changes of any kind. The requirements of French enterprises for express international document delivery services as an outgrowth of their activities abroad are becoming more stringent in the following respects:
>
> - *Shorter and shorter transit times* are needed to facilitate business negotiations, improve financial management, and facilitate project coordination efforts (within the enterprise itself and with other enterprises);
> - *Increased reliability* is needed to improve overall efficiency;
> - *Greater flexibility* is needed to enhance a company's capability to adapt rapidly;
> - *Broader range of services* (office to office service, wide range of possible destinations) is needed to improve the productivity of a company's internal document delivery unit.
>
> The proportion of companies located in the provinces which have such needs is considerable. France outside the greater Paris area generates seventy-five percent of the country's exports in terms of value. On average these provincial enterprises are smaller than the Parisian enterprises that are oriented towards international trade.[3]

The BIPE study was followed by similar economic surveys including Coopers & Lybrand, *International Air Couriers and Their Role in the Irish Economy* (Ireland, 1984); Intermarket, *Air Courier Services: Attitude and Use* (West Germany, 1984); and Makno, *Indagine sui Servizi Offerti dai Corrieri*

[3]Page 5. Informal translation from original French.

Aerei Internazionali (Italy, 1988).

While making the economic case for courier services, DHL also prepared against the day when it might face the postal monopoly in court. This, too, was largely uncharted territory. There existed no critical analysis of the postal monopoly laws of France or Germany except for official exegesis by lawyers and professors retained by the post office. In France, DHL's lawyers reviewed postal statutes and judicial decisions going back to the thirteenth century (in Germany, it was sufficient to review a century of legal precedents). Armed with such research, DHL was able to deal with postal lawyers on equal terms and to persuade them of the risks of confrontation in court.

DHL likewise sought to adapt its message to the political dialog of each country rather than presenting the "courier issue" as a new policy problem. For example, in France, in view of La Poste's decision to ban couriers in the provinces while allowing them access to Paris, the courier issue was accessible as an element in the national debate over decentralization of power to the provinces. The provinces of France (all regions other than Paris) had long demanded a greater share in the political and commercial life of the nation. The powerful mayor of Marseilles, a member of the national cabinet, was more than willing to defend the proposition that provincial cities should have the same access as Paris to international courier service. In Germany, on the other hand, the courier issue was presented as an example of deregulatory reforms under consideration in many areas of the economy. Public confrontation with the postal administration was avoided as much as possible. As a small, relatively unknown foreign company, DHL saw no chance in winning a public debate against a national institution like the post office and hoped that postal officials would be more likely to compromise in the end if inflexible public positions were avoided.

EUROPEAN COMMISSION INQUIRY, 1983

On June 13, 1983, the European Commission changed the terms of postal monopoly debate drastically. Commission officials asked individual courier companies "to explain the problems and difficulties your company faces in forwarding shipments between the Member States of the Common Market" and to provide copies of all relevant documents and studies.[4] Although DHL was aware that national postal monopoly laws were theoretically amenable to attack under Community law,[5] it had avoided engaging the Commission for

[4]Letter from J.E. Ferry, Director, DG IV-B, European Commission, to individual courier companies in Brussels, dated June 13, 1983.

[5]In December 1982, the Commission had applied the competition rules of the Treaty of Rome to certain telex activities of the British Post Office, implying for the first time that postal efforts to suppress competition were subject to European competition law. The Commission's decision was appealed to the European Court of Justice by conservative Member States led by Italy. The European Court of Justice did not affirm the Commission's application of the competition rules to post offices until March 20, 1985. *Italy v Commission*, Case 41/83, [1985] ECR 813.

fear that Commission involvement would unite the politically powerful postal administrations in opposition to couriers. The Commission's inquiry rendered such caution moot. The courier industry was forced to adopt a more collective and public approach towards European postal monopolies.

In August 1983, the major international couriers met in Geneva at the invitation of DHL and formed the International Courier Conference, later renamed the International Express Carriers Conference. After August 1983, defense of the international courier industry against the postal monopolies of European was supervised by the Conference.

Chapter 11 reproduces the first formal submission of the International Courier Conference, a September 1983 response to the postal monopoly inquiry of the European Commission. This document describes the postal monopoly law in each of the twelve (at that time) Member States of the European Community and the experiences of the courier industry in each Member State. The candid approach and detail in this document set the tone for a fruitful relationship between competition authorities and the international express industry that lasted for more than a decade and proved crucial to the survival of the industry.

GERMAN SOLUTION, 1984

Fighting the European postal monopolies on many fronts, the International Courier Conference decided in September 1984 to focus its attention on the German government. Among major European Member States which had not accepted international couriers, Germany appeared the one most likely to respond to policy factors favoring reform. At the same time, the Conference resisted a French compromise proposal to recognize international couriers on condition that they limit services to selected international gateways where shipments to interior points would be turned over to La Poste.[6]

As part of redoubled efforts in Germany, DHL commissioned a new study on economic policy and international courier services. Its author was Professor Erich Kaufer of Innsbruck University, one of a group of economists who were been impressed with the success of U.S. deregulatory policies and spurring Germany to adopt more procompetitive economic policies. From his review of the international courier industry, Professor Kaufer concluded that stifling international courier services would deprive the German economy of the fruits of a discovery process towards which government could not afford to turn a blind eye:

> Essential elements of today's world trade structure have developed largely unnoticed by international trade theory or policy. Thus, for instance, international trade even during the mid 1960s did not expect that the largest share of foreign trade among industrialised countries would eventually lead

[6]In fact, top management of DHL came within a whisker of accepting this solution in late fall 1984.

> to intraindustry interlocking of national economies—a phenomenon which has arisen through competition, without anybody's having foreseen such a result. Intraindustry division of labour has been discovered by competition; it was never consciously aimed at.
>
> Demand for new and diverse types of communication in world trade is an immediate result of the change in world trade from an interindustry to an intraindustry division of labour. Just as this change in world trade patterns was not, and could not have been, foreseen, so nobody could have, nor can now, foresee in detail which channels and systems of communication will be required and how they should be organized. Although it is possible to predict general patterns, what the individual patterns will actually look like, can only be discovered by competition.
>
> A study of the competition in the international courier market demonstrates that this market is extraordinarily innovative, flexible and efficient in terms of its price/cost ratio. It is typified by dynamic competition which continuously discovers new types of services and service improvements.
>
> Across the whole of the communications market, different systems with individually differently organised competition structures compete against each other. Thus, for instance, traditional letter mail may be organised as a national monopoly either including or excluding the telephone network. As a process of discovering efficient communications systems, free competition is vital between those communications systems already organised in one way or another, and those lines of communication which are newly developing.[7]

Professor's Kaufer study helped explain the role of international courier service in terms suited to the German economic policy debate prevailing in the early 1980s.

In late 1984, an opportunity to precipitate a German policy decision appeared almost by chance. It transpired that the Bundespost was offering "on demand" express mail service without proper authority. This omission was a legal technicality since the Bundespost had obtained appropriate authority to provide "contract" express mail service. Nonetheless, to extend its contract express service to non-contract customers, the Bundespost was obliged to obtain new authority from the Postal Council, a quasi-legislative body comprised of members of several ministries, the parliament, and representatives from business and labor. The legal significance of this authorization was derived from the Bundespost's position on the relationship between postal monopoly law and private courier operations. The Bundespost insisted that its monopoly precluded courier service *in cases where the post office's express mail service was adequate*. Hence, before the Postal Council

[7] "The Importance of International Courier Services in International Trade with Particular Regard to the Trade Position of Germany and the Potential for Competition by the German Bundespost." English translation from original German prepared by Astrid Brune of Documenta, Ltd. and reviewed and approved by the author.

approved new operating authority, it should logically consider policy issues raised by the implied extension of the postal monopoly. By bringing this point to the attention of members of the Postal Council who supported courier services, in particular the Ministry of Economics, the Conference placed the Postal Council in a position to review the applicability of the postal monopoly to courier services.

There were two possible outcomes of Postal Council review, neither unfavorable to the couriers. The Postal Council might decline to review the monopoly implications and authorize extension of express mail service; in such case, couriers would in fact be no worse off than previously. Alternatively, the Postal Council could consider the postal monopoly issues and require the German post office to accept courier competition before granting the application, a highly desirable solution. There appeared no likelihood that the Postal Council could or would use a decision authorizing a new postal service to hinder existing courier operations. To reinforce its position, the Conference alerted the European Commission to the significance of this proceeding. The Commission, in turn, telexed the Postal Council and urged it to take into consideration the competitive implications of its decision.

The Postal Council decided to suspend approval of the requested ordinance until a mutually satisfactory solution to competition issues could be worked out in a committee composed of representatives of the Bundespost, the Ministry of Economics, and the European Commission. When compelled to address the economic and competition issues, the Bundespost accepted the weight of the arguments and recognized the right of the couriers to operate between Member States in light of the Treaty of Rome.

The German solution was embodied in an exchange of letters between the Bundespost and the Conference's German counsel, Dr. Ralf Wojtek. Dr. Wojtek counsel wrote the Bundespost as follows:

> The participants of the meeting were in agreement that the activities of international courier firms do not include letter service within the framework of the normal mass mail of the post but rather are specialized on particularly fast and reliable transmission from door to door. Contrary to traditional mass mail, courier shipments are transmitted within one organization across national boundaries and are subject to the control of this organization which may be one enterprise or a combination of several enterprises working together on the basis of management agreements. Uniform administrative control over the courier shipments exists from the beginning to the end of the transmission and allows the courier firm to direct and redirect any shipment as necessary. Control over the shipment is further ensured by accompanying personnel as well as by documentation over every single shipment, comparable to an airwaybill; uniform control over the shipment is also necessary for reasons of contract law liability.
>
> It is our common understanding that couriers engaged in the international transportation of shipments—regardless of the contents of such shipments—are not subject to the postal monopoly under Article 2 of the Postal Law.

> We are further in agreement that Datapost and the international courier firms are competing with each other and that free market competition is desirable from the viewpoint and the needs of the business world and other consumers.[8]

An official of the Bundespost confirmed agreement by return letter as follows:

> On the whole I am able to confirm the outcome of the discussions of 27th November as recorded in your letter. In doing so, I am assuming that the term "management contracts" which you have selected for the first time—in connection with the cooperation of courier services—is identical with the term "correspondence contracts" used in the discussions.
>
> Nevertheless, I think it appropriate to point out once again that the agreement only applies to cross-border transportation. Similarly, . . . the German Bundespost must always insist on its reservation of transportation rights whenever the prerequisites of genuine courier services, within the meaning of the delimitation criteria which we worked out jointly, do not exist—individual transportation of consignments from door-to-door by couriers who constantly accompany the individually recorded consignments and who are authorized to make their own arrangements regarding routes and means of transportation, if need be.[9]

Recognition of the legitimacy of international courier operations in Germany was major breakthrough for private express companies. The 1984 exchange of letters formed the legal framework for international courier operations in Germany until 1994. German recognition that European competition law trumped national postal monopoly law set the stage for negotiations between the French government and the Commission.

FRENCH SOLUTION, 1985

Discussions between France and the European Commission over the relationship between the French postal monopoly and international courier services began in earnest in May 1985. To solidify its economic argument, the International Courier Conference commissioned a leading French polling firm, Sofres, to conduct a survey of French international businessmen on their need for courier services. The Conference also commissioned BIPE to prepare a second study, a comparison of courier and postal express services.[10] Further, the Conference encouraged formation of a French Association of Users of International Couriers (AFUCI), led by the president of the French Exporters' Association.

Chapter 12 reproduces a legal memorandum by the Conference describing efforts of the French post office to suppress international couriers and setting

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[8]Letter from R. Wojtek to R. Wohlfart, Deputy Secretary, Federal Ministry of Posts and Telecommunications, November 30, 1984

[9]Letter from R. Wohlfart to R. Wojtek, December 18, 1984.

[10]BIPE, *Comparison des services offerts par Postadex international et par les coursiers internationaux* (1985); Sofres, *Postadex et les sociétés de coursiers internationaux* (1985).

out the case that such efforts were inconsistent with the competition provisions of European law. This paper was styled an "informal" presentation, reflecting the determination of the Conference to participate as an advisor to Commission staff rather than as an open adversary of powerful European institutions such as the French postal administration.

Negotiations dragged on through the summer while prospects for a mutually acceptable solution shifted rapidly from dim to bright and back to dim. On June 2, 1985, the French post office seized courier shipments at the airport in Paris, a bad omen. In September, the post office struck a still more defiant note by demanding an increase in the level of payments due under questionable "agreements" that couriers had been coerced into signing under threat of the postal monopoly. In response, the Conference, acting through the French courier association, provoked a public confrontation. Armed with highly favorable results from the Sofres and BIPE studies, on October 22, the couriers and the French Association of Users of International Couriers held a large rally over lunch at a major Parisian hotel. Representatives of over 400 users attended. At this meeting, the couriers announced that they would refuse to sign the revised postal agreements and would place further payments under existing agreements into escrow.

On November 14, apparently fighting intense pressure from postal unions, French Deputy Minister Mexandeau personally penned a brief and rather vague note to the Commission accepting the right of couriers to provide cross border express services. At the same time, La Poste announced formation of its own courier subsidiary, Société Française de Messagerie Internationale (SFMI). The French position was clarified in a meeting between Commission and French officials on December 12, 1985 in which French representatives agreed to the following six points:

> 1. As of November 13, 1985 said [international courier] activities will no longer be subject to the contractual authorization which was formerly granted by the PTT.
>
> 2. The royalty which was payable under said authorization is eliminated.
>
> 3. The international couriers are now free to carry out their activities in French territory, and they have the option of sub-contracting the forwarding of international dispatches, over part or all of said territory, to other companies.
>
> The constant surveillance of the dispatches does not imply that such dispatches must be accompanied for the entire duration of the journey. Such surveillance may be carried out by means of a shipment notice which permits identification of the dispatch at all times.
>
> The same applies to the guarantee with regard to the object and its delivery, which guarantee may be replaced or furnished by means of insurance.
>
> 4. The Société de Messagerie Internationale" created by the PTT shall be subject to the same operating conditions as the private couriers.
>
> 5. The description given hereinabove by the French authorities with

> respect to the operating conditions for international courier activities is not to be interpreted as constituting the conditions which must be fulfilled in order to carry out to the activity of an international courier.
>
> 6. The French authorities do not intend to take administrative, legal or other measures to regulate the activities of international couriers.[11]

Despite this concession to the Commission, the courier issue was of such political sensitivity in France that the government refused to acknowledge its position publicly. Negotiations between the couriers, the European Commission, and La Poste continued until November 1986 when a public declaration of the operating rights of international couriers was embodied in an official letter from the European Commission to the French courier association.

The French solution improved upon the German solution in several respects. It specified that couriers were to receive the same legal treatment as the post office's own express mail service and that neither would be substantially regulated. The French solution also rejected a requirement that, in order to qualify as "couriers," private companies must forever provide the particular set of services offered at that time. Given the rapid evolution of the courier industry, such a constraint—possibly implied in the German solution—could have limited the growth of the industry.

OTHER EUROPEAN COUNTRIES

Favorable resolution of the postal monopoly issues in Germany and France laid the basis for acceptance of international courier services in Europe and established the intellectual framework for that acceptance. Nonetheless, throughout the 1980s, closely related public policy battles were fought in other Member States, including Denmark,[12] Ireland, Italy, the Netherlands,[13] and Spain,[14] over the right to provide cross border express services without prosecution, taxation, or other legal harassment under the postal monopoly.

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[11]Letter from M. Caspari, European Commission, to M. Luc de la Barre de Nanteuil, French Permanent Representative to European Community, dated Dec 18, 1985.

[12]On April 21, 1988, the public prosecutor filed suit against TNT Skypak, a member of the International Courier Conference, for conducting international courier and remail operations in Denmark in violation of Danish postal monopoly law. In October 1989, the Conference filed a complaint with the European Commission. The Danish prosecutor agreed to hold the case in abeyance before the Danish court pending Commission resolution of similar cases. Because of the remail aspects of this case, it was not settled until 1996 when the prosecutor withdrew the suit.

[13]Commission Decision of 20 December 1989, [1990] OJ L 10/47. The Commission condemned a Dutch postal regulation which extended the postal monopoly to certain services previously open to competition. The Commission also found that the Dutch law imposed stricter conditions on courier services than on the Dutch post office. The Commission considered that the regulation effected an unlawful discrimination and extended the postal monopoly to an adjacent but separate market. The European Court of Justice annulled the Decision on procedural grounds only. *Netherlands PTT v Commission*, Joined Cases C-48/66 and C-66/90, [1992] ECR I-565.

[14]Commission Decision of 1 August 1990, [1990] OJ L 233/19. The European Commission rejected Spanish regulations which stipulated that the Spanish post office alone was authorized to provide an international express service for items of mail weighing less than two kilograms.

In Ireland, the postal challenge to international courier operations was especially persistent and threatened to undo gains in France and Germany. On 14 June 1985, the solicitor for the Irish post office, An Post, ordered international couriers to cease operations in seven days. In an annual report on competition policy, the European Commission described its intervention in the Irish dispute as follows:

> The Commission also pressed ahead with its action on international courier services. In some Member States the postal authorities' mail-carrying monopoly was regarded as extending to courier services, even though private courier companies provided a standard of service, in terms of speed and reliability, which the postal authorities could not match.
>
> The company holding the postal monopoly in Ireland, An Post, still refused to allow international courier services to operate there, basing itself on section 73 of the Postal Act 1983. Its position was supported by the Government.
>
> The Commission is examining the situation in the light of the solution agreed in Germany.[15]

On February 20, 1987, the Irish government finally accepted the position of the Commission and the activities of international couriers.

In Italy, couriers challenged the right of the government to levy a postal monopoly tax on international courier operations for the benefit of the post office. Under a law dating from the 1920s, couriers were allowed to carry letters out of the mails if they applied stamps to the letters carried. In 1996, the Italian post office demanded that couriers agree to payment of a monthly fee in lieu of postage. Instead, in light of the German and French solutions, the couriers challenged the legality of the tax under European competition rules. On March 4, 1989, the Italian government modified its regulations and accepted the inapplicability of the stamp tax to international courier operations.

Victory over the postal tax in Italy effectively completed the effort to win acceptance of the legal right to provide international courier operations in Europe.

[15] *16th Report on Competition Policy (1986)*, paragraph 298.

11

ICC Report on European Postal Monopolies (1983)

I. Introduction

This statement responds to a letter of inquiry from Mr. J.E. Ferry, Director, Directorate IV B (Restrictive Practices and Abuse of Dominant Position), to various courier companies in mid-June 1983. These letters are reproduced in section I of a separately bound Appendix to this statement (hereafter referred to in the form, "Appendix I").

Mr. Ferry requested information on the problems and difficulties which the couriers have faced in forwarding documents between member states of the European Community. Mr. Ferry's inquiry was prompted by a question from Mr. James Moorhouse, Member of the European Parliament (written question number 419/83). On 11 August 1983, Commissioner Andriessen provided a brief response to Mr. Moorhouse which, as we understand it, leaves the door open to further action by the Commission on the issues raised.

The "International Courier Conference" is, as yet, an informal and temporary working committee composed of seven of the world's major courier companies: DHL International, Gelco Courier Services, IML Air Couriers, Purolator Courier Corporation, Securicor Air Couriers, TNT/Skypak International, and World Courier. These seven couriers include the major international couriers operating on an intercontinental scale. The Conference was formed by verbal agreement among the companies in meetings of August 25 and 26 in Geneva, Switzerland. The rules of the conference are in the process of being drafted. When adopted, the conference will, of course, be opened to all other courier companies that may qualify for membership under

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International Courier Conference, "Statement of the International Courier Conference" (Sep 15, 1983) (submitted to the European Commission Directorate-General IV, Directorate B). Separate Appendices are omitted.

objective rules of membership.

The International Courier Conference was formed in an effort to devise an industry-wide forum for responding to certain transnational legal and political issues facing the courier industry. The first priority of the Conference is to serve as an appropriate partner to work with the Commission on rules applicable to the couriers operating within Europe.

The members of the Conference apologize for the delay in responding to Mr. Ferry's letter. Prior to the formation of the Conference, there existed no means of providing a suitable, coherent industry response. Except for national courier associations of limited jurisdiction, there existed no trade association of the courier industry.

We in the courier industry sincerely look forward to cooperating fully with the Commission in developing legal standards that will advance the economic and social well-being of Europe.

We propose to respond to Mr. Ferry's letter by first reviewing briefly the international context of the issues raised: the role of couriers in the international economy, the structural differences between the international courier service and international postal service, the origin and nature of the postal monopoly laws and their effects on international courier services. We then address, for each country in the Europe Community and Switzerland, the formal and informal scope of the postal monopoly problems, the pertinent legal or economic studies dealing with the postal monopoly, and the history of the couriers' dealings with the post office. This statement is supplemented by a bound Appendix which contains copies of all legal documents, legal and economic studies, and legislative materials referred to in this statement. In preparing this statement, our goal has been to prepare a complete and responsive document that will serve as a useful reference for the Commission and its staff.

II. THE INTERNATIONAL COURIER SYSTEM

A. ECONOMIC ROLE OF INTERNATIONAL COURIERS

In the last fifteen years, international couriers have developed into an important element of the international infrastructure which facilitates modern international commerce. Couriers developed to fill a need for the rapid and reliable delivery of time-sensitive business documents.

Today many business documents must be delivered within very short periods of time if they are to serve their purpose. In providing the delivery service required by such documents, international couriers assist in the daily tasks of a wide range of international industries. Financial institutions use couriers to transport cheques and other monetary instruments; a delay in the delivery of a banking document could result in hundreds of thousands of dollars of lost interest per day. Transportation companies forward bills of lading and other shipping documents by courier to effect customs clearance

before arrival of the cargo, thereby saving thousands of dollars in unloading delays. Engineering and construction firms manage projects in remote corners of the world by using couriers to exchange drawings, bids, and project reports between home offices and field offices. Virtually all multinational organizations depend on international couriers to maintain the flow of vital information that allows managers to direct and coordinate widely separated activities.

A primary reason that international businessmen use couriers is speed of delivery. Time is money. Other attributes of courier services are also very important. Couriers are more regular in their delivery schedules than other modes of transmission. The coordination of different tasks often means that regularity is as important as speed. Further, couriers provide special services which are frequently vital to international business: rapid tracing of missent documents, automatic proof of delivery receipts, recall or rerouting of documents up to the moment of delivery, pick up of documents in foreign locations, hand carriage of extremely sensitive documents, pick up and delivery outside of normal business hours, and so on. Although any given customer uses such specialized services infrequently, the constant availability of these services is important for the functioning of international business generally.

In the world economic system, international couriers have become a standard and almost universally accepted means of transmitting time-sensitive business and governmental documents. All major banks, engineering companies, trading companies, shipping lines, manufacturers serving international markets, tourist agencies, and governments send or receive urgent documents by these means. The international courier system serves virtually all non-communist countries in the world. Clearly, the growing demand of businessmen and governmental officials for international couriers is the best possible evidence of the value of couriers to international commerce.

So far as we are aware, there is little scholastic study of the role of couriers in the international commerce. The best single study is probably *Impact des Services en Courrier International sur L'Activité des Entreprises Françaises* by Bureau d'Informations et de Prévisions Economiques (Paris, 1982). A separately bound copy of this report is included with this statement. Also of note is a detailed survey in the *Financial Times*, March 23, 1983, pages 13-18.

B. STRUCTURAL DIFFERENCES BETWEEN THE INTERNATIONAL COURIERS AND THE INTERNATIONAL POSTAL SYSTEM

International couriers have developed an important role in international commerce for the simple reason that other organizations are structurally less well suited to the specialized services required by time-sensitive documents. International couriers are *not* performing traditional postal services. They did *not* arise because of the failure of the national post offices to perform their jobs well. A comparison of the operations of international postal services and

international courier services reveals fundamental differences.

The most basic fact of life of a national post office is that its administrative control is limited to its own national territory. No matter how excellent a national post office is, it cannot assure excellent service from a postal administration in another country. This is not a critical limitation for the vast bulk of letters and documents. For such items, the important issue is whether they are delivered to the proper address at a reasonable cost. With respect to time-sensitive international documents, however, this limitation of administrative control becomes extremely important. If a time-sensitive document—a cheque, bill of lading, or blueprint—is not delivered on time, its commercial value is substantially reduced.

The only way to guarantee the timely delivery of time-sensitive documents on a continuing basis is to have total administrative control from the point of pick up to the point of delivery. Direct administrative control over every portion of the route from shipper to addressee maximizes the speed, reliability, and security of transmission. Such direct administrative control ensures that all persons who handle the documents operate according to precisely the same procedures and standards. As a matter of commercial practice, it is also very important the shipper knows that the local organization that picked up his document will be immediately answerable if a problem in transmission occurs anywhere in the world.

No national post office can provide on a regular basis the service required by international time-sensitive documents. No national post office can physically deliver the documents in the territories of foreign post offices. Nor can a national post office maintain offices in third countries which might serve as logical intermediate transhipment points. The lack of total administrative control across national boundaries thus serves as a structural impediment to the post office's ability to maintain the flexibility and uniform quality of service that is required for international time-sensitive documents.

Postal operations and international courier operations differ in other basic respects besides the scope of physical control. Post offices are generally bound to the schedules of their national airlines. In international operations, national airlines usually depart in the morning and return in the evening. This pattern of operations minimizes costs and best serves the airline's customers. In contrast, however, time-sensitive documents—and couriers—require the reverse pattern of operations. Urgent business documents should be picked up as late as possible in the evening, leave on the last flight, and be delivered at their destination as early as possible in the morning.

The working relationships between a national post office and other organizations differs from that of a courier. Post offices sign long term contracts with airlines and other carriers in order to minimize costs. Couriers must be able to change airlines at a moment's notice depending on last minute variations in schedules. Whereas post offices must respect the channels of communication necessary for two post offices to work together, couriers trace

documents instantly without regard to formalities.

On the whole, post offices are well structured to handle vast quantities of documents at minimal cost. Couriers are well structured to provide the quickest possible service without regard to the quantity of documents carried.

The differences between couriers and post offices are somewhat similar to the differences between post offices and security services. Security companies provide a very specialized transportation service for high-value documents such as bank notes, securities, letters of credit, and so on. Virtually anything that is carried by an armored car company could also be posted. The difference between security companies and post offices lies not so much in what is carried, but in the fact that security companies provide an extremely high-quality, specialized service that is inappropriate for mail generally. Similarly, couriers provide a very specialized service for other sorts of high value documents. Indeed, as a matter of historical fact, the first international couriers developed as subsidiaries of security companies and not from postal-type services.

From these simple observations it may be seen that international couriers did not arise due to failings in the postal system. They arose to fulfill certain specialized needs that national post offices are structurally inappropriate to meet. In short, couriers are performing a different business from the traditional postal services.

The correctness of these observations has been demonstrated by the events of the last few years. Several national post offices have set up "express mail" (or "datapost") services. Of necessity, they have been organized as completely separate activities within the post offices. Since there is very little overlap between "express mail" and ordinary postal services, the commercial reality is that the post offices have undertaken a new line of business.

This is an important point. The International Courier Conference does not object to the post offices entering new lines of business, such as courier services, security services, or electronic "mail." The Conference would, however, object to a post office's attempt to use an ancient legal monopoly over traditional postal services to fortify an administrative takeover of what is fundamentally a new and different business pioneered by the couriers themselves. If the post office believes that the public interest is served by extending its monopoly to include courier services, then the post office should present its case to the national legislature where the views of all can be heard.

III. NATIONAL MONOPOLY POSTAL LAWS

A. ORIGIN OF THE NATIONAL POSTAL MONOPOLIES

In order to understand and appreciate the relationship between the postal monopoly laws, modern postal policies, and the international couriers, it is necessary to review very briefly the origins of certain basic postal concepts.

As the Middle Ages ended in Europe, the demand for the carriage of

private correspondence was spurred by increased trade and the expanding educational facilities. In most countries, private correspondence was slight and primarily involved business communications. These commercial documents were carried by private couriers and, in some cases, by university couriers. In Italy and Germany, private courier companies grew quite large. State documents were at first carried by royal couriers who did not carry private correspondence.

In the 13th century, the French crown allowed the University of Paris to establish a postal service. It was originally organized for the benefit of foreign students but later served non-university customers. The essence of a postal system then was a series of "post" or relay stations at regular intervals along the roads. At these stations horses were kept and post riders, and other travelers, could be lodged.

In 1464 Louis XI began efforts to restrict the rights of the University messengers and to take charge of the post stations. Although Louis XI intended to reserve the system of posts for the state, within twenty years at least some private correspondence was being carried as well. All private documents were opened and read to restrict the dissemination of unauthorized ideas. In steps the postal system gradually became a more regular service open to the public. Not until the 17th century did it appear that the French postal service might be a source of net revenue. The state's insistence on a monopoly increased correspondingly until Louis XIV, the Sun King, issued a decree on 18 June 1681, which shaped the postal monopoly into essentially its current form.

In England, in 1482, Edward IV established the first series of post stations on certain roads for the purpose of transmitting state correspondence. In 1591, Elizabeth I prohibited any but the royal messengers to carry international letters. The 1591 proclamation was not merely an assertion of a crown monopoly over the business of carrying letters, it was the assertion of a monopoly over the right to communicate. A state monopoly over internal correspondence was established by James I and Charles I in the first half of the 17th century. The English crown did not enjoy any revenues from this early post. The purpose of the monopoly was to permit the state to monitor private correspondence. The English postal monopoly assumed its current form with a parliamentary act of 1660, which confirmed the right of the crown to carry all correspondence, to censor the correspondence, and to keep the revenues from the business.

In this manner, the idea of a governmental monopoly over the transmission of private correspondence was evolved in the 15th and 16th centuries in France and England and assumed more or less its current form in those countries during the 17th century. The original purpose was, in the words of a recent publication by the French Post Office, to "control the circulation of ideas." Indeed, in the case of international communications, the purpose was not only to control but to prohibit private correspondence. By the late 17th century, the growth of commerce had led to an increase in postal revenues and,

it seems clear, the original idea of a postal monopoly was buttressed by the state's need for money. In other words, the postal monopoly was also thought of a form of tax. Because England and France were two of the earliest nation-states and extended their political influence far and wide in the 18th and 19th centuries, the English and French postal monopoly laws are the original source for many of the modern postal monopoly laws throughout the world.

Although the concepts of the postal monopoly laws derive from 17th century, the essentials of the modern, universally available post office derive from the middle of the 19th century. In the 1840's, spurred by the studies of Rowland Hill, England rethought the idea of a post office. Hill discovered that transportation costs were a small fraction of postal costs and that therefore it would be more profitable to institute a uniform charge for all internal letters. The English Post Office did so. Following Hill's advice, the Post Office also introduced prepayment of letters by means of adhesive "stamps" and drastically reduced postage rates. In the first year after these changes were introduced, the number of letters carried by the English Post Office doubled. Instead of a source of revenue, the postal system came to be thought of as a public service available to all.

The English reforms were closely followed and soon adopted by other nations. Switzerland and Brazil, for example, introduced the necessary legislation in 1843; France, in 1848.

B. CURRENT JUSTIFICATION FOR THE POSTAL MONOPOLY

Today few would argue that the postal monopoly laws can be justified by their original purposes. Nations no longer claim the right to prohibit or censor private correspondence except in the most extreme circumstances. Nor, since the mid-19th century, do nations operate postal systems to make money.

The current justification for the postal monopoly was recently well stated by the French Post Office in an article in the official magazine of the Universal Postal Union (*Union Postale*, September/October 1981) as follows:

> In former times a means of exercising control over private correspondence and a source of fiscal revenue, the postal monopoly today has an economic basis; it is justified by the obligations and constraints inherent in the nature of the public service provided by the PTT administration.
>
> The costs of the services provided by the Post are extremely variable. In order to that the price of the postal service can be kept at a reasonable level for all users, it is necessary that, through equalization of tariffs, the expenditure of large-deficit traffic such as that in rural areas should be offset by revenue from profitable traffic.
>
> If this equilibrium was not protected by the monopoly, transport firms would be tempted to organize regular services over heavy-traffic routes, particularly between large cities and between establishments exchanging big quantities of mail. There would be thus a "creaming-off" of traffic, leading to a deterioration in the financial situation of the Post. Resulting tariff increases would bring about further losses of traffic, and the postal service

would be reduced to conveying only the least profitable fraction of the mail at a prohibitive price. Those penalized would be mainly small-scale users and the people living in rural areas.

The postal monopoly thus meets the need of provide everyone with a high quality service at the lowest cost to the community.

C. SCOPE OF TRADITIONAL POSTAL MONOPOLIES

Following the lead of England and France, most governments have reserved for their post offices a legal monopoly over the regular carriage of "letters." Whether or not these national postal monopolies could be interpreted to prohibit international courier services is a very difficult legal question. There are several sources of difficulty.

As discussed below, since 1874 the international postal treaty, the "Universal Postal Convention," has distinguished between "letters" and "commercial papers" (now included in the more general category, "small packets"). Undoubtedly, then, under most postal laws, couriers may carry some documents, that is, "commercial papers." But whether or not a particular document is a "commercial paper" or a "letter" is very often unclear.

A second problem arises in that most postal codes allow a private person to perform special messenger services of some type. Some laws exempt "special messengers" such as messengers on motor bikes. Others allow the employees of businesses to carry "in-house" documents. Under these exceptions, many documents are carried privately in domestic commerce. Whether these exceptions should be applied to international couriers is often unclear. What is clear, however, is that as a matter of economic reality, international couriers perform much the same function in international commerce as special messengers do in domestic commerce.

A third source of difficulties is the antiquity of the monopoly statutes. Their basic concepts date from long before the development of modern international commerce, and it is obvious that the law was written without any thought to international couriers. While it is usual to adapt old laws to new situations, it is also customary to interpret commercial monopolies narrowly, extending them to fundamentally new situations only by legislative act.

Finally, if one looks to normal commercial practice as an aid to interpreting the laws, one will find that today private international couriers provide rapid and reliable delivery of time-sensitive commercial documents in virtually all non-communist countries. In almost all countries, neither the couriers nor their customers pay an licence fee, special tax, or postage.

D. MODERNIZATION OF POSTAL MONOPOLY LAWS BY CERTAIN COUNTRIES

In the last few years, three countries—United States, Canada, and the United Kingdom—have reexamined their postal monopoly laws to resolve these legal uncertainties and adapt their laws to modern commerce. In each, a reexamination has occurred on a government-wide level. And, in each, it was

been decided that the economic self-interest of the country required a clear delineation between traditional postal services, over which the monopoly is maintained, and new extremely urgent services over which a monopoly is inappropriate. In short, these countries have concluded that the courier business is distinctly different from the postal business.

In the United States, in 1979, under pressure from Congress, the United States Postal Service authorized private courier companies to transport all time-sensitive documents. A time-sensitive letter was defined as a letter whose contents lose value if the letter is not delivered within twelve hours or by noon of the next day. In the alternative, an urgent letter is defined as one for which the carrier charges the sender a fee equal to at least twice the rate for domestic postage (section 320.6 of Title 39, Code of Federal Regulations). A complete set of the administrative and legislative reports and debates which led to this regulation is provided in Appendix III.D.1.

In Canada, the Canada Post Corporation Act of April 23, 1981 altered the postal monopoly by explicitly authorizing private transportation of time-sensitive letters and documents. The definition of a time-sensitive letter is "letters transmitted by messenger for a fee equal to at least three times the postage due for distribution in Canada of 50-gram letters with comparable destinations." A 50-gram letter consists of about six sheets of paper. A complete set of the administrative and legislative reports and debates which led to the Canadian law is provided in Appendix III.D.2.

In the United Kingdom, at the request of the Government, Parliament passed the British Telecommunications Act 1981 on 27 July 1981. This law reorganized both the telecommunications and postal activities of the British government. Section 69 of this Act authorized the Secretary of State for the Department of Industry to "suspend the exclusive privilege conferred on the Post Office . . . for such period and to such extent as may be specified in the order." On 15 October 1981, the Secretary of State issued the Postal Privilege (Suspension) Order 1981. The order took effect on 7 November 1981. It states "The postal privilege is hereby suspended until the end of the year 2006 in relation to the conveyance of a letter which is conveyed in consideration of payment of not less than £1 made by or on behalf of the person for whom it is conveyed." A complete set of the administrative and legislative reports and debates which led to the British statutory instrument is provided in Appendix III.D.3.

E. EFFECT OF EXEMPTIONS FOR URGENT DOCUMENTS ON POSTAL REVENUES

In the United States and the United Kingdom, the legislatures have recently investigated the effects of the new exemptions for time-sensitive documents upon the revenues of the national post office.

In the United States, in June 1982, the Joint Economic Committee of the U.S. Congress asked the U.S. Postal Service to identify any losses attributable

to the exemption for time-sensitive letters. The Postal Service responded as follows:

> It is impossible to provide any estimate of the effect upon mail volumes and postal revenues of the suspension for extremely urgent letters. . . . It is known that the volumes and revenues of First Class Mail and Express Mail service, including International Express Mail service, the classes of mail in which "extremely urgent" letters might be expected to be sent through the mail, have increased since November 1979, when the suspension went into effect. . . . Any estimate of Express Mail volume given the hypothetical situation of no suspension for "extremely urgent" letters would be highly conjectural.

In fact, Express Mail revenues for the U.S. Postal Service increased from $88.6 million in fiscal year 1978 to $113.6 million in fiscal year 1979 to $184.2 million in fiscal year 1980 to $269.7 in fiscal year 1981. International Express Mail revenues increased from $12.7 million in fiscal year 1980 to $18.9 million in fiscal year 1981.

In the United Kingdom, in April 1982, the Industry and Trade Committee of the House of Commons asked the Department of Industry, the ministerial department which includes the Post Office, to identify the effect of the new exemption for time-sensitive letters on the Post Office's Datapost service. The Department of Industry responded as follows:

> The BT [British Telecommunications] Act has had no detectable effect on Datapost traffic. Datapost traffic levels are influenced by a variety of factors. There is no evidence that long term growth prospects have diminished as a result of the recent legislation.

To date, then, the only objective evidence on the impact of couriers on postal revenues suggests that the couriers have no detectable adverse effect at all on postal revenues.

F. PRACTICAL PROBLEMS CREATED BY NATIONAL POSTAL MONOPOLIES

Broadly speaking, the problems created by national postal monopolies do *not* result from a simple application of the law. In most countries, the problems arise because, in fact, the legislature has not issued a judgement on the role of couriers. As noted above, the only law is an ancient law whose application to the current situation is very unclear. The uncertainties are compounded by the fact that the governmental department charged with enforcing the postal monopoly law finds itself torn between its desire to advance the public interest generally and a strong financial and political interest in interpreting the postal monopoly broadly.

To understand the actual problems and difficulties created by the postal monopoly law, one must appreciate the gradation of practical problems created for the couriers depending upon the attitude of the postal officials. Closure by criminal prosecution is an extreme measure that is rarely attempted because postal officials are themselves unsure of the meaning of the law. More

typically, couriers are required to do business in an atmosphere of great ambiguity. Customers are unsure whether to use couriers and so use couriers as little as possible. Couriers are afraid to advertise openly because of threats of postal prosecution. In this climate, a strong postal official can force a courier to pay arbitrary taxes or even close part of its business and the courier has very little power to object. At very least, in most countries, a courier must decline to carry even occasional personal letters regardless of how desperate the customer may be for a service the post office cannot provide. The courier must remember the ancient postal monopoly laws were written in terms of "letters" even if they could not have foreseen the differences between ordinary postal services and courier services.

G. UNIVERSAL POSTAL CONVENTION

Lastly, we turn to a brief discussion of the relationship between the international postal law and the national postal monopoly laws.

The Universal Postal Union (UPU) is an association of virtually all of the post offices of the world organized for the purpose of establishing common rules on the exchange of postal items. It was formed in 1874 and is now an agency of the United Nations. The Union meets in full session every five years to revise its Convention and Detailed Regulations.

The UPU Convention does not purport to impose a postal monopoly upon international document delivery. Article 24 of the Constitution states that "The provisions of the Acts of the Union do not derogate from the legislation of any member country in respect to anything which is not expressly provided for those Acts." No Act, such as the Convention or the Detailed Regulations, pertains to a postal monopoly. Therefore, each nation is free to apply or not apply any form of postal monopoly it deems appropriate. In fact, of course, the postal monopolies vary substantially from nation to nation.

In November 1982, the Consultative Committee on Postal Studies of the Universal Postal Union met in Berne, Switzerland, to review, among other things, the relationship between the postal monopoly and the private couriers. It has been reported that all except one or two countries opposed a proposal to involve the UPU in an effort to legislate an international postal monopoly. The working committee, however, did endorse a proposal to ask the full Union to "draw the attention of governments to the importance of maintaining the monopoly in some form." The full implications of this cryptic resolution will not be known until the committee's full report is issued, probably in early 1984.

Although UPU does not establish a postal monopoly, the legal doctrines of the UPU may be helpful in interpreting some national postal monopoly laws, especially in defining the term "letter." The Union uses the term "letter" to mean *current and personal correspondence*. This definition emerges from an analysis of several sections. Article 18 of the current Convention (adopted in Rio de Janeiro in 1979) divides "letter-post" items into five categories: letters,

postcards, printed papers, literature for the blind and small packets. The Detailed Regulations explain the differences between these categories of items. Article 126 defines "printed papers" as "reproductions on paper, cardboard or other materials commonly used in printing produced in several identical copies by means of a mechanical or photographic process, involving the use of a block, stencil or negative." Article 130 states that "small packets" may consist of anything including "documents" excepts those "having the character of current and personal correspondence." Obviously, then, "letters" refers to documents—as opposed to postcards or literature for the blind—which have the character of current and personal correspondences.

The distinction between "letters" and documents not "having the character of current and personal correspondence" is further illuminated by reference to UPU Conventions prior to 1964. Between 1874, the date of the first UPU treaty, and 1964, the term "letter" was used in distinction from the term "commercial papers." The 1957 Convention and Regulations of Execution (former name for "Detailed Regulations") were the last to use this traditional distinction. This historical perspective is important for two reasons. First, it illuminates the meaning of the term "current and personal correspondence" found in the present treaty. Second, it was the international legal framework at the time many of the current national postal laws were formulated.

The size and weight limits of "letters," established by Article 19 of the Convention, are also useful in interpreting the term "letter" and the appropriate scope of national postal monopolies. Article 19 indicates that worldwide postal authorities employ the term "letter" to refer to a document that weighs less than one kilogram. The weight limit for "small parcels" is two kilograms.

Copies of the relevant portions of the UPU treaties are provided in Appendix III.G.1.

IV. THE POSTAL SITUATION IN EACH COUNTRY OF THE EUROPEAN COMMUNITY AND SWITZERLAND

A. BELGIUM

1. Postal monopoly

The postal monopoly of Belgium is established by the Law of 26 December 1956, as amended by royal decrees dated 12 January 1970, and 19 November 1981. A copy of the full text of the Law relating to the Postal Service is provided in Appendix IV.A.1. Article 1 of the 1956 law states, in pertinent part (in English translation):

> Article 1. The post administration is charged with picking up, forwarding, and distributing within the extent of the Kingdom
>
> 1. closed or opened missive letters;
> 2. postcards;

> 3. advices, circulars, prospects, current files and notices of all kinds, if they have the consignees address.
>
> [The Post] has the monopoly of this service.

A definition of the crucial term "letter" is set out in a royal decree of 19 November 1981, amending the definition in article 5 of a 1970 decree. Article 3 of the 1981 decree defines "letters" as:

> 1. all correspondence of whatever nature, sent blank or enveloped, closed or not, and which has the character of current and personal communication or that which is similar;
>
> 2. all correspondence for which the consignor has marked his intention to see it being treated that way;
>
> 3. all correspondence in which the way of sealing prevents verifying the content without tearing or damaging the envelope or packing, except samples mentioned in article 24 §2 and correspondence which benefits from a closure authorisation, accorded by our Minister, who has it within his control;
>
> 4. all correspondence which does not refer to the conditions fixed by the present decree, for receiving a tax discount.

In January 1977 the Belgian Post Office brought an action against an international courier, World Courier, for alleged infringement of the postal monopoly. The court found in favour of Worldwide. The court accepted the argument that the courier was carrying "business papers," rather than "letters" and that business papers fell outside the scope of the monopoly. Further, the court emphasized that the monopoly did not extend to a service which, due to its high cost, did not compete with the services offered by the post office. The full opinion of the Court is provided in Appendix IV.A.2.

The overall postal monopoly policy of the Belgian Post Office may be found in a paper it presented to a working party of the Consultative Committee on Postal Services of the Universal Postal Union in November 1982. The title of the working party's study was "Means of combating competition from private undertakings in the conveyance of documents, etc."

The Belgian paper concentrated on the need of the postal service to improve its quality and reliability. The Post Office noted:

> It is pointless to persist in defending a postal monopoly which cannot preserve the letter post on its own, because if in the future the service provided no longer corresponded in any way to the customers' requirements, this monopoly would soon become inoperative.

A copy of this paper is included in Appendix IV.A.3.

In general, the practical effects of the postal monopoly in Belgium are to prevent the couriers from advertising freely or to restrict them from carrying urgent personal letters. The couriers do not experience active harassment from the post office.

2. Legal or economic studies

Apart from legal opinion prepared with respect to the aforementioned litigation, and ongoing legal advice, the International Courier Conference is unaware of any legal or economic studies of the postal monopoly in Belgium.

3. International couriers' dealings with the Belgian Post Office

The primary dealings between the Belgian Post Office and members of the International Courier Conference have taken place with DHL and World Courier.

DHL. Belgian lawyers, on behalf of DHL, have been in correspondence with the Belgian Minister of Post and Telecommunications in an attempt to clarify the Post Office's definition of the scope of its monopoly. In this respect, by letters dated 24 December 1982 and 18 January 1983 DHL has asked the minister to comment on whether "business papers" fall outside the scope of the monopoly. He was further asked to comment on the decision of the court in the World Courier case. On 21 January 1983 the minister replied by restating the law of the postal monopoly as stated above. On 25 January 1983 DHL asked the minister to comment upon the hypothetical applicability of the letter monopoly to certain business documents. In early February, the minister replied that in his opinion such documents would fall within the monopoly. Copies of these letters are included in Appendix IV.A.4.

World Courier. As explained above, World Courier successfully defended against a postal monopoly prosecution in 1978.

B. DENMARK

1. Postal monopoly

The postal monopoly of Denmark is established by §§ 5, 6, 7, and 8 of Law Number 318 of 10 June 1976. A copy of full text of Law Number 318 is provided in Appendix IV.B.1. An English translation of pertinent parts of §§ 5, 6, 7, and 8 follows:

> § 5. The postal authorities have the sole right to collect, carry and distribute the hereinbelow mentioned items of mail:
>
> 1. Closed letters and other closed mail which fulfils the conditions for conveyance by post, when such mail contains information in writing or printed information filled in in writing.
>
> 2. Cards with written information or printed information filled in in writing, apart from invoices, cover notes, bills of lading and similar accompanying documents concerning an item which may be lawfully sent without the assistance of the post office. . . .
>
> § 6. Despite the restrictions contained in section 5, above, any party shall be at liberty to send dispatches without the aid of the post offices, when such dispatch is made on his own behalf or for some other party who

is the employer of the party handling the dispatch in question.

Section 2. The same applies when the forwarding is undertaken on behalf of another party for whom he has occasionally undertaken specific forwarding. . . .

§ 7. No one shall be entitled to carry on a trading concern of collecting, carrying, or distributing addressed letter-post items [*brevforsendelser*].

§ 8. Mail and other communications may legally be sent outside the post office system when each separate item for dispatch is provided with valid stamps pursuant to the postal authorities' rates for such forwarding.

In light of the discussions described below, as a practical matter, the Danish postal monopoly has not presented any significant difficulties for international courier operations.

2. Legal or economic studies

Aside from short legal opinions prepared for individual companies, the International Courier Conference is unaware of any legal or economic studies of the postal monopoly in Denmark.

3. Dealings with the Danish Post Office

The members of the International Courier Conference have not had extensive dealings with the Danish Post Office. The discussions that have taken place may be summarized as follows.

DHL. On 17 October 1980, DHL received a letter from the Danish Post Office drawing DHL's attention to the Danish postal monopoly law and suggesting the DHL could continue to operate if the Post Office was protected against loss of appropriate revenue.

On 24 October 1980, DHL replied that it felt it was not violating the postal monopoly but would be willing to discuss the matter further. On 19 January 1981, DHL met with the Post Office to discuss the scope of the monopoly and the means of calculating a tax which the Post Office would accept as replacing lost revenue. As a result of this meeting, DHL conducted an internal survey of its shipments for the ten-day period 26 January to 6 February 1981 and, in a letter dated 12 March 1981, proposed two alternative methods for calculating a tax.

On 5 May 1982, the Post Office responded to the DHL's 12 March 1981 letter. It set out some disagreements with the calculations of DHL and noted the need for more data. On 16 September 1982, DHL replied to the Danish Post Office that it was prepared to meet the Post Office in the near future and enter into an agreement within the framework set out by the Post Office in May 1982. This letter also called the Danish Post Office's attention to the success of the British exemption for urgent documents.

On 25 March 1983, the Danish Post Office replied to DHL's letter of 16 September 1982. The Post Office did not accept DHL's offer to enter into an agreement. Instead, the Post Office stated, in part (as translated into English):

> [A]s it is difficult to determine the number of consignments which are actually affected by the monopoly, the Post Office will at the time being, take no steps in the matter towards you until further notice is given.
>
> However, in those cases in which it appears unmistakably from the exterior of the consignment that this is actual correspondence, you are requested to see to it that the consignment is stamped according to the tariffs of the Post Office.

To date DHL has complied with the requests of the Danish Post Office as set forth in this last letter.

Copies of all letters referred to above are included in Appendix IV.B.2.

C. FRANCE

1. Postal monopoly

The French postal monopoly is currently embodied in the Post and Telecommunications Code, established by the decree of March l2, l962. In pertinent part, in English translation, key provisions of the Code read:

> Article L.l. The transportation of letters, and of packets and papers not exceeding one kilogram in weight, is within the exclusive jurisdiction and competence of the Postal Administration.
>
> It is therefore forbidden for any private transporter or other person not dependant on or working under the auspices of the Postal Administration to carry our such transportation.
>
> Article L.2. The following are excluded from the monopoly:
>
> (l) Packages containing legal documents;
>
> (2) Papers relating exclusively to the personal business of a private transporter;
>
> (3) Newspapers, anthologies, public records, memoranda, newsletters, and all printed matter, of whatever weight, provided that they are sent in a removable wrapper or in an open envelope or unsealed parcel that permits easy inspection.

The French postal monopoly thus applies to "letters" and to "packets and papers not exceeding one kilogram in weight." A copy of the French postal laws is placed in Appendix IV.C.1.

In addition to the explicit statutory limits to the postal monopoly, the French courts have evolved an exception termed the "express" exception. Philosophically, the express exception may be conceptualized in either of two approaches: (i) as an exemption due to the time-sensitive nature of a letter or (ii) as an exemption for the "in-house" organization of mail distribution.

With respect to the time-sensitive concept, scholars justify the exception by the inability of the regular postal service to meet very tight deadlines. According to these authors, the question of whether or not the postal service is deprived of a legitimate source of income is irrelevant. However, these scholars would argue that the delivery of time-sensitive documents must

remain exceptional for both the addressor and the messenger and consequently, according to these authors, the identity of the messenger and the nature of his activities are very significant.

As to the alternative theory based upon the regular "in-house" distribution of documents, scholars seem to recognize that such documents need not necessarily be time-sensitive. Further, they may be entrusted not only to employees but to individual independent contractors as well, provided, however, that these contractors work exclusively for their principals and that their services remain limited. Under this second conceptual approach, the identity of the messenger and the way he renders his services would again be determinant.

The public attitude of French postal officials is one of opposition to the international couriers. On 16 December 1982 the Parisian newspaper *Le Monde* published an article that was clearly inspired by the French Post Office. The article stated that the largest international courier in France, DHL, was (i) violating the postal monopoly law and (ii) violating an agreement with the French Post Office. The first charge has never been raised, much less proven, in a court of law. The second charge, in some ways more serious because it goes to a point of honor, is absolutely untrue. French postal policy was stated even more clearly on 28 February 1983 when the French Minister of PTT was asked in Parliament to state the government's policy toward international courier companies. The Minister replied the government's policy was to exclude the international couriers from the provinces and that, as soon the Post Office improves its delivery capabilities in Paris, "authorizations [for the couriers to operate in Paris] will be withdrawn and all correspondence, should it be outbound or inbound, will be transported on the entire French territory by the Post as foreseen by law." Appendix IV.C.2.

As described more fully below, the practical effect of the French postal monopoly is to seriously handicap international courier services, especially to the provinces, and to raise significantly the price of courier services. The couriers feel that they may not advertise openly. All but one have abandoned efforts to serve the French provinces because of objections by the French Post Office. All have been placed on notice that the French Post Office intends to stop all courier services to and from France. To avoid interminable litigation, the couriers pay substantial taxes to the postal office although the legal basis for this tax is questionable. In sum, there is a shadow over the future of international services in France.

2. Legal or economic studies

An extremely scholarly review of French postal monopoly law was completed on 20 July 1983 by Mr. Dominique Borde of the French law firm of Siméon, Moquet, and Borde. A copy is placed in Appendix IV.C.3. This study was undertaken at the request of DHL.

A very detailed study of the role of international couriers in the French

economy, especially the provincial economy, is *Impact des Services en Courrier International sur L'Activité des Entreprises Françaises* by Bureau d'Informations et de Prévisions Economiques (Paris, 1982). A separately bound copy of this report is included with this statement. Subsequently, BIPE also completed shorter studies of the role of international couriers in four regions: Haute Normandie, Provence-Alpes-Cote d'Azur, Rhone-Alps, and Nord-Pas-de-Calais. These are included in Appendix IV.C.4. Both studies were undertaken at the request of DHL.

3. International couriers' dealings with the French Post Office

The members of the International Courier Conference have had extensive dealings with the French Post Office. They may be summarized as follows.

DHL. The first postal problems experienced by DHL in France were in early 1976. On three occasions DHL's courier was stopped and items weighing less than one kilogram were seized. The Post Office stopped the harassment without explanation.

In late 1979, DHL sought permission to relocate to offices at Charles DeGaulle Airport. The airport authority required Post Office approval. The Post Office repeated its objection to private carriers and proceeded to suggest a fee arrangement.

After lengthy negotiations, an agreement was reached with the Post Office on 24 June 1980. Appendix IV.C.5. The agreement does not appear to give DHL any explicit rights. It does not, for example, explicitly exempt DHL from the postal monopoly. It provides only that DHL will pay the Post Office a certain number of francs per month and that such figure will be modified according to changes in Postadex rates. It does not state how the tax was derived nor limit future modifications. The agreement, however, does clearly embrace "the territory of France." The agreement provides that it may be cancelled by either party on three months notice. DHL's lawyers have subsequently concluded that it is very questionable whether the Post Office has legal authority to enter into such an agreement. Nonetheless, DHL, like the other couriers, concluded that it had no practical alternative.

The fee paid by DHL under the June 1980 agreement and its successor has to date been increased about 370 percent. The increase reflects both increasing numbers of shipments and increased postage rates. The Post Office has never agreed to a written explanation of how this tax is calculated. At one point, the Post Office verbally explained the tax as follows: The tax is levied at a rate of eight francs per shipment (as of July 1982). This presumes an average weight per shipment of one kilogram, which, as a matter of fact, is incorrect. DHL understands that the 8 francs per kilogram may represent 15 percent of the domestic Postadex rates on the theory that 15 percent is the marginal profit on such services. There is an additional tax of 31 francs per 25 kilograms of documents transiting France. DHL does not know the reason for this charge.

On 12 November 1981, the French Post Office sent a letter to DHL and other couriers stating that "only shipments collected in Paris for foreign destinations are covered by this agreement . . . . Transportation between Paris and the provinces must be entrusted to the Post Office." Appendix IV.C.6. Following receipt of this letter, DHL and the Post Office engaged in a series of informal discussions regarding the contradictions between the 12th November letter and the clear wording of the June 1980 agreement which refers to "the territory of France." DHL also suggested the impossibility of the Post Office providing the rapid transmission of items between Paris and the provinces as required by DHL.

On 31 March 1982 the Post Office sent DHL a new contract which covered courier operations only in Paris and the departments of Val de Marne, Seine St. Denis, and Hauts de Seine. In contrast to the June 1980 agreement, the proposed agreement omitted all of the territory of France outside of greater Paris and certain areas in greater Paris. The proposed agreements also bound the Post Office to only one month's notice of termination in contrast to the three months provided in the previous agreement. Appendix IV.C.7. On 23 June 1982, the Post Office wrote DHL a letter cancelling the June 1980 agreement as of 30 September 1982. Appendix IV.C.8.

On 24 June 1982, several postal inspectors spent the entire day in DHL's operations office in Paris and collected evidence of DHL's service to the provinces. Similar raids took place against DHL in Nice and Marseilles in July 1982. On 13 August 1982, DHL received from the French Post Office a notice of a fine in amount of FFr. 41,958.70 for violations of the postal monopoly. Appendix IV.C.9. This notice was based upon the evidence collected on 24 June 1982. Since, as of 24 June 1982, DHL had a contract with the French Post Office pertaining to the entire territory of France, DHL has never responded to this notice.

On 21 October 1982, after long negotiations and many threats by the Post Office, DHL signed a second contract pertaining only to Paris. Appendix IV.C.10.

During this period of negotiations, DHL received the impression from postal officials that the Post Office would be willing to attempt to negotiate a contract or series of contracts covering services to the provinces as soon as the Paris contract was finished. The Post Office refused to discuss a contract for the provinces. Instead, the Post Office insisted that the only thing for DHL to do was to post items between its offices in Paris and its offices in the provinces; DHL's provinces would then be closed city by city as the Post Office developed its own "city express" ("villexpress") service. DHL has consistently stated that it cannot hold itself out to the world as serving the provinces unless it does in fact maintain administrative control of the documents from pick up to delivery. On this basis, DHL has always declined to agree to post documents between its offices in Paris and its offices in the provinces.

In early 1983 French Customs issued Regulation 83-5 (dated 12 January 1983). This regulation confirms that Customs will apply to couriers certain expedited clearance procedures that had been worked out over the years between French Customs at the Parisian airports and the international couriers. At the request of the Post Office, the regulation states that these procedures will not be available to documents bound for the provinces. It was understood by all parties that the implication of the regulation is that Customs would prevent the couriers from importing documents bound for the French provinces even though they could still serve Paris. Appendix IV.C.11.

On 14 March 1983 DHL filed a notice of appeal of Regulation 83-3 with the Conseil D'Etat. On 11 July 1983, DHL filed its initial brief in this. This document details DHL's belief that Regulation 83-5 discriminates against the provinces and non-French companies in a manner that is violative of French administrative law and the Treaty of Rome. Appendix IV.C.12.

Other couriers. The experiences of other couriers with the French Post Office have been very similar to DHL's, although often not so convoluted. After DHL agreed to the June 1980 agreement, the other couriers were required to sign very similar agreements. Unlike DHL, most of the international couriers abandoned the provinces after pressure from the French Post Office in late 1981. Hence, some were more willing than DHL to sign the second version of the postal agreement that pertained to Paris only and that was first proposed in spring 1982. On the other hand, some of the other couriers have had very lengthy discussions with the Post Office over such issues as the subcontracting of deliveries to other companies and the unreasonableness of the taxation levels. The other couriers have also been less willing than DHL to file for the formal license required by Customs Regulation 83-5, notwithstanding the fact that it is DHL will has appealed the regulation to the courts).

D. GERMANY

1. Postal Monopoly Law

The German postal monopoly is established by section 2 of the Post Law of 28th July 1969. A copy of the full text of the Law relating to the Postal Service is provided in Appendix IV.D.1. The relevant provisions of section 2 state as follows:

> (1) the establishment and operation of facilities for commercial forwarding of shipments containing written correspondence or other communications from person to person is reserved exclusively to the German Bundespost.
>
> (2) forwarding as used in section 1 above includes all tasks related to collecting, transmitting or delivering to the receiver.
>
> (3) communication used in the sense of paragraph 1 is not to be so regarded
>
> 1. if it is a communication that is attached to and related exclusively

to another shipment,

2. returned printed-matter.

In a legal study undertaken for the Federal Association of International Courier Services (Bundesverband Internationaler Kurierdienste), Professor Dr. Volker Emmerich, Judge of the Superior Court of Nuremburg, presented his opinion on the scope of the German postal monopoly (see 2 below). His view is that the wording of section 2, paragraphs (1) and (2) enables the Bundespost to claim a monopoly for an exceptionally wide range of postal items and activities.

The German Post Office has, however, given some recognition to the legal proposition that the postal monopoly does not include services which the Post Office cannot offer. This policy is described under 3, below.

As a practical matter, the postal monopoly serves as a significant hindrance to the development of international courier services in Germany and there is a possibility that the difficulties will increase substantially. The couriers are reluctant to advertise in the light of postal objections and so they cannot promote their businesses. Nor can the couriers offer to carry urgent personal letters. The prospect of increased difficulties in the future arises from suggestions from the Post Office that it may decide to claim a monopoly over the best international courier routes as it develops its own "datapost" service. This possibility, of course, discourages substantial investment in Germany. The policies of the German Post Office are described more fully below.

2. Legal or economic studies

In early 1982 the Federal Association of International Courier Services commissioned Professor Dr. Volker Emmerich, a Judge of the Superior Court of Nuremburg, to undertake the aforementioned study 'On the limits of the German Postal Monopoly under Article 2 of the Post Law'. This was completed in April 1982.

Dr. Emmerich concentrated his study on three basic considerations. Firstly, the scope of the German postal monopoly under article 2. Secondly, the limitation of the scope of that monopoly under German antitrust legislation. Thirdly, the applicability of the provisions in the EEC Treaty, with particular emphasis on articles 86 and 90. A copy of Dr. Emmerich's opinion, and an English translation thereof, is provided in Appendix IV.D.2.

Within the last few months the Federal Association of International Courier Services has commissioned a German market research company, Intermarket GMbH of Dusseldorf, to undertake a market survey of the courier industry in Germany. At the present time the details of this study are being settled. A more complete economic study is also to be prepared. This will focus on the effect of the courier industry on the German economy.

3. International couriers' dealings with the German Post Office

In 1978, the Bundespost warned certain couriers that they were in violation of its postal monopoly, and that measures may be taken to prevent them from offering express international services. To date, no such action has been taken by the Bundespost against any member of the International Courier Conference. The Dusseldorf state post office did, however, prosecute Airport Couriers (later purchased by Securicor) in 1982. This case was settled before trial in spring 1983 with the payment of a small fine. Appendix IV.D.3.

Negotiations have been conducted with the German postal authorities primarily through the Federal Association of International Courier Services ("BIK" or Bundesverband Internationaler Kurierdienste) and not by the individual courier companies. The following members of the International Courier Conference are also members of the Federal Association of International Courier Services: DHL, Securicor, TNT/Skypak, and World Courier. To date there have been two meetings between the BIK and Post Office, on 16 September 1982 and 26 April 1983.

On 16 September 1982, the Post Office suggested that all courier advertisements should state expressly that couriers will not carry any items in violation of section 2 of the Post Law (quoted above). Anything less would be considered provocative by the Post Office. The Post Office went on to indicate that it is not seeking a confrontation with couriers. The Post Office implied that it would not claim a monopoly over delivery services that could not offer as well.

On 26 April 1983, the Post Office expanded upon the points made in the first meeting. The Post Office agreed to a statement of minutes of the meeting that makes clear that "the transport of information and messages will not fall within the reservation of transport [of the Post Office] where the Post is not able to service their clients." Appendix IV.D.4. The Post Office, however, went on to suggest that datapost services would soon reach a quality good enough to permit the Post Office to reapply the monopoly to courier services, especially in respect to service to the United States and the United Kingdom. The Post Office and the BIK agreed to an exchange of information on their respective spheres of activity and to meet again in about six months.

In another development, the Bundespost have recently announced the introduction of their own courier service. This is to operate nationally between Bremen, Dortmund, Dusseldorf, Manheim Ludwigshafen, Munich, and Nuremburg. It is scheduled to commence on 4th October 1983, for a two-year trial.

E. GREECE

1. Postal monopoly

Based upon advice of legal counsel, Appendix IV.E.1, it is understood that the postal monopoly law of Greece is established by Law 4581/1930 re

"correspondence by mail." Under this law the Greek Post Office enjoys the exclusive right of carriage, to carry (a) open or closed letters, (b) short letters, and (c) post cards. Article 22 of the P.D. 21/30.9.1935 ("Executing the Laws concerning Correspondence by Mail") defines the term "letter: as any document holographed or printed, which, as concerns the addressee, is characterized as personal and current correspondence or which may be taken as such, insofar as it does not fulfill the terms to be classified as a post card."

Article 24 of the same decree defines "business documents," which are outside the post office's monopoly, as follows:

> Business documents are taken to be any and all these in hand writing in whole or in part, or designed notes, or documents which are not taken to be personal or current correspondence. The documents under this category are indicatively specified hereunder: Consequently, the conditions for business documents can be proportionally implemented, instances of documents which even though are not mentioned hereunder, yet present similar indications.

The article goes on to list specific types of documents which are considered as "business documents," including: invoices, "balance sheets, inventories and other accounting data of banking, industrial or trading firms," "contracts . . . except . . . suggestions to conclude, amend or terminate contracts," maps and drawings, bills of lading, etc.

As a practical matter, the international couriers have not experienced any difficulties with the Greek Post Office. The couriers generally do not carry urgent personal letters in Greece.

2. Legal or economic studies

As far as the International Courier Conference is aware there are no detailed legal or economic studies on the postal monopoly of Greece.

3. International couriers' dealings with the Greek Post Office

The Greek Post Office has not raised any serious objections to the operations of international couriers. DHL has conducted very desultory talks with the Post Office about a possible license arrangement. DHL submitted a rough draft in October 1982, but no substantive talks have ever taken place. Except for this, none of the members of the International Courier Conference have had any significant dealings with the Irish Post Office in relation to the postal monopoly law.

F. IRELAND

1. Postal monopoly

The postal monopoly law of Ireland is in transition. On 13 July 1983, Ireland enacted the Postal and Telecommunications Services Act of 1983. Appendix IV.F.1. The effective date for this law will be set by ministerial

order; it will probably be 1 January 1984. When effective, the new law will expand substantially the postal monopoly of Ireland.

In Ireland, the currently effective postal monopoly law is old Post Office Act, 1908, of the United Kingdom. Appendix IV.F.2. The most pertinent sections are as follows:

> Section 34. (1) . . .
>
> (2) Subject to the provisions contained in this Act with respect to British possessions, the Postmaster-General shall, wheresoever within His Majesty's dominions posts or post communications are for the time being established, have the exclusive privilege of conveying from one place to another all letters, except in the following cases, and shall also have the exclusive privilege of performing all the incidental services of receiving, collecting, sending, despatching, and delivering all letters, except in the following cases (that is to say):-
>
> (a) Letters sent by a private friend in his way, journey, or travel, so as those letters be delivered by that friend to the person to whom they are directed:
>
> (b) Letters sent by a messenger on purpose, concerning the private affairs of the sender or receiver thereof:
>
> (c) Commissions or returns thereof, and affidavits and writs, process or proceedings or returns thereof, issuing out of a court of justice:
>
> (d) Letters sent out of the British Islands by a private vessel (not being a vessel carrying postal packets under contract):
>
> (e) Letters of merchants, owners of vessels of merchandise, or the cargo or loading therein, sent by those vessels of merchandise or by any person employed by those owners for the carriage of those letters, according to their respective directions, and delivered to the respective persons to whom they are directed, without paying or receiving hire or reward, advantage or profit for the same in anywise:
>
> (f) Letters concerning goods or merchandise sent by common known carriers to be delivered with the goods which those letters concern, without hire or reward or other profit or advantage for receiving or delivering those letters:
>
> But nothing herein contained shall authorise any person to make a collection of those excepted letters for the purpose of sending them in the manner hereby authorised.

On 15 July 1983, a trial court in Ireland decided the first major case under the old postal monopoly law, *Attorney General v Paperlink*, No. 11515P - 1982 (1983). Appendix IV.F.3. The defendant, a downtown messenger service, was found guilty of violating the postal monopoly because at least some of the articles it carried were held to be "letters." In construing the crucial term "letter," the court stated that a "letter" is a written communication

> addressed in a personal way to the person with whom [the author] wishes to communicate. This would mean that business communications such as invoices or checks would not be "letters," but that a document beginning

and ending with a personal salutation probably is.

The *Paperlink* case did not involve any shipments to or from points outside of Ireland. The members of the International Courier Conference understands that this decision has been appealed by Paperlink to the Irish Supreme Court.

Under the new act, the postal monopoly has been expanded to include not only "letters" but all "postal packets." It also appears that a courier would be placed in the position of being presumed guilty until proven innocent. The pertinent sections are as follows:

> Section 63.
>
> (1) The company shall, subject to the provisions of this section, have the exclusive privilege in respect of the conveyance of postal packets within, to and from the State and the offering and performance of the services of receiving, collecting, despatching and delivering postal packets.
>
> (2) . . .
>
> (3) Each of the following shall not be regarded as a breach of the exclusive privilege granted by this section.
>
> (a) Services provided in accordance with the terms and conditions of a licence granted by the company under section 73 or by the Minister under section 111,
>
> (b) the conveyance and delivery of a postal packet personally by the sender,
>
> (c) the sending, conveyance and delivery of a postal packet by means of a private individual otherwise than for hire or reward where that individual himself delivers the packet to the addressee,
>
> (d) the sending, conveyance and delivery of a postal packet concerning the private affairs of the sender or the addressee by means of a messenger sent for the purpose by the sender or receiver of the packet provided that the messenger is either a member of the family or an employee of the sender or receiver thereof,
>
> (e) the sending, conveyance and delivery otherwise than by post of any document issuing out of a court or of any return or answer thereto,
>
> (f) the sending, conveyance and delivery of a postal packet of the owner of a merchant ship or commercial aircraft or of goods carried in such a ship or aircraft by means of that ship or aircraft and its delivery to the addressee by any person employed for the purpose by the owner provided that no payment or reward, profit or advantage of any kind is given or received for the conveyance or delivery of the packet.
>
> (g) the sending, conveyance, and delivery by means of a common carrier of postal packets concerning and for delivery with goods carried by him, provided that no payment or reward, profit or advantage of any kind is given or received for the conveyance or delivery of those packets.
>
> (4) Nothing in paragraphs (b) to (g) of subsection (3) shall be taken as authorising any person to make a collection of postal packets for the purpose of their being sent, conveyed or delivered in accordance with that subsection.
>
> (5) A postal packet originating within the State shall not be taken or sent

outside the State with a view to having the packet posted from outside the State to an address within the State for the purpose of evading the exclusive privilege of the company.

(6) A person who breaches the exclusive privilege granted by this section, or who attempts to breach that privilege or who aids, abets, counsels or procures such a breach, or who conspires with, solicits or incites any other person to breach that privilege, shall be guilty of an offence. In any proceeding in relation to that offence it shall lie upon the person proceeded against to prove that the act or omission in respect of which the offence is alleged to have been committed was done in conformity with this section.

(7) In this section "postal packet" does not include a telegram, a newspaper or a parcel unless a communication or, in the case of a newspaper, a communication not forming part of a newspaper is contained in it.

The new act also establishes the possibility of new licensing system for private carriers under sections 73 (licenses granted by the post office) and section 111 (licenses granted by the minister). There is, however, no reason to think that either the post office or the minister will be willing to grant licenses to international couriers.

As a practical matter, the Irish postal monopoly has not hindered the development of international couriers although the couriers cannot carry urgent personal letters. The *Paperlink* case and the new law leave the future of international courier service in doubt.

2. Legal or economic studies

As far as the International Courier Conference is aware there are no detailed legal or economic studies on the postal monopoly of Ireland. The Irish Association of International Air Courier Services has, however, retained Coopers and Lybrand to undertake an examination of the role of international air couriers in the Irish economy. This report is expected to be completed by end of October 1983.

3. Dealings with the Irish Post Office

None of the members of the International Courier Conference have had any significant dealings with the Irish Post Office in relation to the postal monopoly law.

G. ITALY

1. The postal monopoly law

The postal monopoly of the Italy is established by D.P.R. ("Decreto del Presidente della Repubblica") No. 156 (29 March 1973). Appendix IV.G.1. As translated into English, pertinent portions of this law are as follows:

Article 1. *Exclusive control of postal and telecommunications*

services—The following services are under exclusive State control under the limits stated in this decree:

- collection, transportation and distribution services for letter correspondence;
- transportation services for parcels and packages;
- telecommunications services.

Article 41. *Exceptions to exclusive postal control*—The provisions of article 39 [penalties for violating the monopoly] do not apply:

(a) . . .

(b) to the collection, transport and delivery of letter correspondence for which postal rights have been satisfied by means of a postage meter or by means of stamps cancelled by a post office or directly by the sender using indelible ink to register the date of the beginning of the transport itself;

(c) to the transport and delivery of letter correspondence which a person sends under exceptional circumstances to another person by means of a proper appointee;

(d) to the collection, transport and delivery of letter correspondence in the localities and on the days in which the postal services are not functioning, within the limits established by the regulation;

In papers filed with the Universal Postal Union, the Italian Post Office has recognized that its legal monopoly does not protect it against competition by international couriers. Instead, the post office advocates a vigorous commercial campaign against couriers taking advantage of the "privileged position" of the post office. Appendix IV.G.2.

Under article 41, the couriers or their customers operating in Italy pay domestic postage on all items carried both internationally and domestically. Since this fee is usually small in relation to the charge by the private courier, article 41 has eliminated any incentive to contest the precise scope of the postal monopoly over "correspondence."

There is one practical problem caused by the postal monopoly in Italy. This arises from the requirement of paying postage by applying stamps to documents, rather than paying an equivalent amount by check. The actual application of postage stamps to documents can slow the inbound delivery of time-sensitive documents by a half day or more. If outbound documents bear postage stamps, couriers may experience difficulties in clearing such documents through foreign customs who do not understand Italian law and suspect that the documents are true postal items.

2. Legal or economic studies

As far as the International Courier Conference is aware there are no detailed legal or economic studies on the postal monopoly of Italy.

3. International couriers' dealings with the Italian Post Office

Dealings with the Italian Post Office have centered about ways to simplify the administrative burden of paying domestic postage for items carried by

courier. In particular, the application of individual postage stamps to each document in a large inbound shipment can delay the clearance of such time-sensitive documents by a half business day or more. So far, it has not been possible to negotiate a formal agreement to simplify this administrative burden.

H. LUXEMBOURG

1. Postal monopoly

The postal monopoly of Luxembourg is established by the Règlement Grand-Ducal of 26 June 1981. The pertinent sections, in English translation, are as follows:

> Article 1. The conveyance of letters and postcards is reserved exclusively for the Post and Telecommunications Administration, referred to in the present regulations as the 'Administration'.
>
> Notes able to take the place of letters inserted in sealed or unsealed parcels are deemed to be letters
>
> Article 2. Exceptions to the monopoly:
>
> (1) letters and postcards which private persons have taken or carried to the nearest post office or which they send by their servant or by express messenger, the express messengers being forbidden to serve more than one consignor or sender at the same time;
>
> (2) consignment notes or invoices accompanying the merchandise transported and containing only the statements indispensable for the delivery of the object to which they refer;
>
> (3) the commission orders carried by the messengers, the exclusive object of which is to give them the authority to deliver the merchandise which they have with them or to take that which they have to bring back.
>
> The consignment notes, invoices and orders mentioned in (2) and (3) must always be sent in the unsealed state.
>
> (4) letters and postcards sent or received by foreign military post offices belonging to the armed forces or the North Atlantic Treaty Organisation and established on Luxembourg territory in time of war and, as an exception, in times of peace when the stationing of these forces on the national territory proves necessary.

The full law is presented in Appendix IV.H.1.

As a practical matter, the postal monopoly situation is not completely settled although the international couriers have experienced no specific difficulties operating in Luxembourg. The couriers, however, do not carry personal letters or post cards even if urgent.

2. Legal or economic studies

As far as the International Courier Conference is aware there are no detailed legal or economic studies on the postal monopoly of Lux embourg.

3. International couriers' dealings with the Luxembourg Post Office

The members of the International Courier Conference have had only very limited dealings with the Luxembourg Post Office in relation to the postal monopoly law.

DHL. On 26 August 1981, DHL received a letter from the Luxembourg Post Office calling DHL's attention to the postal monopoly. After consultation with legal counsel and postal officials, DHL notified the Post Office that it would modify its standard contract to state explicitly that it could not carry "letters or post cards" in Luxembourg. Appendix IV.H.2.

I. NETHERLANDS

1. Postal monopoly

The Dutch postal monopoly is established by Post Office Act of 1954. Appendix IV.I.1. The monopoly covers the transportation of "letters" with the following exceptions, in English translation:

> Article 3. 1. Letters may be carried against payment by companies other than the G.P.O. of the Netherlands only if such items:
>
> a) are carried by assignment, or at the request of, the G.P.O. of the Netherlands;
>
> b) weigh more than 500 grams;
>
> c) are sufficiently post-paid and intended for delivery by post, and carried within the district of ONE office of the G.P.O.;
>
> d) have specific reference to the items which they accompany, or that they serve as receipts, bills of exchange or other commercial papers carried in connection with the relevant monetary amounts to be either collected or paid out;
>
> e) are from one sender or from persons belonging to one household, provided that that laid down in Article l0, subsection b of the Post Office Act 1975 does not apply in respect of these letters and also that the following conditions are complied with:
>
> - 1st. carriage is within the borders of the Netherlands;
> - 2nd. the person carrying such letters is not the entrepreneur or the manager of the public transport company carrying the letters, or is employed by the entrepreneur or company.

As a practical matter, the couriers have experienced no difficulties in operating in the Netherlands.

2. Legal or economic studies

As far as the International Courier Conference is aware there are no detailed legal or economic studies on the postal monopoly of the Netherlands.

3. International couriers' dealings with the Dutch Post Office

There have been no significant dealings between the members of the International Courier Conference and the Dutch Post Office.

J. SWITZERLAND

1. Postal monopoly

The postal monopoly is established by PTT Law ("Postverkehrsgesetz") of 2 October 1924 and its Ordinance ("Verordnung") of 1 September 1967. Appendix IV.J.1. Article 1 of the law reads, in pertinent part and in English translation, as follows:

> Article 1. The organisation of the PTT, telephone and telegraph has, subject to article 2, the exclusive right:
>
> (a) . . .
>
> (b) to transport open and closed letters, cards with written messages and other closed parcels up to five kilograms.
>
> The federal council may place the transport of foreign newspapers and journals under the post monopoly.
>
> It is prohibited to transport objects which are comprised in the monopoly and destined for different receivers, in collective parcels through the post or in another way, in view of avoiding the post taxes.

The precise scope of the postal monopoly has never been an issue in Switzerland because, under article 5 of the Ordinance, international couriers may operate upon the payment of domestic postage:

> Article 5. For monopoly bound parcels in the meaning of article 1 paragraph 1, part b of the postal law, which in the international freight traffic are not transported by the post, the monopoly fee is to be paid by the transporter.
>
> As far as members of the International Courier Conference are aware, all international couriers pay the Swiss Post Office domestic postage according this provision.
>
> As a practical matter, the international couriers experience no difficulties in operating in Switzerland.

2. Legal or economic studies

As far as the International Courier Conference is aware there are no detailed legal or economic studies on the postal monopoly of Switzerland.

3. International couriers' dealings with the Swiss Post Office

Dealings by any of the members of the Conference with the Swiss Post Office have involved efforts to simplify the payment of the postal monopoly tax.

DHL. On 16 November 1981, DHL agreed with the Swiss Post Office to

an arrangement for paying the postal monopoly tax in a lump sum every six months rather than by applying postage to each document transmitted. The calculation of the payment is based upon survey conducted during April, May, and June 1981. From this survey, an average postage per shipment was calculated to be SFr. 1.17. At the end of each six months, DHL reports the number of shipments carried and pays a tax equal to SFr. 1.17 per shipment. Every three years, a new survey is to be conducted to recalculate the average postage per shipment. A copy of the letter from the Swiss Post Office embodying this agreement may be found in Appendix IV.J.2.

K. UNITED KINGDOM

1. Postal monopoly

The postal monopoly of the United Kingdom is established by the British Telecommunications Act 1981. Appendix IV.K.1. Sections 66 and 67 of this act read, in pertinent part:

> Section 66. (1) Subject to the following provisions of this Part, the Post Office shall have throughout the United Kingdom the exclusive privilege of conveying letters from one place to another and of performing all the incidental services of receiving, collecting and delivering letters. . . .
>
> (5) In this section and section 67-
>
> "letter" means any communication in written form which-
>
> (a) is directed to a specific person or address:
>
> (b) relates to the personal, private or business affairs of, or the business affairs of the employer of, either correspondent; and
>
> (c) neither is to be nor has been transmitted by means of a telecommunication system,
>
> and includes a packet containing any such communication;
>
> "sender," in relation to any letter or other communication, means the person whose communication it is.
>
> Section 67. (1)The privilege conferred on the Post Office by section 66(1) is not infringed by-
>
> (a) the conveyance and delivery of a letter personally by the sender;
>
> (b) the conveyance and delivery of a letter by a personal friend of the sender;
>
> (c) the conveyance and delivery of a letter by a messenger sent for the purpose by either correspondent;
>
> (d) the conveyance of an overseas letter to an aircraft by a messenger sent for the purpose by the sender and the conveyance of that letter out of the United Kingdom by means of that aircraft;
>
> (e) the conveyance and delivery of any document issuing out of a court of justice or of any return or answer thereto;
>
> (f) the conveyance of letters from merchants who are the owners of a merchant ship or commercial aircraft, or of goods carried in such a ship or aircraft, by means of that ship or aircraft, and the delivery thereof to the addressees by any person employed for the purpose by those

merchants, so however that no payment or reward, profit or advantage whatever is given or received for the conveyance or delivery of those letters;

(g) the conveyance and delivery of letters by any person, being letters concerning and for delivery with goods carried by that person, so however that no payment or reward, profit or advantage whatever is given or received for the conveyance or delivery of those letters;

(h) the conveyance and delivery to the Post Office of prepaid letters for conveyance and delivery by the Post Office to the addressees, and the collection of letters for that purpose;

(i) the conveyance and delivery of letters by a person who has a business interest in those letters, and the collection of letters for that purpose;

(j) the conveyance and delivery of banking instruments from one bank to another or from a bank to a government department, and the collection of such instruments for that purpose;

(k) the collection, conveyance and delivery of coupons or other entry forms issued by authorised promotors in connection with established competitions.

(2) Nothing in paragraphs (a) to (g) of subsection (1) shall authorise any person to make a collection of letters for the purpose of their being conveyed in any manner authorised by those paragraphs.

(3) For the purposes of paragraph (i) of subsection (1) a person has a business interest in a letter if, and only if-

(a) he is an employee of one of the correspondents or of a member of the same group as one of the correspondents and the letter relates to the business affairs of that correspondent; or

(b) he and one of the correspondents are employees of the same person or of different members of the same group and the letter relates to the business affairs of that person or, as the case may be, the employer of that correspondent.

As noted above, section 69 of this act authorized the Secretary of State for the Department of Industry to "suspend the exclusive privilege conferred on the Post Office . . . for such period and to such extent as may be specified in the order." On 15 October 1981, the Secretary of State issued the Postal Privilege (Suspension) Order 1981. Appendix IV.K.2. The order took effect on 7 November 1981. It states:

> The postal privilege is hereby suspended until the end of the year 2006 in relation to the conveyance of a letter which is conveyed in consideration of payment of not less than £1 made by or on behalf of the person for whom it is conveyed.

As a practical matter, the international couriers experience no difficulties in operating in the United Kingdom.

2. Legal or economic studies

As far as the International Courier Conference is aware there are no detailed legal or economic studies on the postal monopoly of United Kingdom since proclamation of the 1981 order. The only known review is a report by the Industry and Trade Committee of the House of Commons in April 1982. As has been noted above, this report applauds the exemption for urgent documents. Appendix III.K.3.

There are, of course, many articles and books on the history of the British Post Office generally. An especially good brief review of the history of the post monopoly in both England and the United States is G.L. Priest, "The History of the Postal Monopoly in the United States," 13 J. Law & Eco. 33 (1974). Appendix IV.K.4.

3. International couriers' dealings with the U.K. Post Office

There have been no significant dealings by any of the members of the Conference with the U.K. Post Office since the adoption of the 1981 order.

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ICC on French Postal Monopoly (1985)

This legal memorandum has been prepared by the undersigned lawyers for the International Courier Conference for the information and assistance of the staff of the European Commission. The purpose of the memorandum is to assist the cooperative and informal efforts by the staff to forge a common understanding between the Commission, the French Postal Administration, and the courier industry regarding the relationship between the Treaty and French postal monopoly law, insofar as international courier operations are concerned. This memorandum does not attempt a complete and exhaustive legal analysis. Rather, it aims to serve as a useful conceptual discussion of certain points which appear to be of particular interest at the present stage of discussions.

This memorandum does not represent an official complaint by the International Courier Conference in any sense. Nor is it intended to present a final, formal position of the Conference on the various legal issues raised.

I. THE FRENCH POSTAL ADMINISTRATION HAS LIMITED THE DEVELOPMENT OF COURIER SERVICES IN FRANCE BY PHYSICALLY INTERFERING WITH THEIR SERVICES, BY FORCING THEM TO PAY DISCRIMINATORY CHARGES, BY HARASSING THE COURIERS' CUSTOMERS, AND BY REPEATEDLY PROCLAIMING PUBLICALLY AN INTENTION TO TERMINATE COURIER SERVICES.

While the facts of the case are well known to the Commission, a very

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J-M. Duchemin, R. Wojtek, and J.I. Campbell Jr., "Informal Memorandum on the Competition Rules of the Treaty of Rome and Certain Actions by the Postal Administration of France Which Restrict, Distort, or Limit the Activities of International Courier Services Operating Between France and Other Member States"(submitted to Competition Directorate of the European Commission, May 6, 1985). Me. Duchemin was a member of a French law firm, Simeon, Moquet & Borde & Associates. Mr. Wojtek was a member of a German law firm Ohle, Hansen & Ewerhan.

brief summary may serve as a useful introduction to the legal points which follow. The French Postal Administration has, since 1980, taken the position that international couriers may not transport international shipments over the territory of France unless permitted by a special agreement between the Post Office and individual couriers. The Post Office threatened to stop the operations of each individual courier unless it signed an "agreement" under which the courier would pay the Post Office a large fixed sum of money. From time to time, the amount of the monthly payment has been raised to reflect increases in Postadex rates. None of the couriers' agreements, however, indicate exactly how the total charge is calculated nor the legal basis for it. The agreements have other objectionable aspects as well. They are revocable by the Post Office on very short notice and require the couriers to submit to the Post Office confidential information regarding the conduct of their business.

In spring 1982, the Postal Administration abruptly terminated these agreements insofar as they applied to courier service to Paris and areas within the Petit Couronne. Since 1982, the Post Office has intermittently obstructed the couriers' service to the provinces in several ways. First, it has seized inbound shipments, both at the Parisian airports and in the provinces, and delivered such shipments to the addressees, usually demanding a fine equal to four times the domestic postage that would have been charged if the shipment had been posted. Second, officials of the Post Office have called couriers' customers and tried to discourage them from using couriers. Third, postal officials have issued official statements casting doubt upon the legality of couriers and announcing that their services would be terminated. Obviously, these efforts have discouraged the couriers' provincial customers and greatly concerned the couriers' employees.

In May 1984, more than an hundred provincial companies signed a full page "open letter" in *Le Monde*; the letter called upon the President to assist them in providing international commerce by ending the Post Office's campaign of obstruction.

On 27 August 1984, the French Deputy Minister for Posts and Telecommunications responded to a question in the National Assembly about the Postal Administration's contracts with couriers. The question asked whether the Post Office would agree to allow the couriers to serve the provinces on the same terms as the agreements applicable to Paris. The Deputy Minister, echoing a long series of earlier statements, answered:

> These easy terms [i.e., the courier agreements for Paris] were only agreed to because of exceptional circumstances, so as not to injure the users, and they could only be limited and precarious, on account of the principles governing the postal monopoly.
>
> . . . It is not the PTT Administration's intention to extend the geographic scope of the tolerance admitted for international transport companies. On the contrary, *as soon as it disposes of sufficient service means, without penalizing correspondence by the intervention of postal services, an end*

> *will be put to these authorizations, and all mail, for import as well as for export, over the whole of the national territory, will be transmitted by the Post Office*, according to the law. [Emphasis added]

On April 4th, the Deputy Minister qualified the Post's position somewhat with the following indication of willingness to work out a position that is consistent with the Commission's views:

> The P.T.T. has no immediate intention of altering the existing rules of [courier] operations by, for example, extending the geographical scope of the derogations [Paris agreements] granted to the international transport companies. Nonetheless, in the longer term, the French Administration, which currently offers a service for the international transport of urgent mail (Postadex International, serving forty-eight countries to the general satisfaction of its users), is envisioning a strategy which is more consistent with the recommendations of the European Economic Commission.

II. THE FRENCH POSTAL ADMINISTRATION IS AN "UNDERTAKING" WITHIN THE MEANING OF ARTICLES 85, 86, AND 90.

Article 85 (prohibition against anticompetitive agreements), Article 86 (prohibition against abuse of dominant position), and Article 90 (application of Competition Rules to governmental agencies) all apply to "undertakings." The term "undertaking" is not defined in the Treaty. It might be read restrictively to refer only to specific legal entities which normally engage in commercial activities, such as a company, partnership, or person. Such a restrictive reading could exclude governmental units. A broader reading, however, would include all entities, including governmental units, to the extent that they engage in commercial activities of the sort which fall within the intent of Articles 85 and 86. Case law and the logic of the Treaty support this second broader reading; hence, the French PTT must be held an "undertaking" within the meaning of the Rules of Competition.

In the *Sacchi* case, the German Government argued that a television station was a public institution which fulfills a task in the public interest and hence not an "undertaking" within the meaning of article 86. This position, however, was rejected by both the Commission and the European Court. The Court held that even a public institution which performs a task in the public interest and enjoys a legal monopoly may be subject to the Rules on Competition when it acts on a commercial level. ECJ *Sacchi* - 155/73 Slg. 174, 409, 431.

Very recently, on 20 March 1985, the European Court upheld the conclusion of the Commission that the British Post Office and, its successor, British Telecommunications, were undertakings subject to article 86. The Commission grounded its conclusion in the observation that:

> The United Kingdom Post Office and the British Telecommunications are public corporations and economic entities carrying on activities of an

> economic nature. As such they are undertakings within the meaning of Article 86 . . . [O.J. No. L 360/36, 39 (21 December 1985)]

In upholding the Commission, the Court reasoned:

> It first bears noting that the Appellant does not contest that, despite BT's status as a national enterprise, the activity whereby it manages public telecommunications facilities and makes them available to users against the payment of fees does, in fact, constitute a business activity and as such is subject to the obligations under article 86 of the Treaty.

Other decisions by the Commission have also held that the legal form of the enterprise or its owner or operator is irrelevant (e.g., decision of the Commission of June 2, 1971, O.J. L. 134/15; BNIA, O.J. L. 231/24).

In addition to the case law, one must also consider that the Treaty is intended to promote the economic integration of Europe by eliminating legal obstructions to free trade among member States. It is clear that the obstructions to be eliminated include, in particular, legal obstructions raised by national governments. It would therefore be contrary to the whole purpose of the Treaty to read the term "undertaking" to automatically exclude all governmental entities engaged in commercial activities.

Article 90(1) makes this point explicitly:

> In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules in this Treaty, in particular the [Competition Rules]

The words of Article 90 indicate that no *enactment*—that is, no legislative or administrative decree—may override the Competition Rules. Logically, what a Member State cannot confer on an institution, it cannot confer on itself, without destroying the whole meaning of Article 90(1).

The Commission has supported this reading of Article 90(1). Repeatedly, the Commission has taken the position that public enterprises are also undertakings in the sense of article 85 (Commissions's answer to question no. 48 O.J. 1963, 2235, and to question no. 149 O.J. 1968 C 109/5). Most importantly, the so-called Transparency Directive of the Commission of June 25, 1980, Amtsbl. no. L 195 of July 29, 1980, p.35, which was drafted in implementation of article 90 defines a public undertaking within the meaning of article 90 as any undertaking which is, directly or indirectly, subject to the controlling influence of the government. A challenge to this directive was made by the governments of France, Italy and Great Britain and was rejected by the Court. By specifically excluding the Post from the operation of the Transparency Directive the Commission intimated that the postal administration may be considered a "undertaking" within the meaning of the Treaty.

Indeed, it is fair to say that the Commission and the European court have, so far, in all close cases ruled in favor of treating a governmental commercial

entity as an "undertaking." For example, the BBC was treated as an undertaking, Commission 6. Report, 1977, Tz. 163 (p. 97); Radio Luxemburg, RS. 125/78, R. 1979, p. 3173 (3185 ff.), the Dutch NAM, Commission, 2. Report, 1973, Tz. 58 ff.; the various enterprises safeguarding immaterial rights, including GEMA, Rs. 127/73, RsprGH 1974, p. 313 (316 ff.). *See also* "SABAM"; Rs. 22/79, RsprGH 1979, p. 3275 (3286 ff.) "SACEM." RS. 125/78, RsprGH 1979, p.3173 (3185 ff.) "GEMA"; Commission, decision of 2 June 1971, Amtsbl. no. L 134, p. 15 ff.; Decision of 29 October 1981, Amtsbl. no. L 370 od 28 December 1981, p. 49 (54).

The concept of "undertaking" has been extended to include even governmental entities devoid of any resemblance to a corporate form, to the extent such entities are engaged in activities of an economic nature. The French state was treated as an "undertaking" in its function as grantor of patent licenses, Commission, 9. Report, 1980, Tz. 114 (p. 86). In *Re the Agreement between Kurt Eisle and the Institut National De Recherche Agronomique*, 21 o.j. (No. L 286) 23,23 Comm. Mkt L.R. 434 (1978), the Commission found a "State agency of administrative character responsible, amongst other things for improving and developing crop production" to be an undertaking within the meaning of article 90. In its decision concerning the French *Armagnac Association*, the Commission took the view that the Association was subject to the application of article 85, although the French Government had conferred upon the Association public powers with respect to quality control (O.J. L 231/24 *BNIA*). A similar position was taken by the European Court in its *General Motors* decision.

In sum, every entity, governmental or private, acting like an enterprise must be considered as an undertaking and subject to the rules on competition. *See* Gleiss, *Common Market Cartel Law*, 3rd edition, 1978, 47. The fact that a Member State's post office may be a branch of the government and not a separate "public company"—the only conceivable objection in the present case—therefore does not preclude the post office from being treated as an "undertaking" under the Competition Rules. The applicability of the Rules on Competition facilitates the Commission's power to police against measures endangering the accomplishment of the goals of the Treaty. See Pappalardo, "die Stellung der Fernmeldemonpole in EWG-Recht" in Mestmacker, *Kommunikation ohne Monopole* 1980, 202, 214; Hochbaum, article 90 note II 2 a; *Langen* § 98 note 19).

Finally, when looking at the underlying rationale of the cases decided, it is useful to point out that, in the present case, it is unnecessary to hold the French PTT is an "undertaking" for all purposes and in all respects. Rather, it is only necessary to hold that the French PTT is an "undertaking" insofar as it engages in the express post business because this activity directly competes with preexisting private industry. In other words, where a governmental agency like the Post Office has entered a new commercial field and offers goods or services in competition with other, private enterprises it should be subject to

the same rules as its private competitors. The German Supreme Court, for its part, has accepted this reasoning and decided that the government is subject to the Rules on Competition if it acts on the same basis as private competitors (BGHZ 66, 2299, 237; BGH WuWE 1469). The decisions indicate that as long as there is factual competition the Rules on Competition apply. The pursuit of a task in the public interest does not exempt the public body from the Rules on Competition (BGH WuWE 1661, 1663). *See* Gleiss, EWGV, article 85 Rn 11; Emmerich, *Nationale Postmonopole und Europaisches Gemeinschaftsrecht*, Eur 1983, 216, 222.

In January 1985, an important British decision in the context of international courier traffic shows that it also accepts of the force of such reasoning. In July 1984, a new administrative regulation ("statutory instrument") required all importers to pay Value Added Tax at the time of import instead of merely accounting for V.A.T. owed every quarter. The Post Office was exempted from this new, burdensome regulation. The couriers protested, however, that this exemption was over broad insofar as it applied to the Post Office's datapost service. Unlike traditional postal services, datapost was a new offering of the post office in competition with the international couriers. Recently, the British Government accepted this point; it issued a second regulation under which datapost lost its special status and is treated exactly like its private competitors.

III. INTERNATIONAL HIGH-SPEED MAIL SERVICE PROVIDED BY THE FRENCH POST OFFICE AND ITS FOREIGN PARTNERS COMPETES DIRECTLY WITH INTERNATIONAL COURIER SERVICES.

The high speed international document delivery service operated by a network of some fifty national post offices is intended to be, and is in fact, directly competitive with the international couriers. In France, this high speed postal service is provided by the French Postal Administration under the name of "Postadex International."

The current state of this competition between postal and courier services is described in a recent study by the Bureau d'Informations et de Previsions Economiques (BIPE) and by recent poll by Sofres. These studies show that a complex competitive relationship between the two types of services. The reason for the development of Postadex International appears to have been as a competitive response to the couriers rather than as a natural response to the market. The public advertisements of both postal and courier systems are similar. On the surface, they appear to be very similar services.

When one takes into account flexibility, special services, availability, and geographical scope, one must conclude that today the postal system as a whole is inferior to, although still competitive with, the courier system, as a whole. In order to understand the matter fully, however, one must take into account the dynamics of competition. Although it has been slower to develop than the

courier system, the Postadex system is clearly improving in flexibility and geographical scope. Notwithstanding its overall inferiority, the postal system is much more competitive with the courier system in selected submarkets. The postal system's strategy has been to concentrate on attracting those urgent documents which can be transported in the regular, scheduled shipments between selected countries. In other words, the postal system has begun to compete by trying to handle those urgent shipments which are relatively simple and inexpensive to transport. In this submarket, which would include a significant fraction of intra-European shipments, it is far from clear that the postal system is an insignificant competitor.

The BIPE and Sofres studies support the conclusion that the postal system is in fact becoming a more credible competitor to the couriers. Table 4 of the BIPE study suggests that on some routes, at least, the postal system is comparable to or, at least not far inferior to, the courier system. Table 9 of of the Sofres poll indicates that the marketplace is correctly giving the Postadex credit for relatively better service, compared to the couriers, to Europe, as opposed to other parts of the world. Having watched the development of Postadex, fully 76 percent of the interviewees believe that competition between the couriers and the postal system will become more important in the future (Table 10).

The evidence of current services and customers' attitudes does not, however, give a complete picture of the state of competition between the two types of service. One must also consider the expressed intentions of the postal administrations in this area. At the Universal Postal Union plenary congress in Hamburg in July 1984, great emphasis was placed on the need to improve the competitiveness of the Postadex system vis-a-vis the couriers. Resolution 2000.19, adopted by the UPU, stated, in pertinent part:

> Congress, aware of
>
> (i) the need to develop and promote with extreme rapidity the high-speed mail services operated by postal administrations. . . .
>
> (iii) the advantages of providing and strengthening this service *to meet the competition from certain companies specialized in the transport and delivery of documents and small parcels*. . . .
>
> Instructs the CCPS [the Consultative Council for Postal Studies, the permanent technical committee of the UPU]. . . .
>
> (c) where necessary, to recommend to postal administrations joint action aimed at introducing or developing the service in order *to counteract the effects of the competition at the international level from private companies*;
>
> Reasons:
>
> [This resolution was] aimed at the need to quickly take the necessary measures to promote the international high-speed mail service and, by so doing, to enable the postal administrations *to compete more effectively with the private companies now providing this service*. [Emphasis added]

The UPU Congress also adopted Resolution 2000.8 which clearly

demonstrates the intent, on the part of some postal administrations, to use the postal monopoly law to obstruct the legitimate competition of international couriers. Interestingly, the explanatory note to 2000.8 also reveals that many administrations could *not* subscribe to using the postal monopoly law to suppress couriers:

> Reasons: One of the conclusions reached regarding CCPS study 522 "Postal monopoly. Means of combating competition from private undertakings in the conveyance of documents, etc." was that, for various reasons, the UPU cannot effectively legislate to protect postal monopolies. . . . The resolution stresses the most important points emphasized by the administrations, viz the need for governments to intervene in order to define the postal monopoly clearly and to take steps to preserve it by associating in its defence, in particular, the authorities at the entry and exit points for international mail, especially the customs services.

The French PTT was especially active in the drafting and promotion of Resolution 2000.8 and of an even more vigorous anticourier resolution, 2000.9, which was rejected by the Congress.

The emphasis on development of postal express systems evidenced by Resolution 2000.19 has, in fact, been carried forward. Forty-seven postal administrations attended a conference on international high-speed mail held in Berne, Switzerland, on 25-26 October 1984. The conference noted that "the quality of operations was making progress" and called upon "postal administrations with substantial assets to pool their potential in order to combat the very powerful competition that currently holds the bigger share of the market." *Union Postale*, 6/1984, pages 149A-50A.

To summarize, there can be no doubt of the increasingly vigorous competition between the international couriers and the high speed postal services offered by the French PTT and other post offices, at least in regard to regular services to certain areas, including Europe. Nor can there be any doubt of the intention of the post offices to vigorously pursue this competition even further in the near future.

IV. APPLICATION OF THE RULES ON COMPETITION WILL NOT OBSTRUCT THE PERFORMANCE OF A PARTICULAR TASK ASSIGNED TO THE FRENCH POSTAL ADMINISTRATION.

The incompatibility of the French Postal Administration's actions against couriers with the Treaty is sufficiently apparent that the first issues that leap to mind involve the exception from the Competition Rules in article 90(2). A discussion of the article 90(2) at this point seems useful both because it addresses these obvious issues first and because it will clarify concepts necessary in the review of articles 85 and article 86.

A. THE "PARTICULAR TASKS ASSIGNED" TO THE FRENCH POSTAL ADMINISTRATION DO NOT INCLUDE INTERNATIONAL HIGH SPEED MAIL SERVICES.

Since the exception in article 90(2) is clearly contrary to the Rules of Competition and to the general purpose of the Treaty, it must be read very narrowly. With this approach in mind, it must be very seriously questioned whether International Postadex is a task which has been "assigned" or "entrusted" to the French Postal Administration, as those terms are used in article 90.

The most obvious point is that no legislative or cabinet level mandate has ever been issued directing the Postal Administration to provide International Postadex service. The fact that the Postal Administration, for its own commercial reasons, desires to offer this service hardly is tantamount to a broadly based decision by the French people to "assign" this task to the Postal Administration. The flexibility reflected in article 90(2) should be considered as a legal mechanism for reconciling the Treaty with general national policies adopted after a process of serious consideration by the national political process. The traditional postal services might possibly qualify under such a test. Clearly, Postadex International does not. It is simply a commercial program launched by the Postal Administration unilaterally without any broadly based governmental consideration.

The absence of any formal assignment of this task to the Postal Administration is underscored by a consideration of the official legal description of the Postal Administration's services, the *Code des Postes et Télécommunications*. Not only is any legislative or cabinet level assignment of International Postadex services absent, there is not even a legal description of such a service in the *ministerial* level decrees (Decrets) describing and regulating the postal service. Article D. 34 of Chapter V, for example, states that the exchange of international correspondence "will be effectuated under the conditions fixed by the Universal Postal Convention." Since the Convention does not contain any reference to high speed mail services, it is clear that the official, legal description of French postal services itself does not yet include such services. See also Chapter IV, Article D. 6. In terms of French law, then, International Postadex has yet to be codified into the formal structure of postal law, much less "entrusted" as a "particular task" to the French Postal Administration.

The only argument that the French Postal Administration can advance for its being "entrusted" with the Postadex is, of course, the postal monopoly law. The truth is that the postal monopoly law is so ancient and its original purpose so obscure that the Postal Administration interprets it much as entrails of a sacrificed lamb were interpreted—to suit the purpose and imagination of the interpreter. In order to evaluate a recourse to the monopoly, there is no substitute for a short review of the evolution of the law.

The origin of the current French postal monopoly law has been well summarized by the French Postal Administration as follows:

> From Louis XI to Louis XIV the kings of France tried to eliminate messenger services that competed with the Royal post, especially University [of Paris] messengers, *in order to control the circulation of ideas*. [*Union Postale*, 5/1981, p. 126A (emphasis added).]

In keeping with this original purpose, the original monopoly decrees under Louis XI, in 1464, and his immediate successors forbade royal messengers from carrying private correspondence.

By the time of Louis XIV, however, it had long become clear that there was no practical way to keep royal messengers from carrying private correspondence and that, in any case, the legal repression of the free circulation of ideas could be turned into a vehicle for generating revenue. Louis therefore granted the monopoly to a certain private individual in return for a monthly fee. In support of this enterprise, on June 18, 1681, the king issued a decree which, with little change, is the postal monopoly law now in effect in France.

On June 16, 1801, Louis' royal decree was codified and reenacted without significant change by government of the French Revolution. The monopoly law was modified in 1856, 1870, and 1878, but only to progressively *exclude* newspapers, newsletters, periodicals, and printed matter addressed to the public at large. In 1962, the preexisting postal laws were again codified, without change to the monopoly law.

In addition to these legislative exemptions, the courts evolved an additional exemption called the "express exception." Case law has not settled upon a definitive formulation for this exception. It is variously said to be applicable to certain documents because of their time sensitivity or to certain messengers because they are "in-house" in some sense. The private carriage of documents permitted by the express exception is roughly similar, in economic terms, to the services provided by international couriers. Whether the French courts would one day develop the express exception to cover international courier operations is, of course, unknowable.

The history of the postal monopoly thus reveals that the monopoly was decreed by the French crown in two different forms with two different purposes. First, in 1464, Louis XI granted a monopoly over the carriage of royal correspondence for the purpose of repressing the circulation of ideas. Second, in 1681, Louis XIV granted a monopoly over royal and private correspondence for the purpose of raising revenue (as well as, no doubt, continuing the ability to protect state security). Even in the latter case, however, the monopoly law was interpreted to permit at least some private carriage of extraordinary, express documents.

It is obvious that the day is long past when either the people of France or the people of Europe would accept the idea of the post office as a controller of ideas or a revenue source for the state. Today, the French Postal

Administration does not use either purpose to describe its particular task. Rather, the Postal Administration describes its essential task in the following terms:

> In former times a means of exercising control over private correspondence and a source of fiscal revenue, the postal monopoly today has an economic basis; it is justified by the obligations and constraints inherent in the nature of the public service provided by the PTT administration.
>
> The costs of the services provided by the Post are extremely variable. In order to that the price of the postal service can be kept at a reasonable level for all users, it is necessary that, through equalization of tariffs, the expenditure of large-deficit traffic such as that in rural areas should be offset by revenue from profitable traffic.
>
> If this equilibrium was not protected by the monopoly, transport firms would be tempted to organize regular services over heavy-traffic routes, particularly between large cities and between establishments exchanging big quantities of mail. There would be thus a "creaming-off" of traffic, leading to a deterioration in the financial situation of the Post. Resulting tariff increases would bring about further losses of traffic, and the postal service would be reduced to conveying only the least profitable fraction of the mail at a prohibitive price. Those penalized would be mainly small-scale users and the people living in rural areas.
>
> The postal monopoly thus meets the need of providing everyone with a high quality service at the lowest cost to the community. [*Union Postale*, September/ October 1981.]

This third version of the particular task assigned to the Postal Administration may be summed up as "the task of providing universal, traditional postal services throughout France." Although the French Postal Administration is undoubtedly correct that "universal service" is the task it is now pursuing, this was a task that the Postal Administration set for itself in the middle of the 19th century. The idea of universal service grew out of a series of reforms espoused by a Mr. Roland Hill in England in the 1840's. He argued, in essence, that it was in the economic self-interest of the post office to establish rates that did not vary with distance and to drastically reduce the postage rate in order to attract more business. Mr. Hill's ideas led to a transformation of the British Post Office into a provider of universal, inexpensive postal service. This reform was soon copied by all other major national post offices, including the French.

Coming back to the present case, the question is whether this history indicates that the postal monopoly implicitly "entrusts" to the Postal Administration services such as Postadex International. One must begin by recognizing that, under standard principles of French law, the scope of a monopoly must be read restrictively because it is a derogation of the rights of the people. With this principle and the purposes of the Rules of Competition in mind, one can only conclude that the French postal monopoly does not

imply that Postadex International is a "particular task assigned" to the French Postal Administration. The postal monopoly law was clearly not decreed to protect the Postal Administration's ability to provide universal service. Rather, universal service was a justification for the monopoly applied by the post office itself some two to three hundred years after the law was last modified in any substantial respect. In short, when the monopoly was granted, there was no intention whatsoever to entrust the task of universal postal service to the post office. Hence, the postal monopoly law by itself cannot even be said to constitute an implicit assignment of the task of universal postal service.

The long gap between the "assignment" by decreeing the monopoly and the post office's assumption of its "particular task" is all the more of a problem when one considers International Postadex. International Postadex is not a necessary element of universal service. It is rather a new task taken up by the Postal Administration only a few years ago. In view of the similarity between Postadex International and services which have historically been exempted from the monopoly by the "express exception," it is more difficult still to interpret a 1681 (or 1464) law as an implicit assignment of this particular task to the Postal Administration.

To summarize, it is impossible to conclude that Postadex International has been "entrusted" or "assigned" to the Postal Administration. There is no positive legislative or cabinet level decision so stating. There is only a three to five hundred year old postal monopoly law which was decreed without any intention whatsoever to implicitly "entrust" or "assign" to the Postal Administration its current mission, the provision of inexpensive universal postal services. It is therefore not possible to read this postal monopoly law to constitute an implicit assignment of a brand new service, Postadex International; Postadex International is not a necessary ingredient in the provision of universal postal service. The difficulty of reading the postal monopoly law to constitute an implicit assignment of Postadex International is compounded still further by uncertainty over the scope of the French postal monopoly. In light of the restrictive interpretation one must apply to a monopoly law and the history of the the express exception, it is not even clear that, the Treaty aside, the French courts would apply the postal monopoly law to services like Postadex International. On the matter of Postadex International, the French Republic has simply not made the sort of national decision of entrustment that should be required to support an exemption from the Rules of Competition under article 90(2).

B. INTERNATIONAL COURIER SERVICE WILL NOT "OBSTRUCT" THE PROVISION OF UNIVERSAL POSTAL SERVICE OR EVEN POSTADEX INTERNATIONAL.

Even if one could assume that universal postal service and Postadex International are "particular tasks assigned" to the Postal Administration, the Rules of Competition would apply unless their application would "obstruct the

performance" of these tasks. The French Postal Administration has defended the need to suppress couriers by suggesting that the couriers would in fact obstruct its ability to provide its basic mission, the provision of universal postal services. This assertion is incorrect, however, as a matter of logic and fact.

The initial premise is that the public interest is advanced if traditional letter delivery services to rural areas are subsidized by means of extra revenue generated from monopolistic charges on international courier delivery services. This initial premise is logically incorrect. If rural postal services should be subsidized, it is difficult to understand why the subsidy should not be open and direct rather than hidden by the folds of a monopoly over urban services. A tax on urban delivery services and direct subsidy to rural delivery services seems highly preferable to an internal "cross-subsidy" of unknown dimensions. In any case, the possibility of a direct subsidy makes clear that the issue of whether to enforce a monopoly is logically independent of the need to provide rural postal service.

Yet, even granting the initial premise, the proposition that international courier services constitute a threat to the cross subsidy mechanism is incorrect. Despite obvious similarities, the provision of specialized express services and the provision of mass document delivery services—traditional, universal, inexpensive "postal" service—are two distinctly different business activities. This has been the experience of the couriers. It has also been the experience of the national post offices, which organize their high speed services as quite separate departments from their traditional postal services. As the French Postal Administration has explained in a long article on Postadex International in its official magazine, *Réferences*, "[It] is evident that in order to assure the speed and regularity of international service, the postal service uses, from one end of the chain to the other, circuits that are distinct from those used for other correspondence [September 1984, page 60]." In its recent comparison of postal and courier services in France, BIPE likewise found a distinction between regular postal personnel and facilties and Postadex personnel and facilities. Indeed, this distinction has been carried so far that Postal Administration proclaims that Postadex International will operate even if its regular services are closed by labor disputes!

In contrast to these points, for the monopolization of Postadex International to be justified by the need to provide universal postal service, it would been necessary for the Postal Administration to demonstrate that the two services are economically interdependent. In other words, the Post would have to show that the transportation of standard mail becomes much more costly or even impossible unless the Post also offers high speed international services. The contrary is true, however, as is made clear by an economic study by a German professor of economics, Dr. Kaufer of Salzburg, Austria. Dr. Kaufer has demonstrated that the establishment of an express mail service is not part of the "natural" monopoly of the Post. From an economic point of view it is even harmful for the proper functioning of the Post if it adds an express mail

service to the services offered already. By adding an express mail service to the Post automatically will allow its standard mail service to deteriorate. Also, by establishing a new personnel-intensive operation the Post itself will have little incentive to support new technologies such as electronic transmission of information, which do not require a great number of people. Kaufer, "The Importance of International Courier Services in International Trade with Special Regard to the International Trade Position of the FRG and the Competition Potential of the German Bundespost," pages 24, 46 (1984).

In addition to the work of Dr. Kaufer, one may also cite the experience of the United States and British Post Offices which have long accepted private courier services, both domestically and internationally. Both post offices have found that the existence of private couriers has so stimulated the market that all high speed services—postal and private—have grown. This phenomenon was nicely summarized in a recent, official study of the French postal system which commented upon the U.K. experience: "Paradox: This [exemption for couriers] has aided the Post Office. Because the measure has revealed the existence of a market in which it has been able to compete with success." *L'Avenir de la Post*, Annex 6, page 158 (1984).

In short, high speed services are not a by-product of standard postal services in any sense. There is, therefore, no more reason why users of express services should subsidize rural postal services than there is why users of, say, air freight services should do so. Similarly, it is no more "natural" for the post office to claim a monopoly over express services than it is for it to claim a monopoly over any other venture that returns a profit.

Finally, it is obvious that a monopoly over high speed international services is unnecessary to provide effective international high speed document delivery. The couriers, many airlines, and many post offices are providing these services throughout Europe today and none benefit from a de facto monopoly and only a very few post offices would even assert a theoretical claim to a de jure monopoly.

The economic facts show that competition for Postadex International will "obstruct," in any necessary way, the ability of the Postal Administration to provide traditional postal services, especially postal services to rural areas. Finally, it should be noted that some statements by the Postal Administration might be read to suggest the Postal Administration's true position is that a monopoly over Postadex International is necessary for the sole reason that it can generate revenue to help sustain other services entrusted to the Postal Administration. To the extent that this is the Postal Administration's position, it is tantamount to admission of the inapplicability of article 90(2). A mere increase in the difficulty in selling an otherwise unrelated service or product could not possibly be deemed a proper invocation of article 90(2)'s protection for "particular tasks assigned" to public undertaking.

V. AS A CLEAR MAJORITY OF EUROPEANS RECOGNIZE, INTERFERENCE WITH THE INTERNATIONAL COURIER SYSTEM WOULD BE CONTRARY TO THE DEVELOPMENT OF TRADE WITHIN THE COMMUNITY.

It is clear that a substantial consensus is developing among European businessmen and European governments that French interference with the international courier industry would substantially harm trade within Europe and between Europe and the rest of the world.

In France, the well respected BIPE has reached this conclusion in after a long and carefully researched study. BIPE's conclusions have, in turn, been strongly supported by the French Chapter of the International Chamber of Commerce. They have been echoed in an extraordinary open letter to the President of France signed by more than 100 companies who use couriers in the French provinces. A recent poll of international business by the most respected polling institution in France, Sofres, substantiates that real experts on international business in France, the men and women who engage in trade for their livelihood, support the presence of the couriers. When asked about the consequences of an interruption in courier services for their businesses, eighty-five percent responded that such an event would be either "very troublesome" or "troublesome enough"

Similarly, the role of couriers in the development of trade is emphatically supported by others in the Community. As the Intermarket study shows, German businessmen depend upon couriers for the transmission of urgent international documents, even within Europe. The recent decision by the German Bundespost to withdraw all objections to international courier operations makes clear that it, too, on balance, must recognize that the economic and legal reasons supporting courier service must override even the economic and legal policies underlying the German national postal monopoly. For similar reasons of sound economic self interest, the British government exempted the couriers from both the international and the *domestic* postal monopoly in 1982. A poll of other members of the Community would likewise show little actual opposition to the couriers or even, as in The Netherlands and Belgium, and growing interest in attracting additional courier services.

In summary, the substantial value of the couriers in promoting and developing trade within Europe is apparent to international businessmen throughout Europe. The economic need for couriers became a element of national policy in England and Germany (as it has in the United States and other advanced countries). It is therefore clear that even if the international Postadex were by law particularly entrusted to the French Post Office, this national policy could not override the protection which the Treaty gives to the development of trade within the Community generally.

VI. THE FRENCH POSTAL ADMINISTRATION'S INTERFERENCE WITH PRIVATE INTERNATIONAL COURIER SERVICES OPERATING INTO, FROM, OR THROUGH THE TERRITORY OF FRANCE CONSTITUTES AN ABUSE OF DOMINANT POSITION.

Certainly, the French Postal Administration has a "dominant position" in the document delivery business both by virtue of its tremendous size in the overall document delivery and small parcel delivery sectors and by virtue of its official governmental mantle. Moreover, recent history has shown that the Postal Administration has, in fact, the power to distort competition in any submarket, such as the high speed mail market.

It also seems clear that this dominant power has been abused in regard to the couriers' service to and from the French provinces. Physical interference with the operations of couriers, use of the power of the government to impeach the legitimacy of the couriers, and an harassment of the couriers' customers—all without recourse to normal legal proceedings—each of these is clearly an "abuse" of dominant power.

The "agreements" which the couriers have been forced to sign in order to serve Paris without official harassment are not any less abusive in nature. Under these agreements, the couriers agree to pay substantial sums of money to the Postal Administration. In return, they receive nothing of any legal worth. The Postal Administration under French law has no right to grant such agreements, and hence they are meaningless. Moreover, even if such a right existed, the agreements are terminable by Post on such short notice as be of little practical commercial value (since it would be irrational to invest in the business). Obviously, these agreements were not freely entered into. No rational businessman would sign such an agreement unless he felt compelled to do so by a dominant power.

Application of the specific criteria of article 86 does not require extensive discussion. Clearly, the activities of the Postal Administration have "limited the market" for courier services "to the prejudice of the customers," especially those in the provinces. Article 86(a). By refusing to extend the Paris agreements to the provinces, the Post has "applied dissimilar conditions to equivalent transactions" thereby placing provincial businessmen "a competitive disadvantage" compared to Parisian businessmen and compared to other businessmen in Europe. Article 86(c). Moreover, the Paris agreements effectively make the contract between the courier and his customer subject to the payment of an additional charge—to cover the cost of the payment to the Postal Administration—that has "no connection with the subject of such contract." Article 86(d).

The governmental mantle, unsupported by specific legal authority, is simply no excuse for this conduct. During the past ten years, many of the postal administrations in Europe have questioned whether international courier operations should be permitted under their various national postal monopoly

laws. Many postal officials have been dismayed by the success of the couriers relative to worldwide postal system's international high-speed service. Yet none of these administrations and officials have dealt with these issues as so abusively as the French administration and its officials.

The activities of international courier services are plainly "trade between Member States." Nonetheless, from time to time, the Postal Administration has made a point of the fact that its interference with the activities of the international couriers occurs while the documents are being transported over French territory. For this reason, argues the Post, it is only enforcing a "domestic" right. Obviously, an urgent document from a businessman in Paris to a businessman in Cologne is "trade between Member States" for the whole length of its journey. It does not consist of "domestic" trade up to the border and "international" trade thereafter. The same would hold true of an urgent document sent from a businessman in Cologne to a businessman in Paris or Marseilles. Indeed, if the Postal Administration's philosophical approach had any validity, it could justify French interference with documents which have nothing to do with France other than that they cross French territory at some point in their journey from shipper to addressee.

The utter implausibility of the position assumed by the French Postal Administration is further demonstrated by the fact that the transport laws of France take exactly the opposite view. For the purposes of licensing or taxation, "international" surface transportation begins at the point of dispatch or receipt (for example, as the warehouse of an exporter or importer), and not at the border. Similarly, when one buys a through international air ticket, the rules of international air transport apply from the moment from the origination airport and not from the time the plane flys across the border. (This statement would apply even if one had to connect to a second flight within France.)

VII. THE AGREEMENTS PERTAINING TO INTERNATIONAL COURIER SERVICE TO AND FROM PARIS VIOLATE ARTICLE 85.

The agreements between the Postal Administration and individual couriers pertaining service to and from Paris also violate article 85. Because of the emphasis of article 85 differs somewhat from article 86, a few additional remarks may be useful.

These agreements "restrict or distort" a significant fraction of the trade in high speed delivery services between France and other member States. The Postal Administration estimates that Postadex International has 15 percent of this trade. *Réferences*, page 59 (PTT Ministry, September 1984). Virtually all of the rest of the traffic is covered by the Paris courier agreements. The traffic to and from Paris is affected because each shipment carried by a private carrier generates an obligation on the part of the courier to pay the Postal Administration an amount of money (which may vary from courier to courier). The traffic to and from the provinces is affected because the limitation of the

agreements to Paris has, in fact, reduced the customers' choice of courier services. When, in 1982, the Postal Administration modified the agreements to limit them to Paris, several courier companies closed their offices in the provinces.

The agreements appear to be per se violative of article 85 on three counts. First, they should be held to violate article 85 *per se* because they are a result of a conduct which violates article 86.

Second, the geographical limitation of the agreements appears *per se* to limit markets and discriminate between trading partners (e.g. between the German businessman who must communicate with a Parisian office and a second businessman who communicate with a provincial office). It is no answer to say, as the Postal Administration has suggested, that the failure to extend the courier agreements to the provinces was due to the fact that Postadex International was adequate in the provinces. In addition to the obvious legal defects in this line of reasoning, it also suffers from the fact for much of the duration of these agreements, Postadex International served only Paris and not the provinces. *Réferences*, page 59 (PTT Ministry, September 1984).

These agreements also restrict trade in a third *per se* illegitimate manner. In conjunction with French Customs' Texte 83-5 (12 January 1983), they effectively expand the power of the Postal Administration to regulate the courier transport of items clearly outside of the postal monopoly. This gist of this customs regulation is to require a postal agreement for eligibility for speedy procedures appropriate for time-sensitive articles. As a matter of commerical reality, it is impossible to offer a transportation service for the import of time-sensitive objects such as samples of merchandise, spare parts, computer programs, etc., without speedy clearance by customs. Many such articles would not be covered by the postal monopoly under even the most expansive definition. Nonetheless, one cannot obtain access to speedy import procedures, and hence a practical matter, engage in the business, without the agreement of the Postal Administration.

VIII. THE HIGH SPEED MAIL AGREEMENTS BETWEEN THE FRENCH POSTAL ADMINISTRATION AND THE POSTAL ADMINISTRATIONS PROBABLY VIOLATE ARTICLE 85 SINCE THEY HAVE AS THEIR INTENT OR EFFECT THE DISTORTION OF COMPETITION BETWEEN THE COURIERS AND POSTADEX INTERNATIONAL.

It is recognized that, at this stage of discussions, it is unlikely that the high speed mail agreements between the French Postal Administration and other postal administrations will be reviewed in detail. Nonetheless, the connection between the actions addressed above and these agreements is so clear that the questionable status of these agreements must be noted in passing.

A very brief summary of well know facts will suffice. The French Postal

Administration has repeatedly proclaimed the connection between the successful implementation of these agreements and its campaign to repress the international couriers. These intentions have been communicated quite openly to the foreign postal administrations in and out of Europe. Hence, these agreements were signed and implemented by both parties with full knowledge that the service made possible by the agreements was the necessary and sufficient condition for vigorously anticompetitive actions by the French Postal Administration. At very least, in view of the circumstances, it would have been prudent and reasonable to condition each such high speed mail agreement on the condition that both parties agreed not take actions that would restrict or distort competition between the service provided under the agreement and the services offered by other undertakings.

The simple truth, then, is that these bilateral high speed mail agreements are part and parcel of a scheme by the French Postal Administration to suppress courier competition in violation of the Rules of Competition. A detailed analysis of these agreements, which is beyond the scope of this memorandum, will most likely show that they too must be held to violate Article 85.

Part 5

International Customs Law

CHRONOLOGY

18 Feb 1986	Customs directors from major countries order Customs Cooperation Council to study express consignments.
26 Sep 1986	International Courier Conference submission to CCC on fundamental customs reform for express consignments.
6 Nov 1986	CCC Expert Group meets for the first time and defines scope of the study on express consignments.
12 Nov 1986	International Courier Conference slide show presentation to CCC on express industry.
15 Jan 1987	Draft report on express consignments by CCC secretariat proposes new annex to Kyoto Convention and memorandum of understanding between CCC and couriers.
2 Feb 1987	CCC Expert Group emasculates secretariat's proposal and proposes weaker "guidelines" for customs treatment of express consignments.
23 Mar 1987	Peat Marwick study on customs treatment of postal express consignments.
22 Jun 1987	CCC Directors General approve one year trial of express guidelines (later extended to 2 years).
21 Oct 1987	CCC and IECC sign Memorandum of Understanding on enforcement of customs laws with respect to express consignments.
Mar 1988	CCC approves rules implementing Memorandum of Understanding
Dec 1989	CCC Advisory Group on Express Consignments, first meeting.
Sep 1992	CCC Advisory Group on Express Consignments, fourth meeting, completes work on revised guidelines.
1993	Joint CCC-International Express Carriers Conference publication, *Guidelines on the Clearance of Express Consignments*

13

Overview: International Customs Law

The present study shows clearly that air-courier, fast parcel, and expedited mail services are, in fact, a single special service category.

- CCC Secretariat (1986)

The Customs Cooperation Council (CCC) was the first intergovernmental forum in which the express industry undertook major policy reform on a worldwide basis. The occasion was a special study on customs procedures for express carriers prompted by the Customs directors of several industrialized countries. A strong presentation by the express industry in 1986 persuaded the professional staff of the CCC of the need for fundamental reform, but individual Customs administrations proved more resistant to change. In 1993, after seven years of discussions, the CCC and the International Express Carriers Conference agreed on a set of guidelines for expedited and simplified customs procedures for express consignments. The Conference's patient participation in CCC deliberations also provided a conduit for constructive discussions between the industry and individual Customs administrations. For the express industry, publication of the "Express Guidelines" was a landmark in worldwide customs reform, even though the leading edge of reform had, by 1993, moved beyond the Guidelines in some countries.

Initiation of Special Study on Urgent Consignments

On February 18, 1986, customs directors from Australia, Canada, France, Germany, Japan, Sweden, the U.K., and the U.S. convened to consider implications of the emergence of international express traffic. The group met in the offices of the Customs Cooperation Council, predecessor of the World Customs Organization. Founded in 1952, the CCC was an intergovernmental

organization composed of customs administrations of more than ninety countries. The extraordinary meeting in February 1986 was prompted the directors of customs services in the United States and United Kingdom. Afer two days of discussions, the directors formally requested the CCC's Permanent Technical Committee (PTC) and Enforcement Committee to study the "urgent air consignment" industry and suggest appropriate responses. [1]

The CCC secretariat began this study by distributing a questionnaire to customs administrations requesting information on how they dealt with "air couriers, fast parcels, and expedited mail services." Information and comments were also solicited from the Universal Postal Union, International Air Transport Association, and the International Courier Conference (renamed the International Express Carriers Conference in1987). Secretariat staff visited courier operations at major international airports.

Chapter 14 reproduces the policy presentation of the International Courier Conference, submitted on September 26, 1986. The Conference viewed the CCC inquiry as an historic opportunity to explain to customs administration the need to modernize worldwide customs operations. The Conference submission, known in the courier industry as the "Blue Book," offered a vision of a fundamentally new approach towards customs treatment of express shipments. The Conference also produced a French language v ersion of this document.

On November 6, 1986, an "Expert Group" convened at CCC headquarters in advance of the regularly scheduled meeting of the Permanent Technical Committee. The Expert Group included representatives from Algeria, Argentina, Australia, Belgium, Brazil, Canada, China, Denmark, Egypt, France, Germany (West), Kenya, Netherlands, New Zealand, Nigeria, Sudan, Sweden, Switzerland, Thailand, Trinidad, U.K., U.S., Zimbabwe. The Universal Postal Union, European Union, International Air Transport Association, and International Courier Conference attended as observers. The purpose of this initial meeting was to define the precise scope and product of the CCC study on "rapid consignments."

Among members of the Expert Group, initial reaction to the proposed study on customs treatment for rapid consignments ranged from skeptical to hostile. To educate delegates on the nature of courier services, the International Courier Conference provided a tour of courier facilities in Brussels. After prolonged debate, the Expert Group determined the scope of the study to be "express consignments" defined as follows:

> Express consignments are goods which are transported, by any mode, by means of a special express commercial service operated under closely integrated administrative control.
>
> Special express commercial service for express consignments is offered by regular, commercially specialized services for urgent, time-sensitive

[1] "Rapid Clearance of Urgent Air Consignments: Report on the Meeting of 18-19 February 1986," CCC Doc 33.478E.

shipments.

Integrated administrative control for express consignments means that the operators of discrete express commercial services must be sufficiently integrated at both ends of the service so that they can exercise a high degree of control over the shipments, particularly in regard to the reliability of information supplied for Customs purposes such as: description, tariff classification and value. Such control would be implemented by substantial common ownership between the local company and the foreign affiliate and/or by a very close contractual relationship between the local company and its foreign affiliate(s) (e.g. a franchise arrangement).

In other respects, the Expert Group emphasized the need to enforce customs laws as well as to facilitate express shipments. The Expert Group endorsed a proposal by the secretariat that the CCC study should also lead to a "memorandum of understanding" between the CCC and courier companies that would require couriers to provide customs authorities an extraordinary level of cooperation in return for expedited customs processing.[2] The Expert Group postponed addressing the question of whether the product of the CCC study should be a draft treaty or informal guidelines for customs administrations.

The full Permanent Technical Committee convened the week following the meeting of the Expert Group and approved its recommendation for the framework for the special study on express consignments. More notably, the Permanent Technical Committee invited the International Courier Conference to present to this session a slide show on the nature and evolution of the express industry. The ICC was pleased to comply.

EQUAL TREATMENT OF POSTS AND EXPRESSES

A central element of the position of the International Courier Conference was a call for equal application of customs laws to all express shipments, whether conveyed by courier companies or by international postal services. In the view of the Conference, equal application of customs law was important for two reasons. First, equal legal treatment was needed to protect against unfair competition from post offices since leading post offices were increasingly positioning their express mail services to compete with private express services. Second, equal legal treatment would encourage all participants in the market, post offices as well as private couriers, to work together for customs simplification for express shipments. The Conference represented a handful of companies viewed as foreign interlopers by government officials in almost all countries. The Conference therefore felt that prospects for long term customs simplification would be enhanced greatly by support from the numerous and politically powerful post offices.

To buttress its call for a new customs order for all express shipments, the

[2]*See* "Report on the Meeting of the Expert Group on Rapid Clearance of Urgent Air Consignments (6-7 November 1986)," CCC Doc 33.627E.

Conference retained an accounting firm, Peat, Marwick, Mitchell & Company, to conduct a detailed test of the collection of duty and tax from express mail shipments sent between the United States and the European Community and among member countries of the European Community. The test lasted from May 1986 until February 1987 and included 98 shipments from the U.S. to the Europe, 91 shipments from the Europe to the U.S., and 143 shipments within the European Community. The articles shipped were similar to those actually transported by private express, including stationery, clothing samples, circuit boards, electronic calculators, and automobile parts. The value per shipment ranged from $25 to $200.

In March 1987, Peat Marwick reported the results of its survey.[3] The study demonstrated widespread failure by customs authorities to apply customs laws to express mail shipments in the same manner as applied to private courier shipments. Overall the assessed duty was within 25 percent of the lawful amount for only 11 percent of shipments sent to Europe and 1 percent of shipments sent to the United States. In two instances, European customs collected duty even though none was due. In the United States, assessment of duty on two express mail shipments appears to have been a mistake; it was later learned that U.S. Customs had adopted a non-public practice of waiving low amounts of duty on shipments transported by express mail shipments, although not on similar shipments transported by pri vate express.

PM study on customs treatment of express postal consignments, 1987

Instances in which -	EEC Duty	USA Duty	Total Duty	EEC VAT
Some tax was paid	38%	2%	19%	22%
Tax paid was within 25% of correct amount	11%	1%	6%	16%
Total amount of tax paid as percent of tax due	27%	4%	19%	25%

Although the sample size of the Peat Marwick study was insufficient to draw detailed conclusions, the study revealed a definite tendency towards undercollection of duty and VAT on express mail shipments. In contrast, as the International Courier Conference pointed out, a courier company incurred severe penalties if it failed to declare accurately the nature of shipments carried or erred in the calculation of duty and VAT payable on such shipments. These penalties precluded a similar level of undercollection on shipments transported by private express. Undercollection of duty and VAT on express mail shipments is possible only because the CCC and national customs authorities acquiesce in the post offices's claim that they are exempt from misdeclaration

[3]Peat, Marwick, Mitchell & Company, "Survey of Customs Collection of Duty and Value Added Tax on Items Shipped Via Express Mail" (Mar 23, 1987).

penalties.[4]

TRIAL GUIDELINES FOR EXPRESS CONSIGNMENTS

In January 1987, the CCC secretariat, experts drawn from customs administrations around the world, issued a far-sighted draft report on express consignments. Adopting many of the recommendations of the International Courier Conference, the draft report called for simplification of customs procedures applicable to a new category of traffic, called "express consignments." The report further urged that reforms be harmonized internationally by means of a new annex to the Kyoto Convention, the international treaty on customs simplification. The draft report declared:

> The present study shows clearly that air-courier, fast parcel and expedited mail services are, in fact, a single special service category. It is a service in the sense that the ordinary post is a service. It is a special service in that it has attributes that are peculiar to it, and it is not based on the mode of transport. This service could appropriately be called "Express Service" (ES).
>
> The CCC should recognize that ES is a special service and that Express Consignments (ECs) merit special consideration by Customs services.
>
> To achieve world-wide standardization of Customs formalities in respect to ECs the CCC should adopt an additional Annex to the Kyoto Convention exclusively for ECs.[5]

The draft report also considered how rapid clearance of express consignments could be reconciled with obligations of customs authorities to protect national security and revenue. The secretariat's answer was to encourage voluntary "memoranda of understanding" according to which courier companies would provide customs authorities with information on shipments in a more timely manner than ordinarily required.

> Express consignment carriers provide a service which is essentially based upon three aspects: speed, security and immediate knowledge of [the] consignment's location. Of these, speed is paramount to the industry. It is this speed requirement which is most affected by any Customs delays and accordingly carriers are anxious to co-operate in exploring ways and means [of] reducing such delays.
>
> In this regard both IATA [International Air Transport Association] and ICC [International Courier Conference] have expressed an interest in concluding Memoranda of Understanding with the CCC which will focus

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[4]See Part 9, below. The basis of the post offices' claim to immunity from customs penalties is a provision of the Universal Postal Convention. Whether this provision is binding on national customs administrations is unclear since the Universal Postal Convention does not override inconsistent national law. At a minimum, the Customs Cooperation Council could object to, rather than acquiesce in, this practice.

[5]"Study on Rapid Clearance of Express Consignments," Doc 33.673E, paragraphs 1-3 (Jan 15, 1987). Annex 1 set out the terms of a draft annex. Annex 2 summarized the responses to the secretariat's 1986 questionnaire.

> on co-operation in both the facilitation and enforcement fields.
>
> These Memoranda would be supported by guidelines incorporating practical ways of how the spirit of the Memoranda could be actioned through mutually co-operative efforts. From the viewpoint of facilitating Customs processing of express consignments, the guidelines would recognize the need for simplifying and harmonizing documentation and procedures, including interfacing of automated systems. . . .
>
> Another avenue of co-operation could be through a trial bilateral effort between Customs services of two countries having considerable express consignment traffic with each other.[6]

In this manner, the CCC secretariat proposed a commercially neutral legal framework to facilitate the global flow of urgent, time-sensitive parcels.

In late January 1987, the CCC Enforcement Committee met and reviewed the draft Memorandum of Understanding prepared by the Secretariat for use with International Air Transport Association and the International Courier Conference. These were approved with minor revisions, including most of the changes proposed by the Conference. In addition, the Enforcement Committee welcomed a second showing of the ICC's slide show on the express industry.

On February 2, 1987, however, the Expert Group reconvened in an atmosphere of simmering antagonism. Customs officials from Australia, the United Kingdom, and Japan rejected the idea of an annex to the Kyoto Convention adapted to the needs of express consignments, arguing that such a provision would discriminate against general air cargo. The delegate from France attacked the basic concepts of the draft report. He pointed out that customs treatment was traditionally based on the type of good transported. Customs laws, he noted, did not take into account the fact that some shipments were more urgent than others; the draft report, he observed disparagingly, proposed "something new." France, joined by the United Kingdom, condemned the idea that private shipments should be entitled to the same customs treatment as postal shipments. Having rejected the philosophy of the draft report, the Expert Group proceeded to consider the document section by section, deleting or revising virtually all substantive measures until, as members of the Expert Group noted, the resulting recommendations constituted only a "skeleton" of the original proposals by the secretariat. It was further decided that the remaining provisions should be cast in the form of non-binding "guidelines" and not as "recommendations" included in the Kyoto Convention.[7] In late April 1987, a Working Party of the Permanent Technical Committee, chaired by the French delegate to the Expert Group, reviewed the report of the Expert Group, and struck several measures which had escaped

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[6]Ibid., §§ 79-83.

[7]"Report on the Second Meeting of the Expert Group on Rapid Clearance of Express Consignments," CCC Doc 33.860E (Feb 27, 1987). Changes made by the Expert Group in the proposal of the secretariat are shown more clearly in "Draft Conclusions," CCC Doc 33.794 (Feb 3, 1987). The International Courier Conference prepared detailed minutes of this meeting; the CCC declined the request of the Conference to prepare official minutes.

rejection by the Expert Group.[8]

Emasculation of the secretariat's draft report was ratified by higher authority. In early May, the full Permanent Technical Committee approved a one-year trial of the revised "Draft Guidelines Which Could Be Applied to Simplify and Harmonize Customs Formalities in Respect of Express Consignments."[9] In June 1987, the annual general meeting of the directors general of Customs Cooperation Council in Ottawa approved the decision of the Permanent Technical Committee. The trial period for the draft express guidelines was later extended an additional year, to June 1989.

Even though drastically reduced from the visionary proposals of the secretariat, the 1987 draft CCC guidelines for the customs treatment of express consignments were a step in the direction of reform. Paragraph four of the 1987 draft guidelines, for example, usefully recognized the special characteristics of the express industry:

> In the light of this study, the CCC recognizes:
>
> (a) the existence of express consignment services (private commercial services and postal services);
>
> (b) the rapid growth of these services in some countries;
>
> (c) the need for equality of treatment for all parties involved in international trade;
>
> (d) the need for equality of treatment for express consignment services;
>
> (e) the need for rapid clearance to match commercial demands; and
>
> (f) the need for harmonization and interfacing of ADP [automatic data processing] systems wherever practicable particularly since computerization can offer major advantages both to Customs and express consignment operations in handling this type of traffic.

Despite the CCC's reluctance to facilitate the international movement of express shipments, the CCC's study of express consignments and trial express guidelines resulted in wide dissemination of reform concepts. Dispersion of progressive ideas made feasible discussion at the national level reforms considered radical only a year or two before, including higher "de minimis" levels,[10] flat rates, entry on manifest documents, specialized courier express clearance centers, and equal treatment of private and postal shipments.

MEMORANDUM OF UNDERSTANDING

The Ottawa meeting of CCC directors general also approved the draft memorandum of understanding between the CCC and the courier industry.

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[8]"Report of the Working Party to the Permanent Technical Committee," CCC Doc 34.030E (Apr 24, 1987).

[9]"Report to the Customs Cooperation Council of the 135th/136th Sessions of the Permanent Technical Committee (27 April-1 May 1987)," CCC Doc 34.040E (May 1, 1987) at § 45. The text of the guidelines appeared as Annex II to this document.

[10]Most customs laws permit entry without duty for shipments valued below a certain level because the amount of customs revenue involved is negligible; this is referred to as the "de minimis" level.

On October 21, 1987, the "Memorandum of Understanding Between the CCC and the International Express Carriers Conference" was formally signed by G.R. Dickerson, Secretary General, of the Customs Cooperation Council and Gordon Barton, Chairman of the International Express Carriers Conference. The memorandum was a general agreement which pledged:

(i) To strengthen further the co-operation between the two organizations.
(ii) To examine and develop together ways in which co-operation and consultation between operators of express consignment services and Customs authorities could be improved with a view to providing rapid clearance arrangements for express consignments and to combating Customs fraud, in particular drug smuggling, e.g. the development of practical guidelines for operators of express consignment services and Customs.
(iii) To seek to ensure a better understanding by the operators of express consignments services of Customs authorities' tasks and problems and vice-versa, thereby facilitating co-operation between the two parties.
(iv) To consider practical ways in which the personnel of operators of express consignment services and their agents might assist Customs authorities in the detection of Customs offences, in particular, those relating to drug smuggling.

In March 1988, the CCC Enforcement Committee gave final approval to a detailed document implementing the memorandum of understanding: "Guidelines on Co-operation Between Customs Administrations and Operators of Express Consignment Services Aimed at the Prevention of Drug Smuggling." At the same time, the CCC adopted similar guidelines with respect to the International Association of Ports and Harbors and the International Federation of Freight Forwarders Association.

CCC-IECC EXPRESS GUIDELINES

After completion of the two-year trial period for the draft express guidelines, the CCC resumed work on a more permanent and comprehensive version of the express guidelines in late 1989. By this time the rise of the international express industry was an established fact and the concept of substantive express guidelines was less revolutionary. Even so, progress was slow.

On December 18, 1989, an Advisory Group on Express Consignments was convened to review the experience of the trial period and to recommend further steps. The International Express Carriers Conference again offered a presentation on the nature of express services. The Advisory Group directed the CCC secretariat to prepare a revised and expanded version of the guidelines for processing of express consignments in light of the experience of the trial period. In November 1990, the Conference submitted a new position paper. Responding to earlier criticism that special customs treatment for "express consignments"amounted to undue favoritism, the Conference modified its

position and argued that express clearance procedures could be viewed as a procedural bargain open to all carriers and all shipments provided adequate, reliable data are submitted to customs authorities sufficiently in advance of the arrival of cargo:

> the IECC sees the opportunity and need for a quite new philosophy in which rapid clearance by Customs is linked, contractually, to special information facilities from the carrier. . . . [T]here would be no need to define a special category of consignment or class of operator.[11]

The Conference further renewed its plea for revised procedures based on four categories reflecting the customs revenues at risk rather than specific type of goods transported: documents, low value shipments which incur no duty, low value shipments which incur only a small level of duty, and high value shipments.

Work on the express guidelines proceeded slowly. In December 1990, the secretariat issued a draft revision of the express guidelines.[12] In January 1991, the Advisory Group considered and amended seven of eighteen points in the draft guidelines. Most of the remaining points were addressed in a third meeting in September 1991.[13] In September 1992, a fourth meeting of the Advisory Group completed work on the express guidelines. Although the pace was slow, the revised guidelines reflected many of the proposals of the International Express Carriers Conference.

The final express guidelines urged customs administrations to apply expedited procedures equally to "all consignments for which expedited release or clearance is requested, regardless of weight, value, size, type of operator or carrier (e.g. courier companies, airlines, freight forwarders, postal services) or of mode of transport." The guidelines divided such "express consignments" into four categories: (i) documents, (ii) low value non-dutiable consignments, (iii) low value dutiable consignments, and (iv) high value consignments and recommended specific procedures for simplified customs clearance of each. The guidelines also recalled that "It must also be borne in mind that the facilities granted to operators by the Customs are based on mutual trust and on compliance with the procedures and conditions laid down. That is why the Guidelines recommend that the two Parties conclude co-operation agreements."

The International Express Carriers Conference regarded the final version of the express guidelines as a major achievement in the evolution of customs

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[11]IECC, "Express Freight and Customs Requirements" at 6 (Nov 1990). This paper was prepared by John Raven. In early 1988, the IECC created a committee, chaired by Bertie Coxall, founder of Airport Couriers, which took over direction of IECC customs policy. In mid 1989, the IECC established a "customs project" under the directorship of Mr. Raven. Mr. Raven skillfully led the long effort to develop the express guidelines in conjunction with the CCC.

[12]"Draft Guidelines Which Could be Applied to Simplify and Harmonize Customs Formalities in Respect to Express Consignments," CCC Doc 36.345E (Dec 6, 1990).

[13]"Report on the Third Meeting of the Advisory Group on Express Consignments," CCC Doc 37.000E (Sep 30, 1991).

thinking towards international express traffic even though, by 1993, the most advanced customs administration had moved beyond the guidelines in terms of facilitating express shipments. The Conference was therefore pleased to join with the CCC in 1993 in an collaborative effort to publicize and promote use of the guidelines. In a preface to a joint publication, *Guidelines on the Clearance of Express Consignments*, A. Doyle Cloud, chairman of the International Express Carriers Conference, commented,

> The Guidelines . . . provide evidence that Customs Administrations around the world now recognize the time-sensitive needs of the international marketplace. I applaud the efforts of the CCC, its Secretary General and, in particular, the CCC's Express Consignment Advisory Group.

In his preface, CCC Secretary General, James Shaver, declared:

> All Customs Services are searching for new ways to reconcile the conflicting objectives of ensuring that importations conform to national laws and regulations while interfering as little as possible with legitimate international trade. The answers lie in increased co-operation with and new levels of trust in responsible enterprises that have a particularly critical interest in rapid Customs clearance. The Express Industry is at the cutting edge in this. These Guidelines are the result of common sense and understanding by Customs and the Express Industry for each other's interests and difficulties.

14

ICC Submission on Urgent Consignments (1986)

INTRODUCTION

1. The International Courier Conference (ICC) is an association of the major international couriers and express companies, now in the final stages of registration in Geneva, Switzerland. The members of the ICC and their home countries are: Airsystems (USA), DHL (USA and Hong Kong), Federal Express (USA), IML Air Service (UK), International Bonded Courier (USA), Purolator Courier Corporation (USA), Securicor Air Couriers (UK), TNT/Skypak (Australia), and XP International (Netherlands). This statement is submitted on behalf of all members.

2. The ICC is extremely pleased to be able to participate in this important and timely study of the Customs Cooperation Council on how customs laws can be modernized to facilitate the customs clearance of urgent consignments. With commendable foresight, the CCC has embarked on this study at just the right moment in history. Our industry is still young, and most national customs codes have yet to be revised to fully take into account courier/express traffic. However desirable individual national reforms may be, they would together form a patchwork of inconsistent approaches that would deprive international commerce of many of the advantages of international courier/express service. Because of the unique importance of rapid, centralized sortation to courier/express operations, standardization and simplification of customs laws is relatively more important for the flow of urgent consignments than for other types of traffic.

3. Leadership from the CCC is, quite simply, vital to the future of this

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International Express Carriers Conference, "Special Study on Rapid Clearance of Urgent Air Consignments: Statement by International Express Carriers Conference" (1986) (submitted to the Customs Cooperation Council). Appendices A and B are omitted.

industry. In the late nineteenth and early twentieth centuries, when the international postal system was beginning to mature, the Universal Postal Union successfully persuaded the world to adopt simplified and standardized rules, including customs rules, for the exchange of letters and small parcels. Without doubt, world commerce was, and still is, indebted to this farsighted effort by the UPU. With respect to the new traffic in urgent consignments, however, neither the post office nor any other commercial organization is in a similar monopoly position. Only the CCC is in a position to develop and recommend an overall framework of rules. And to do so, the CCC must act quickly. After legal reforms are adopted and large commercial interests become vested, harmonizing and rationalizing diverse customs laws will be extremely difficult. Today there exists a rare opportunity to develop a truly international approach to the customs law on urgent consignments, and only bold, energetic action by the CCC will allow us all—shippers, customs officials, couriers, airlines, and post offices—to take full advantage of this opportunity.

4. At the outset, we would like to lay to one side much of the rhetoric that has been exchanged between the post offices and the courier/express industry. As the CCC is all too well aware, each has accused customs and customs laws of unfairly favoring the other. Both points may be true to some degree. But both points are most constructively seen as portions of a larger whole. The post offices' express mail program and the courier/express companies are, in fact, providing similar, freely competitive services (indeed, in some cases, postal and non-postal operators are in joint venture). These "air courier/fast parcel/express mail" services are commercially distinct from traditional postal service and cargo service. For this reason, neither the traditional customs approach to postal traffic nor the traditional customs approach to baggage and cargo fits the new services well. Yes, both sides have grounds for complaint. But the larger truth is that all members of the industry—postal and non-postal—have a strong *common* interest in simple, workable customs procedures that are specifically adapted to the needs of urgent consignments, on the one hand, and to the duties of customs officials, on the other. In our presentation, we have tried to emphasize this commonality of interest and to suggest new procedures that will be feasible for all.

5. In our presentation, we have focused on broad principles. At appropriate points in the text, we have summarized these principles into short statements. For convenience, these summary statements are restated in Appendix A. A central point of our presentation is our belief that the conceptual framework of the CCC's Questionnaire should be reconsidered. Hence, we have not been able to explain our position by simply preparing "ideal" answers to the Questionnaire. In Appendix B to our presentation, however, we have appended answers to the specific questions posed in the Questionnaire. Finally, we have separately prepared studies on the customs laws of six individual countries: England, France, Ireland, Germany, Japan, and the United States. The studies

will, we hope, provide useful supplements to the official responses from these several administrations, by setting out the rules as perceived by the users.

I. AIR COURIER, FAST PARCEL, AND EXPRESS MAIL SERVICE ARE IN REALITY A SINGLE, NEW TYPE OF COMMERCIAL SHIPMENT, WHICH IS DEFINED BY THE *SERVICE* ACCORDED THE SHIPMENT AND NOT, AS IN TRADITIONAL CUSTOMS CONCEPTS, BY THE MODE OF TRANSPORTATION.

1. EVOLUTION OF THE COURIER/EXPRESS INDUSTRY

6. The categories used in the CCC's July 1986 Questionnaire—air courier (AC), fast parcel (FP), and expedited mail services (EMS)—are based upon a traditional conceptual framework which is not well suited to analysis of the customs treatment of "urgent consignments" (UC). To explain this statement, it is useful to begin with a review of the evolution of the express industry.

7. The international air courier industry began in the late 1960's and early 1970's as a very small industry. In retrospect, it is clear that the air courier industry arose because traditional methods of transmitting parcels around the world were not well adapted to the emerging needs of modern multinational companies, especially "service" companies such as banks, shipping lines, engineering firms, and trading companies. During this period, these industries underwent revolutionary changes, brought on by the development of modern computers and telecommunications, by the containerization of surface cargo, by the rapid industrialization of the Middle East, and by the evolution of worldwide markets. No doubt traditional cargo distribution and postal systems performed their particular tasks with efficiency and economy. Neither, however, was equipped to provide the very urgent, very tightly coordinated, very particularized transportation services required by the new types of international commercial activity.

8. This need was filled by the air couriers. Couriers transported documents and small parcels by rapid delivery messenger services from sender to international airport and from destination airport to the addressee. Between international airports, couriers usually transported their shipments as the baggage of an "onboard courier" passenger. At this time, the commercial airlines did not offer a cargo service for very urgent, time-sensitive shipments. Only passengers and their baggage could be checked in at the last minute. Only passengers and their baggage were offloaded immediately upon arrival. Most importantly, only passengers and their baggage were guaranteed to board a specific flight. In order to supply a last minute pickup service, or provide an early morning delivery, or make a tight connection to an onward flight, the courier had no choice but to use airline baggage services to transport time-sensitive shipments.

9. To an equal or greater degree, Customs' procedures also mandated reliance on the baggage system. Only passenger baggage was immediately

cleared by Customs, twenty-four hours a day. In some countries, indeed, only passenger baggage could be promptly cleared at all. "Cargo" would have to await clearance by an "importer," a time consuming legal anachronism for the couriers who were transporting shipments which, like mail, were usually originated by a shipper, not an addressee (hence, the addressee would often be unaware of the particulars of the shipment).

10. More generally, regulatory barriers created by the customs laws fundamentally shaped the evolution of the international courier industry. Couriers concentrated upon the document business primarily because documents were "nondeclarable" before customs (if not in law, then in fact). International couriers handled only a relatively few small parcels, and these were often communicative in nature, such as advertising proofs and punched computer cards. The strong emphasis on documents rather than parcels in the international industry contrasted markedly with the opposite commercial evolution pursued by large domestic companies such as Federal Express and United Parcel.

11. Although international air couriers depended heavily on their innovative use of the airline/customs baggage system, they did not neglect the air cargo system. When airline schedules permitted extra leeway (e.g., when there was a long connection) and when customs facilities were operating as soon as the aircraft arrived, "air couriers" would gladly use air cargo because it was much cheaper than baggage as a method of transportation. By the late 1970s, air cargo was often used for air courier shipments over major international routes.

12. For the original "air couriers," the distinction between documents and small parcels was far more important than the distinction between onboard courier transportation versus air cargo transportation. In fact, air couriers regularly used air cargo. Couriers would switch from one mode to the other depending upon the availability of quick customs clearance, the details of airline schedules, and other considerations such as price and traffic volume.

13. The huge success of air courier services for document transmission suggested the existence of a large, unsatisfied demand for a general international express system for parcels—one that was not burdened by the inflexibilities of the traditional air freight system and its customs formalities. The popularity of dedicated national express parcel systems likewise indicated what was missing internationally. As a result, in the 1980s several types of other delivery systems, which had only dabbled in the international arena before, began to adapt their services to compete seriously with the international courier system. The new entrants included the national post offices (express mail), the airlines (e.g., Pan American's World Pak), dedicated national express parcel systems (e.g., Federal Express), and air freight forwarders (e.g., Emery's Overnight Letter). Meanwhile, the "air couriers" also began to explore the express small parcel business more seriously. With these developments, it became more accurate to refer to the industry as the "courier/express" industry.

14. We may summarize the key points of this short history as follows:

(A) *The original "air couriers" arose because changes in the nature of international commerce resulted in a demand for an express delivery service for which the air cargo and air mail systems were not well suited. Customs laws and procedures, in particular, were very important in shaping the courier industry by forcing it to concentrate on document traffic and the use of onboard couriers.*

(B) *The success of the air courier industry led to the introduction of competitive services by the dedicated national express carriers, the commercial airlines, the air freight forwarders, and the post offices.*

(C) *The distinction between onboard courier transportation and other forms of express transportation has declined in importance due to growth in courier/express traffic, improvement in airline and customs procedures, and the entrance of new competitors.*

2. COURIER/EXPRESS TRAFFIC TODAY

15. Today most courier/express traffic consists of time-sensitive documents such a bank documents, shipping documents, and engineering documents. Parcels sent by courier/express tend to be special, non-repetitive shipments that are for the use or review of the addressee rather than for resale. Typical parcels would include various types of printed matter, samples, advertising artwork and films, circuit boards, computer tapes and diskettes, emergency spare parts, etc. The average weight per shipment is less than 5 kilograms, and the average commercial value per shipment is probably less than SDR 10.

16. International courier/express traffic has been characterized by very dramatic growth. From a base of about 5 million shipments in 1980, we would estimate that, in 1985, express traffic of all types (including postal) totaled roughly 36 million shipments. Total gross revenues for the industry have been variously estimated at between 2 and 4 billion U.S. dollars.

17. The low weight and low value of most courier/express traffic reflects both the historical development of the industry and the practicalities of providing the service. We have already noted the bias in the customs laws in favor of document traffic. The industry's historical reliance on onboard couriers also served to limit the maximum size per piece to 30 kilograms, the maximum weight for baggage accepted by the airlines without punitive surcharges. These historical patterns have been reinforced by operational considerations. It is very difficult to provide a last minute pickup service or rapid sortation for parcels that weigh more than a man can lift and carry easily. Similarly, most express carriers decline to carry articles with a high commercial value (such as negotiable instruments) because of the operational complexities of providing both rapid, flexible service and tight security for each van.

18. Although the courier/express industry has concentrated on documents and

small parcels, the profile of traffic is changing as the carriers develop ways to overcome operational difficulties. There is, of course, no theoretical reason why an urgent shipment cannot be very heavy or very valuable, and it is certainly physically possible to transport a very valuable or very heavy shipment from A to B with great speed. As courier/express companies improve their physical capabilities, particularly by operating their own aircraft, it may be expected that the ratio of parcels to documents will increase and that larger and more valuable shipments will be handled with the same ease and speed as time-sensitive small parcels.

19. Still, it appears likely that the vast majority of courier/express shipments will remain low weight and low value. This has been the experience within the United States, where the courier/express traffic is unconstrained by either customs law or baggage restrictions. In this respect, the courier/express industry is the mirror image of the traditional air cargo industry, which concentrates on relatively heavy shipments while at the same time accommodating some smaller shipments.

20. The international flow of courier/express shipments is now so great that it effectively forms its own category of international traffic, deserving of customs procedures specifically adapted to it. For this type of traffic it is possible to develop rational simplifications in customs formalities that will benefit shipper, addressee, carrier, and customs administrator. In this presentation, we shall deal primarily with courier/express traffic that is easy to handle and relatively low in value. In so doing, however, we do not mean to imply that facilitation of heavier or higher value courier/express shipments is unnecessary or unimportant. Our emphasis is simply a recognition that first priority must be given to the most common types of courier/express traffic and that, as a practical matter, heavier or more valuable traffic may be less amenable to procedural simplifications due to increased security and revenue considerations.

21. To summarize,

(D) *The total number of international courier/express shipments (including postal express) in 1980 has grown from about 5 million in 1980 to about 36 million in 1985.*

(E) *Courier/express traffic consists primarily of very low weight and low value shipments and will continue to do so. The profile of traffic, however, is changing as the industry improves its operational capabilities.*

3. DIFFICULTIES IN ADAPTING TRADITIONAL CUSTOMS CONCEPTS

22. Customs' first response to the rapid growth of the international courier/express industry was to adapt baggage clearance facilities to the needs of onboard couriers. It was, after all, the original onboard air couriers with whom Customs was most familiar (again, due mainly to barriers presented by the customs laws). Pioneering reforms in the methods of clearing onboard

courier traffic were accomplished at London's Heathrow Airport and Amsterdam's Schipol Airport. Intellectually, these reforms were derived from the customs law for baggage, since couriers did, in fact, tender "baggage" to Customs. It was also true, however, that by treating courier shipments as "baggage," Customs deliberately sidestepped many difficult conceptual and political issues.

23. The treatment of onboard courier baggage as "baggage" was—and still is—a highly useful and expedient adaptation of traditional customs concepts to the needs of transporting urgent consignments in markets in which the total express traffic is relatively small. In these markets, onboard couriers can meet the needs of society for rapid, uncomplicated transmission of documents and small parcels. In the developed world, however, this expedient adaptation of pre-existing legal categories is reaching the end of its usefulness. There is no commercial reason to rely exclusively on onboard couriers (and the original air couriers never did so). Hence, to upgrade baggage procedures only is to impose artificial constraints on courier/express operations. Indeed, as the volume of express traffic has grown and the availability of nighttime aircraft capacity declined, even the original air couriers are beginning to charter aircraft to meet their needs. This trend has been greatly accelerated by the entrance into the industry of dedicated national express parcel systems. Shipments on "all courier/express" aircraft are no less urgent because of the absence of a regular onboard courier passenger, yet it is hard to justify calling such shipments "baggage."

24. Moreover, the growth of courier/express traffic and the entrance of other competitors into the field has revealed inadequacies in other legal adaptations as well. Courier/express traffic (documents and small parcels) is not really "cargo" in the traditional sense. In truth, this traffic evolved commercially almost completely outside of, and in reaction to, the cargo system. Unlike classical cargo, courier/express traffic usually has little intrinsic, commercially realizable value (even very valuable circuit boards, for instance, are usually valuable only to the addressee and cannot be sold to others). Nor, as pointed out above, is the addressee really an "importer" in the historic sense. Unlike an importer, the addressee of an urgent shipment frequently does not even know the shipment is coming. It is usually, the shipper, not the addressee, who makes the decision to use a courier/express carrier.

25. Most fundamentally, the express traffic handled by the post office is not truly "mail" in the sense in which that term has always been used. Within the post office, express postal shipments are handled by a separate organization which picks up, transports, and delivers them completely outside the normal mail stream. The French Postal Administration has gone so far as to turn over all express postal shipments to a private law subsidiary, formed in joint venture with a private company. Other post offices are openly discussing the use of private courier/express companies to be their foreign delivery agents. Officially recognizing that express operations are distinct from and outside the scope of

traditional postal activities, almost all developed countries have explicitly exempted such services from the "postal" monopoly. EMS is a commercial service that the post office offers to businessmen. It is *not* a government supplied, government secured "pouch" (the original meaning of "mail") service that "binds the Nation together."

26. In developed countries, the time has come to recognize that:

(F) *As courier/express traffic has grown and new competitors have entered the industry, the adaptation of traditional legal concepts to this traffic is becoming more and more ill suited to commercial realities in the developed countries.*

4. URGENT CONSIGNMENTS: A NEW CUSTOMS CATEGORY DEFINED BY SERVICE

27. In policy debates around the world, these conceptual problems have frequently been distilled into metaphysical questions such as: Is courier baggage "baggage"? Are air cargo shipments by couriers and airlines "cargo" or some sort of "fast cargo"? Is express mail "mail"? It is precisely these conceptual problems that, we believe, have given rise to this CCC study.

28. These metaphysical riddles are unanswerable, however. They arise because, in traditional customs terms, it is important whether a shipment is transported as passenger baggage, cargo, or mail. In this, traditional customs law reasonably reflected commercial realities that developed long ago. Each of these modes of shipment were distinctly different, and the type of traffic suited to one was rarely suited to another. In the courier/express industry, however, the distinct qualities of these three transportation categories are no longer important.

29. An express shipment might travel as baggage or cargo or mail. But not all baggage or cargo or mail is express traffic. What is important—and what distinguishes express shipments from ordinary baggage, cargo, and mail—is the door-to-door service provided for the shipment. Is this shipment so urgent that the shipper is willing to pay for a special pickup within two hours of his call? Is this shipment guaranteed by the carrier to board an aircraft the night of the pickup? Is this shipment especially delivered by the carrier within a few hours of the aircraft's arrival in the destination city? Does the carrier provide very careful, individualized supervision over the transportation of each shipment, so that it can promptly locate, reroute, or recall each shipment as may be ordered by the shipper?

30. These questions describe the sort of urgent, individualized, end-to-end, pickup-to-delivery service which the marketplace demands of courier/express companies and their competitors. From the standpoint of the marketplace, the mode of transportation and customs clearance (baggage, cargo, or mail) makes no difference. A carrier making use of any one of the traditional modes of transportation/customs services can compete with a carrier making use of any other mode, and does so. No matter which mode of transportation/customs

services is used, the requirements for express shipments are not the same as for the traditional traffic for which the mode was developed in the first place.

31. What distinguishes an urgent, express shipment is not the mode of transportation at all. It is the door-to-door *service* provided for the shipment. As a matter of commercial reality, the end-to-end *service* now defines a new, fourth category of shipments, in addition to the three traditional types of shipments which are defined by their mode of transportation. This category might be termed "AC/FP/EMS." It is simpler and more accurate, however, to give it one name which is independent of the mode of transportation. Borrowing from the terminology of the CCC Questionnaire and the Kyoto Convention, we suggest the term "Urgent Consignment" or UC to refer to the service and the traffic itself.

32. It is interesting and enlightening to realize that postal law has gone through a conceptual evolution similar to that which is needed in customs law. In the postal codes of most countries, the post office's exclusive privilege depended upon whether the article transported was a "letter" or not, that is upon the *nature* of the thing carried. When the air couriers emerged, there were endless debates whether a bill of lading or a bank check is or is not a "letter"?

33. These questions were never answered. Instead, the appropriate resolution of this issue was suggested in an insightful report by a special U.S. Commission on Postal Service:

> The Commission recommends that Congress enact legislation defining the scope of the [postal monopoly]. This legislation should respond to the need of business for expedited delivery of extremely urgent matter . . . . *[E]xclusions from the [postal monopoly] should be based not merely on the content of the mail, but also in recognition of service requirements*. . . . [Report, at 73 (1977) (emphasis added)]

34. In postal law, it has gradually become accepted that modern commerce required that the postal monopoly admit a new legal category, "extremely urgent letter." The new category depended upon the end-to-end service provided rather than the nature of the shipment. In many countries, postal monopoly laws in developed countries now exclude articles which are transported within certain time limits or articles for which the sender pays the carrier more than the price of ordinary postal service. The French Postal Administration has been even more specific about what constitutes "UC" service outside of the monopoly:

> transportation of shipments pursuant to particular conditions of rapidity and with a guarantee with respect to the object of its delivery, and subject to an obligation of surveillance of the identification and of the constant ability to locate the shipment. [Announcement by the French PTT, 14 November 1985 (Agence France Presse)]

35. We believe that the customs laws must follow a similar evolutionary path. Customs laws should recognize that urgent, express traffic is not three

variations on three types of traditional traffic—as suggested by the AC/FP/EMS terminology—but a single, new type of traffic defined by service.

(G) *Customs laws (like postal laws) should reflect modern commercial practices by admitting a new category of traffic, one that is based on the end-to-end service accorded a shipment rather than the mode of transportation used*.

36. To define a UC shipment for customs purposes, it is necessary to describe the end-to-end service. We believe that, regardless of what type of public or private carrier provides UC service, it must as a commercial fact of life include the following elements:

A regular, discrete commercial service. UC services are offered by regularly available, commercially discrete, specialized services for the transmission of extraordinarily urgent shipments.

Door-to-door service. Virtually all UC services are door to door services, in which the UC shipment is picked up at the shipper's door (or accepted at the carrier's downtown "check in" counter), cleared through customs, and delivered to a specific address in the destination country. If the shipper is unwilling to pay for "messenger" services at both ends of the service, the shipment cannot be very urgent.

Express intracity service. The UC carrier holds itself out to the public as providing, and in fact normally provides, an express transportation service according to which delivery is effected between the major cities of the world within approximately six hours of ordinary "business" time. That is, excluding transportation between the city of origin and the city of destination, the time consumed in making prompt flight connections, and customs clearance time, no more than six hours of business time (0900 to 1800, Monday through Friday, in most parts of the world) is consumed in intracity pickup and delivery operations. In most cases, the intracity business time delivery time is much less, or even zero (for example, pickup is after 1800 and delivery is before 0900).

Express intercity service. Transportation between the origin city and the destination city is likewise performed on an express basis, although generalities are impossible because of the infinite number of city pair combinations. Typically, air transportation is used although over short international distances (such as within Europe) express ground transportation may also be relied upon. In either case, dispatches from the origin city to the destination city are made not less frequently than daily.

Closely integrated administrative control. The local UC company must be sufficiently integrated with its foreign affiliates so that it can exercise a high degree of control over the pickup, delivery, tracing, or rerouting of shipments by the foreign affiliates. Furthermore, the local UC company must be able to rely absolutely on the reliability of customs classification and declaration information supplied by its foreign affiliates. Typically, integrated administrative control is established and implemented by a

common name, operating procedures, and marketing schemes in the origin and destination countries, by substantial common ownership between the local company and the foreign affiliate, and/or by a very close contractual relationship between the local company and its foreign affiliate (e.g., a "franchise" arrangement).

37. In short, UC shipments may be defined as follows:

(H) *UC shipments may be defined as shipments which are transported by means of a discrete commercial service which provides a door to door, express delivery service (both intracity and intercity) under closely integrated administrative control.*

5. NON-DISCRIMINATION AMONG UC SHIPMENTS

38. By defining all UC shipments in one service-oriented category, Customs will eliminate the persistent accusation (from all sides) of unfair discrimination. This bitter charge is the natural result of trying to adapt three different customs concepts to what is, in reality, one form of traffic. None of the adaptations results in quite the same customs treatment as the other adaptations. From a commercial standpoint, it makes no difference whether a UC shipment is handled by an onboard courier, an airline, a freight forwarder, or a post office. International customs laws and practices should reflect this fundamental commercial reality. It should be made clear that all UC shipments should be treated similarly, regardless of the identity of the carrier, whether courier, airline, forwarder, or post office.

39. Indeed, it is more and more apparent that non-discrimination between FP/AC and EMS shipments may be not merely logical and desirable, but also required as a matter of law and policy. The EEC Commission is actively questioning whether differences in the customs treatment of AC/FP shipments and EMS shipments violate the Competition Rules of the Treaty of Rome. In 1985, the British government established an important precedent by recognizing, for the first time, in fairness to all competitors, EMS had to be deleted from the scope of a regulation that granted beneficial VAT procedures to all "goods imported by post." SI 1985/105 §6. The British goverment is now considering the more general issue of whether EMS should no longer be regarded as a "postal" service for customs purposes. On the other side of the Atlantic, on 1 May 1986, President Reagan became the first American president to qualify his ratification of the Universal Postal Convention. Upon signing the 1984 convention, he explicitly prohibited the U.S. Postal Service from using the Universal Postal Convention "to stifle healthy private competition in the international mail arena."

40. All forms of UC traffic compete with one another, in law and in practice. As a matter of fairness and as a matter of law, they should both be treated *identically* by Customs:

(I) All UC shipments are competitive one with another and should be treated identically by Customs administrations regardless of whether they are

carried by air courier, airline, air freight forwarder, or post office.

II. UC SHIPMENTS SHOULD BE FACILITATED BY MEANS OF PROCEDURES THAT ARE REASONABLY RELATED TO THE SPECIAL CHARACTERISTICS OF UC TRAFFIC AND THE NEEDS OF CUSTOMS ADMINISTRATIONS.

1. CUSTOMS TREATMENT OF UC SHIPMENTS GENERALLY

41. Recognition that all UC shipments form a single, new type of traffic is the first step in facilitation. A second, equally important, step is the formulation of improved customs procedures for this traffic. As with traditional categories of traffic (baggage, cargo, and mail), customs procedures for UC traffic must be rationally related to its specific characteristics. Since UC service is a modern hybrid of older types of transportation services, a good place to start is with the most appropriate features of the procedures worked out for the traditional forms of traffic. In addition, particular characteristics of UC service may be taken advantage of to simplify the entry process for both Customs and the carriers.

42. From a customs standpoint, the most important characteristics of UC shipments would appear to be extraordinary urgency and, for most shipments, low value. Urgency implies that UC shipments must be handled with great speed and simplicity, by Customs and carriers alike, or substantial economic costs will be imposed on society as a whole. Low (or zero) value implies that customs revenue per shipment is very small. Other aspects of UC shipments are also important from a customs perspective. UC carriers are regular, daily operators with tightly organized administrative control over the transmission of all shipments. It is inconceivable, for example, that a UC carrier could successfully advertise "express service four times per month." The organizational imperatives of UC service allow Customs administrations to demand and receive reliable customs information from UC carriers well *in advance* of the arrival of UC shipments at the port of entry. This tight knit organization should also permit close cooperation between customs security officers and UC companies on an international basis.

43. The worldwide scale of international UC operations is a fundamental facet of UC traffic, which should be taken into account in customs procedures. In all UC operations, shipments destined for many destinations are simultaneously sorted at a central, foreign location. As explained in greater detail below, standardization of certain customs concepts will therefore result in improvements in facilitation that are unique to UC traffic. Conversely, uncoordinated national reforms will impede facilitation to a degree that is unique to UC traffic. Wide variations in customs treatment of UC parcels is permissible, but these variations should not thwart the efficiencies of rapid, centralized sortation.

44. Still another characteristic of UC shipments that is relevant to appropriate

Customs procedures is that of *shipper initiation*. In this respect, UC shipments are like postal shipments and articles delivered locally by special messenger, and unlike traditional cargo. The shipper-initiated aspect of most UC shipments reflects the growing internationalization of world markets. In local markets, it has long been customary for small, low value items to be shipped without the specific knowledge of the addressee. A manufacturer or professional may distribute "free" brochures or samples, or "test models" of his product. Or he may decide to rush over a missing machine part at no extra charge to a good customer. It is also commonplace for two companies in a joint venture or two affiliates of the same company to informally exchange documents or low value articles as part of their cooperative effort. Today, the same commercial practices are found internationally. For most UC shipments it makes more sense to speak of a "shipper" (or "sender") and an "addressee" rather than a "seller" and an "importer" or "buyer." It is therefore the shipper, not the addressee, who has the information necessary for customs clearance of a UC shipment.

45. Taken as a group, these characteristics of UC shipments suggest the appropriateness of a customs approach that is distinctly different from, but related to, the traditional Customs procedures developed for baggage, cargo, and mail. In the next section, we attempt to outline customs procedures for UC shipments that are reasonably related to these characteristics of UC traffic and that, at the same time, fit the practical needs and capabilities of customs officials, postal officials, private UC carriers, and shippers.

2. SUBCATEGORIES OF UC SHIPMENTS

46. As described above, during the early development of the UC industry, the most important subcategories of UC traffic were "documents" and "parcels." In developing specific proposals for the customs treatment of UC traffic, it is helpful to refine this division further. For the purposes of developing a modern customs approach, it is logical to divide all UC traffic into four categories: Documents, Non-Dutiable Articles, Low Value Articles, and Full Entry Articles:

(A) *UC shipments should be divided for customs purposes into four subcategories: Documents, Non-Dutiable Articles, Low Value Articles, and Full Entry Articles.*

a. UC documents

(i) Declaration

47. All Customs administrations have a category for "documents" either explicitly (like the U.S. "intangibles" category) or implicitly. Different administrations, however, define the concept of "documents" differently. All include original, written documents. Some countries, however, exclude from the concept of "documents" original drawings, records, and magnetic tapes and

diskettes. In addition, some countries exclude from the concept of "documents" certain copies of information—such as blueprints, phonograph records, printed forms and stationary, newspapers and periodicals, and catalogs—at least when such copies are transmitted in quantities that would require a commercial printer to produce.

48. Documents are usually treated by Customs authorities as subject to inspection but only the most minimal documentation. The great majority of international documents, UC and non-UC, are transmitted by the post office. Postal documents are apparently cleared by customs authorities without any declaration other than, perhaps, a statement as to the total weight on an arriving aircraft or other vehicle. In some cases, national customs authorities treat AC/FP documents carried by non-postal carriers in a similar manner. In other cases, they require a more detailed declaration, perhaps including a list of shippers and addressees for all shipments. No Customs administration applies a duty to documents.

49. To facilitate the flow of UC documents, it would be extremely helpful if the simple customs procedures available to some UC shipments could be made available to all. Specifically, we propose that:

(B) *UC Documents should be declarable by reporting only the total weight of shipments per arriving aircraft.*

50. To the best of our knowledge, this proposal reflects the practice that is now adopted by most customs administrations for most documents, those imported by post. As a practical matter, it appears unreasonable and counterproductive to require more stringent customs formalities for UC Documents than for the vast majority of postal documents. UC Documents as a class form a minority of the total document traffic, so customs formalities applicable to UC Documents could easily be avoided by using the post office. Moreover, UC Documents are the most time-sensitive segment of the document flow entering a country; hence, UC Documents are the ones that should be slowed least by governmental formalities.

51. British Customs, which has been a leader in developing "courier" law, has accepted importation of AC documents by declaration of the total weight. For security reasons, British Customs also requires a declaration of the country where the bag or container holding the documents was shipped from. The "origin of the bag," however, is a very inexact piece of information. For example, a courier bag (or a postal bag) made up in Hong Kong might include documents originating from all over Southeast Asia. Indeed, as the UC industry shifts more and more to the use of airline containers instead of bags, the origination information will be even less useful. Rather than including country of origin, or other shipper/addressee details, in a declaration applicable to all documents, it appears more sensible to apply to UC shipments the same security measures now in place for postal traffic. These, we believe, properly rely more on close cooperation between Customs and carrier in cases of particular concern than on encumbering the entire traffic flow. In addition,

unlike for ordinary postal traffic, it may be possible (and perhaps desirable) to require that all UC carriers retain records of shipper, addressee, and country of origin for all documents, thus allowing Customs to easily monitor changes in traffic patterns.

(ii) Standardized definition

52. A second important principle we urge the CCC to support reflects the strong imperative of rapid, multiple destination sortation. We urge the CCC to devise and recommend a uniform definition of the concept "UC Documents" (we shall use the capitalized form to refer to documents as a UC subcategory) that accords with the realities of the electronic age. Our suggested definition is as follows:

(C) *Customs administrations should accept as "UC Documents" any message, information, or data recorded on any media—including paper, cards, photographs, magnetic or electromagnetic media—if embodied in an original version or a non-commercially prepared copy, and any commercially prepared copy of such message, information or data, if transported in non-commercial quantities (not more than 10 identical copies).*

53. Today, there is no realistic distinction between information that is recorded in written form, drawn form, xerographic form, photographic form, or magnetic form. Any form can be changed into any other form. Postal authorities have long since recognized this fact of life and expanded their definition of "letter" or "message" according. The U.S. Postal Service, for example, says "tangible objects used for letters" include, but are not limited to, "paper (including paper in sheet or card form), recording disks, and magnetic tapes." 39 CFR 310.1(a)(1). For a good discussion of the broad approach now taken by various post offices, see generally, International Bureau of the Universal Postal Union, "Postal Monopoly. Ways and Means of Combating Competition from Private Undertakings in the conveyance of documents, etc." at 14-19 (1984). In view of the position of postal authorities, it is anachronistic to define UC Documents more narrowly than "letter" is defined for the purpose of ordinary postal traffic.

54. Many Customs laws, as well, recognize the equivalence of different forms of information. U.S. customs law, for example, defines documents (or "intangibles") to include "currency (metal or paper) in current circulation in any country and imported for monetary purposes; . . . . securities and similar evidences of value . . . .; and records, diagrams, and other data with regard to any business, engineering, or exploration operation whether on paper, cards, photographs, blueprints, tapes, or other media." 19 USC 1202 Headnote 5. EEC Customs law likewise adopts a liberal view in exempting such items from duty. Commission Regulation 918/83, Art. 109. A continuation of this trend towards a liberal customs definition of "documents" appears inevitable. Not

only is any form of information convertible into any other, but virtually any form of information can be reduced to electronic signals and transmitted across national boundaries outside of customs control entirely.

55. Our suggested CCC definition of "Documents" is similar to the U.S. definition except that it also addresses the issue of copies in a manner that corresponds to the actual practice followed by most Customs administrations. Since documents are the traffic in which most Customs officials are least interested, it is perhaps worth emphasizing that a modern, broadly accepted definition of "documents" would very materially facilititate the flow of UC traffic.

b. UC non-dutiable articles

(i) A realistic "de minimis" zone

56. All customs laws accord non-dutiable status to some articles. In addition, most customs laws permit entry without duty for shipments below a certain value because the amount of customs revenue involved is negligible. In the U.S. this de minimis zone includes all shipments valued at less than about SDR 4 (USD 5). 19 USC 1321. In the EEC, a de minimis revenue zone is set at about SDR 8.5 (ECU 10) for postal shipments, a figure that may be raised to SDR 85 (ECU 100). For non-postal shipments, the EEC level is less clear. Some countries seem to recognize a SDR 8.5 (ECU 10) zone by analogy to the postal exemption. Other use a zone of SDR 38 (ECU 45) for all AC/FP articles, even though this exemption is technically limited to small consignments of a non-commercial nature between private individuals. Council Regulation 918/83, as amended by 3822/85, arts. 27, 29. In Japan, the negligible revenue zone applies to goods valued less than about SDR 5 (JPY 1000).

57. Some Customs administrations also appear to have a higher, unofficial standard for waiving duty if Customs itself must perform the entry, as in the case of postal articles. Information on such "informal" rules for the collection of duty from postal shipments is difficult to obtain. In a recent (still incomplete) survey conducted by Peat Marwick for the ICC, duty and VAT was collected by EEC Customs on less than half of EMS shipments and by U.S. Customs on almost none. The articles shipped varied in value from about SDR 21 (USD 25) to about SDR 165 (USD 200).

58. Based on this survey, it seems safe to conclude that U.S. Customs has concluded that for shipments up to at least SDR 165, the administrative cost of collecting duty exceeds the revenue gained. Likewise, EEC Customs seems to have concluded that the cost of administration exceeds the revenue generated for shipments at a value per shipment level of not less than SDR 85 (the proposed new postal limit), and perhaps significantly higher, depending upon the individual administration.

59. Another way to look at the "de minimis" zone is to consider the social cost of collecting duty on a UC shipment. Conceptually, the *total* adminis-

trative cost borne by the society includes (i) the administrati ve cost borne by the carrier, (ii) the administrative cost borne by the Customs administration, and (iii) the cost of delay borne by the shipper and addressee. The cost of collecting duty on UC entries is difficult to identify, but, in the United States, one rough measure which might be taken is the SDR 4 (USD 5) "user fee" recently imposed by U.S. Customs for the preparation of postal entries. This fee probably understates the total cost of an average UC entry because it does not take into account the time-sensitive nature of UC shipments nor does it include the additional cost of administrative review (necessary in the typical case where the UC carrier prepares the entry and Customs re views it).

60. We may take it, then, that the social cost of even a simple entry in the USA is not less than SDR 4, and hence, duty and VAT should be waived for any UC article yielding less than SDR 4 in revenue. If the average duty on dutiable informal entries is (as we estimate) 3%, this would imply that administrative costs of collection outweigh the revenue at stake for all shipments valued less than SDR 137 (USD 166). This figure seems to agree with the Peat Marwick survey results for the USA.

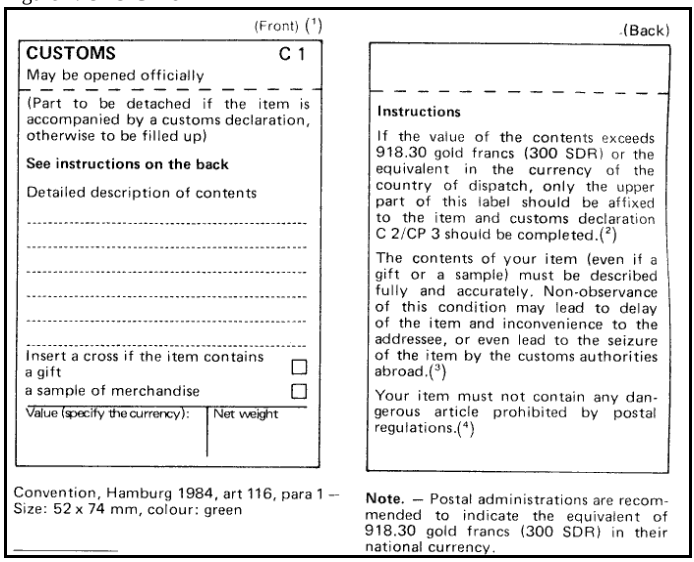
61. Legal technicalities aside, the practice that Customs administrations have in fact adopted for postal shipments is eminently reasonable. The rational level of a de minimis zone is the value at which the cost of collecting the duty exceeds the revenue earned. For postal shipments, it is sensible for Customs not to expend *X* in costs if it collects less than *X* in customs revenues. But there is no reason to limit this principle to costs expended by Customs. From a social standpoint, there is no more justification for wasting the money of UC users than there is for wasting the money of the Customs administration. Overall, it seems plainly counterproductive for the society to spend more than *X* in costs in order to collect less than *X* in customs revenue. Furthermore, to treat postal and private UC shipments differently in this regard would introduce unfortunate, non-economic distortions into the competition between the various UC carriers.

62. Given the economic unreasonableness of discriminating between UC shipments by postal and private carriers and the de minimis zones effectively adopted by the USA and EEC for postal shipments, we believe the following principle to be reasonable:

> (D) *The subcategory of UC Non-dutiable Articles should include all articles for which the total administrative cost of collecting the duty (including VAT, if applicable) borne by Customs and the UC carrier exceeds the revenue to be collected. In developed countries, this subcategory should include all UC shipments valued at less than SDR 100.*

63. In drafting this principle, we have adopted a figure of SDR 100 as a plausible compromise between law and practice. A single figure for developed countries is useful because of its inherent simplicity and the benefits of standardization from country to country (discussed in the next section). There

Figure 1. UPU C1 form



(Front) (1)

CUSTOMS C 1

May be opened officially

(Part to be detached if the item is accompanied by a customs declaration, otherwise to be filled up)

See instructions on the back

Detailed description of contents

.....

.....

.....

.....

.....

.....

Insert a cross if the item contains

a gift ☐

a sample of merchandise ☐

Value (specify the currency):	Net weight

Convention, Hamburg 1984, art 116, para 1 – Size: 52 x 74 mm, colour: green

(Back)

Instructions

If the value of the contents exceeds 918.30 gold francs (300 SDR) or the equivalent in the currency of the country of dispatch, only the upper part of this label should be affixed to the item and customs declaration C 2/CP 3 should be completed.(2)

The contents of your item (even if a gift or a sample) must be described fully and accurately. Non-observance of this condition may lead to delay of the item and inconvenience to the addressee, or even lead to the seizure of the item by the customs authorities abroad.(3)

Your item must not contain any dangerous article prohibited by postal regulations.(4)

Note. – Postal administrations are recommended to indicate the equivalent of 918.30 gold francs (300 SDR) in their national currency.

may, however, also be a case for implementing a higher figure for UC shipments which are both shipped and delivered to points within a customs union such as the EEC. The practical issue is whether the higher de minimis level justifies the costs and delays of a second sort for carriers within the customs union. A proper answer to this question for a given customs union would require a detailed analysis which is beyond the scope of this presentation.

(ii) Shipper's declaration: proposed CCC Format UC 1

64. The large majority of all non-dutiable shipments—those handled by the post office—are apparently released without entry by most customs administrations. U.S. Customs regulations specifically so provide. Apparently no record is kept of these shipments. The only documentation associated with these postal shipments is a UPU C1 form (see [figure 1]), which requires the shipper to state a description, value, and weight for the article. *The UPU C1 form is applicable for all shipments valued up to SDR 300.*

65. Privately transported, nondutiable UC shipments are often subject to individual entry requirements of a simplified or "informal" nature. These regulations usually provide for submission of the name and address of the shipper and addressee, description, weight, and tariff classification of the article, and calculation of duty. The UC carrier must also set forth his name and address and guarantee the accuracy of the declaration.

66. In view of heightened concerns about security and the operational necessities of UC service, we believe that applying traditional postal practices to EMS UC shipments is too liberal. On the other hand, in light of the complete

absence of revenue considerations and the accepted practice for parcel post generally, we believe that the current practice with respect to non-dutiable UC shipments is too burdensome. Before describing an alternative, we would like to highlight one further point. If a courier, airline, postal official, or customs officer must determine the tariff classification of an article in order to determine that it is non-dutiable, then the advantages of a simplified treatment for non-dutiable shipments are largely lost. The best way to facilitate the flow of non-dutiable articles is to require greater responsibility on the part of the shipper, an approach long ago adopted by the international postal system. The shipper will, in many cases, be aware of the non-dutiable status of his shipment. If not, he can be supplied by the UC carrier with simplified lists of non-dutiable articles, by country of destination.

67. In light of the foregoing, we suggest the CCC recommend a simplified procedure for UC shipments, based upon a combination of the best features of the shippers' declarations used for postal traffic and advance carriers' declarations used in some countries for AC/FP traffic. With respect to the shipper's declarations, we would propose as follows:

(E) *Shippers Declaration Format UC 1. The CCC should recommend a simple format for shippers to declare customs information for all UC Non-Dutiable Articles. This format could be included in a UC carrier's airwaybill or applied as a separate adhesive form, like the UPU C1 form. The format should include the following elements:*

- *Shipper's name/address*
- *Addressee's name/address*
- *Description/quantity*
- *Weight*
- *Statement that shipment is known to be either (i) duty free in the destination country or (ii) valued at less than SDR 100*
- *Statement that the shipment is not one of a class of full entry or restricted articles.*
- *Signature, name, and address of declarant and agreement to indemnify the carrier for any penalty due to misdeclaration.*

The indemnity would not apply in cases where the declarant relied upon information supplied by the UC carrier.

68. The proposed UC 1 format would be applicable to *all* UC Non-Dutiable Articles. EMS shipments could be shifted from UPU C1 forms to similar UC 1 forms with very few difficulties, since the two concepts are similar. Current AC/FP practices could also incorporate the UC 1 format with few operational difficulties because a general *format*, rather than an additional form, is proposed. AC/FP carriers that use airwaybills could incorporate the UC 1 format into their airwaybills, which already request much the same information elements from the shipper. AC/FP carriers that do not use airwaybills can design "address labels" that incorporate the elements of the UC 1 format. In no

case will the UC 1 format require any UC carrier to substantially change its current practice nor will UC shippers be required to fill out multiple forms calling for the same information.

69. The idea of a standard shipper's declaration format for all UC shipments may also be used to replace "movement certificates" for UC shipments between two points within a customs union such as the EEC. The "movement certificate" is essentially a declaration that the article is properly and lawfully within the customs union, that is in "free circulation." Customs laws require "movement certificates" for AC/FP shipments but not for EMS shipments. A shipper's declaration as to the status of the UC article could easily be included in the UC 1 format. This simplification would permit equalization of customs treatment of EMS and AC/FP shipments.

(iii) Carrier's advance declaration to Customs

70. While adoption of a standard "UC 1 format" would simplify the documentation for all very low value UC shipments, it does not address one further very important area of discrimination between EMS and AC/FP traffic. AC/FP carriers collect and provide customs with a substantial amount of information about each shipment, usually required by Customs *prior to* arrival of the shipments. No separate documentation is required of EMS shipments and none is provided prior to arrival, since the only customs information accompanies the shipment. The post office relies exclusively on the shipper's declaration.

71. The simplicity of the postal system is extremely attractive, but we believe that security considerations demand advance notification to Customs for all UC shipments. This appears to us to be a reasonable condition of expedited treatment by Customs. Proper handling of UC shipments requires a well coordinated, closely integrated system for monitoring shipments, even by the post office. Moreover, simplification of the content of the advance declaration (as we propose) will make it feasible for all UC carriers, including the post office, to provide advance information to Customs.

72. From a security standpoint, it would appear that the most useful and reliable information is the name and address of the shipper and the addressee. It seems unnecessary to include value, description, tariff classification, and country of origin in the advance declaration. For non-dutiable shipments, this information has no importance insofar as customs revenue is concerned, and it can hardly be supposed that a smuggler will correctly provide self-defeating information. A shipment, bag, or container identification number will be necessary for both Customs and UC carrier to identify and locate the shipment. Finally, it would appear that weight might be useful security information for Customs, although small variations in weight seem insignificant. We propose that an indication of weight be required only for shipments weighing more than 5 kilograms.

73. Drawing these ideas together, we would suggest that:

(F) *Advance declaration for UC Non-Dutiable Articles. For UC*

Non-dutiable Articles, the UC carrier should be required to declare the following information, a reasonable period in advance of the arrival of the UC shipments:

- *Shipper's name/address*
- *Addressee's name/address*
- *Weight, if in excess of 5 kilograms*
- *Shipment, bag, or container number*

74. The additional information required in the "UC 1" format but not contained in the advance declaration would be used to facilitate physical inspection at the border and to permit periodic surveys by Customs authorities, as may be deemed necessary by their governments for statistical purposes.

c. UC Low Value Articles

(i) Definition

75. In addition to subcategories for documents and non-dutiable articles, many customs administrations also permit simplified or "informal" entry for AC/FP articles valued up to a certain amount, except restricted articles. Virtually all countries allow simplified entry for postal shipments. As noted above, the extremely simple UPU C1 form may be used for shipments valued up to SDR 300. Above SDR 300, postal shipments are cleared by using a somewhat more detailed, but still quite simple, UPU C2/CP3 form. Only at a point substantially above SDR 300 do national customs laws override the C2/CP3 form and require all the formalities of "formal entry." The following table provides some examples of the simplified entry zone:

Approximate maximum values for simplified entry (SDR's)

	AC/FP	EMS
England	587 (UKL 475)	1,607 (UKL 1300)
France	0	1,241 (FFR 10,000)
Ireland	224 (IRL 200)	560 (IRL 500)
USA	824 (USD 1000)	824 (USD 1000)

76. A reasonable and round top level for these simplified entry zones might be taken to be SDR 1000 for the developed countries. Other figures could be defended as well, of course. In this presentation, we shall adopt the round figure of SDR 1000 for illustrative purposes. In theory, a higher level would be appropriate for traffic entirely within a customs union such as the EEC. Whether an increased simplified entry zone is practically desirable in such cases depends upon whether the benefits outweigh the operational problems of a second sortation category for UC shipments originating within the customs union.

(G) *UC Low Value Articles should be defined as dutiable urgent*

consignments having a value below a specified level for which simplified entry declarations and procedures (comparable to those now permitted UPU C2/CP3 shipments) are appropriate. In developed countries, a maximum value for this simplified entry zone might be taken to be SDR 1000.

(ii) Standard rate for Low Value Articles

77. For postal shipments, the information required for "simplified entry" is established by the UPU C1 or C2/CP3 form. For a non-postal shipment, "simplified entry" means simplification of the information that must be transcribed by the carrier to a customs form. Although individual countries vary, the information provided for each shipment under "simplified entry" is generally as follows:

Information needed under simplified entry procedures

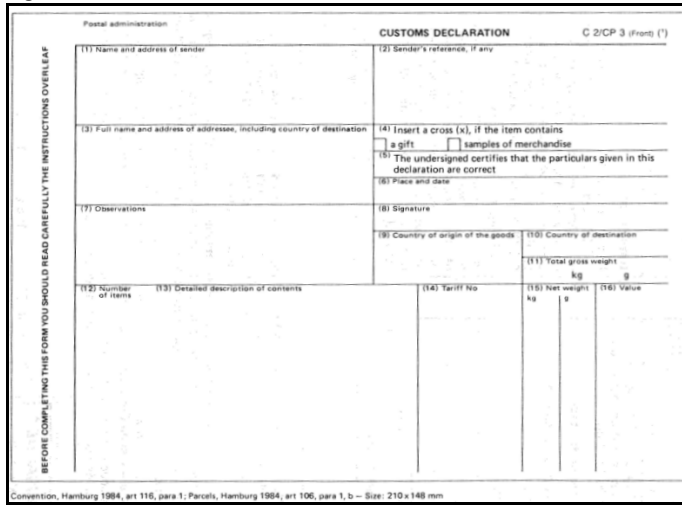
EMS UC	AC/FP
Shipper's name/address	Shipper name/address
Addressee's name/address	Addressee's name/address
Value*	Value
Country of origin	Country of origin
Description/quantity*	Description/quantity
Weight*	Weight
Gift/Sample*	Shipment number
	Tariff classification
	Customs duty
	VAT tax

*only elements of C1 form

Unlike EMS shipments, FP/AC shipments must usually be accompanied by documentation such as a commercial invoice, evidence of a bond, proof of the right to make entry, etc. In some countries (e.g., the U.S.), the tariff classification and duty calculation may be filed after the shipments are released by Customs.

78. Practically, the major differences in treatment accorded EMS versus FP/AC shipments arise in two areas. The first is that the FP/AC carrier, unlike the EMS carrier, must categorize each shipment under very complex tariff schedules and calculate the duty (either before or after release). For EMS shipments, this task is performed by customs officials. The second is that the FP/AC carrier, unlike the EMS carrier, is required to transcribe the documentation onto a customs form, either in writing or electronically. What is needed is a simple, common procedure that overcomes these discriminatory aspects and is usable by all carriers.

Figure 2. UPU C2/CP3 form, front



Postal administration

CUSTOMS DECLARATION C 2/CP 3 (Front) (*)

BEFORE COMPLETING THIS FORM YOU SHOULD READ CAREFULLY THE INSTRUCTIONS OVERLEAF

(1) Name and address of sender

(2) Sender's reference, if any

(3) Full name and address of addressee, including country of destination

(4) Insert a cross (x), if the item contains
☐ a gift ☐ samples of merchandise

(5) The undersigned certifies that the particulars given in this declaration are correct

(6) Place and date

(7) Observations

(8) Signature

(9) Country of origin of the goods

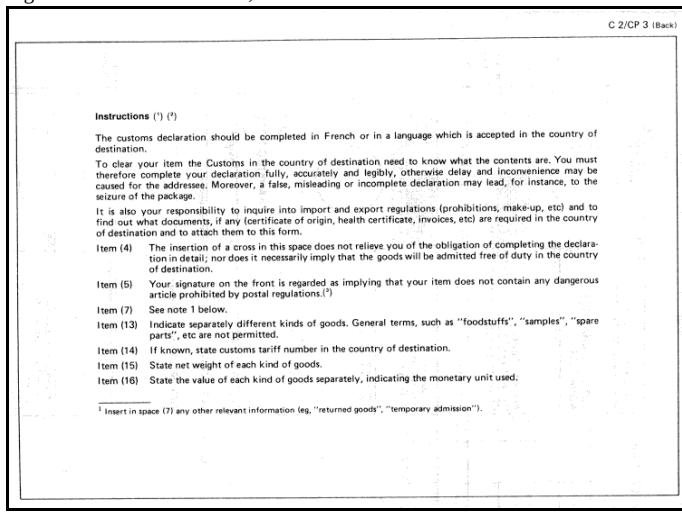
(10) Country of destination

(11) Total gross weight
kg g

(12) Number of items	(13) Detailed description of contents	(14) Tariff No	(15) Net weight kg	g	(16) Value

Convention, Hamburg 1984, art 116, para 1; Parcels, Hamburg 1984, art 106, para 1, b – Size: 210 x 148 mm

Figure 3. UPU C2/CP3 form, back



C 2/CP 3 (Back)

Instructions (1) (2)

The customs declaration should be completed in French or in a language which is accepted in the country of destination.

To clear your item the Customs in the country of destination need to know what the contents are. You must therefore complete your declaration fully, accurately and legibly, otherwise delay and inconvenience may be caused for the addressee. Moreover, a false, misleading or incomplete declaration may lead, for instance, to the seizure of the package.

It is also your responsibility to inquire into import and export regulations (prohibitions, make-up, etc) and to find out what documents, if any (certificate of origin, health certificate, invoices, etc) are required in the country of destination and to attach them to this form.

Item (4) The insertion of a cross in this space does not relieve you of the obligation of completing the declaration in detail; nor does it necessarily imply that the goods will be admitted free of duty in the country of destination.

Item (5) Your signature on the front is regarded as implying that your item does not contain any dangerous article prohibited by postal regulations.(2)

Item (7) See note 1 below.

Item (13) Indicate separately different kinds of goods. General terms, such as "foodstuffs", "samples", "spare parts", etc are not permitted.

Item (14) If known, state customs tariff number in the country of destination.

Item (15) State net weight of each kind of goods.

Item (16) State the value of each kind of goods separately, indicating the monetary unit used.

(1) Insert in space (7) any other relevant information (eg, "returned goods", "temporary admission").

79. The most feasible solution to the problem of tariff classification seems to be a "standard rate" for UC shipments qualifying for simplified entry. If a revenue neutral standard rate can be found that will not distort the traffic flow, such a procedure would be very beneficial to both customs officials and UC carriers, who are already struggling to apply the existing system to the current level of UC traffic. The classification problem threatens to become unmanageable as the volume of UC traffic expands.

80. The suitability of UC Low Value Articles for a standard rate depends upon several factors. The starting point is clearly how much variation there is

in duty paid, both in an absolute sense and when compared to the total cost of the shipment. In most developed countries, there appears to be little variation in the amount of duty charged on shipments commonly transmitted by UC carriers. For example, the average UC shipment valued at more than SDR 100 and less than SDR 1000 might have a value of SDR 700. In the United States, a UC shipment will typically be liable for a duty ranging from 2% and 7% ad valorem. The resulting range in the amount of duty payable is between SDR 14 and SDR 49, or SDR 35. Thirty five SDR represents a variation in the total charge for the shipment of only about 4 or 5% (the total cost of the shipment is the cost of the article, SDR 700, plus the cost of the transportation, perhaps SDR 100). Similarly, a typical range of EEC duty rates, from 7% to 14%, would result in a variation of about SDR 49, or about 6%, in the total cost of the shipment.

81. By changing from a variable to a standard rate system, therefore, the total cost of a UC shipment in this example would be affected by about 3% or less, *half* the total range of variation. This variation is probably less than the savings that a shipper could obtain by transmitting the article via another mode (air cargo or air mail). Moreover, most UC shippers are more sensitive to service than price considerations. Therefore, it appears plausible that a standard rate will produce changes in the total cost of UC shipment that are unlikely to alter substantially the mixture of UC shipments.

82. This illustrative analysis, however, points up several aspects to the standard rate concept that must be explored further. First, to prevent the standard rate from covering too large a range of duty rates, high-rated shipments will have to be entered by classification and duty calculation, as now. These high rated UC shipments are therefore classified below as "Full Entry Articles" regardless of value. Second, the advantages of a standard duty rate would be eliminated by a VAT system, as in the EEC, which requires classification. Hence, the VAT in the EEC should also be subject to a standard rate, on a country by country basis. In most EEC countries, this would appear possible. In contrast to duty, wider ranges of VAT may be amenable to standardization since, ordinarily, VAT is not ultimately paid by either the shipper or the addressee of a UC shipment. Nevertheless, in some EEC countries, two or three standard VAT rates (and hence minimal classification) may be required. A third factor is ignorance about shipper acceptance. While it appears reasonable to assume that a 3% differential in the total cost of a shipment would not alter the mix of UC traffic, it is difficult to be certain.

83. A fourth issue is that the standard rate should not affect the intermodal competition between UC traffic, cargo traffic, and traditional postal traffic. If the standard rate is, in effect, a duty reduction, then UC traffic will be competitively advantaged versus other modes; if it is a duty increase, the opposite effect will occur. The level of the standard rate would therefore have to be set at a revenue neutral point and be recalculated from time to time to ensure that it continues to be appropriate to the mix of traffic in the standard

rate zone. A related consideration is that there probably should be an escape clause for a UC carrier who specializes in low rated shipments of a few different classifications. For such a carrier, classification might not be a burden and the standard rate might amount to significant duty increase. The specialized carrier should be able to opt out of the standard rate. Of course, it would have to do so for all traffic and not only for low duty rate articles.

84. Despite these complexities, we are confident that a standard rate for most of UC Low Value Shipments is necessary and feasible. There is simply no other practical procedure for collecting duty in a nondiscriminatory manner applicable to all UC shipments. Nor is there any other procedure that appears suitable (from a Customs standpoint as well as a carrier standpoint) for the vast increase in UC traffic that may be expected in the future.

85. It should be noted that almost all customs authorities already apply a standard rate to a large number of urgent small shipments, those in the personal baggage of air travelers. The United States applies a standard rate of 10% for shipments valued between SDR 82 (USD 100) and SDR 907 (USD 1100). The EEC has agreed to a standard rate of 10% on shipments valued between SDR 38 (ECU 45) and SDR 136 (ECU 160). Council Regulation 3331/85, section II C. The standard duty concept therefore is both kno wn and tested.

86. To summarize,

(H) *Customs administrations should seriously explore the feasibility of applying a revenue neutral standard rate of duty (and VAT, if applicable) to UC Low Value shipments. High rated articles would be ineligible for the standard rate, and hence classified as Full Entry Articles*.

(iii) Shipper's declaration: proposed CCC Format UC 2

87. The second major practical difference between the customs treatment of EMS traffic and AC/FP UC traffic arises in the area of documentation. As with UC Non-Dutiable shipments, we believe the best solution is a combination of shipper's declaration and advance notification by the UC carrier. The shipper's declaration for Low Value UC shipments could be facilitated by development of a second CCC format—let us call it "UC 2"—that would be very similar to the UPU's C2/CP3 form, but applicable to all UC Low Value shipments:

(I) *Shippers Declaration Format UC 2. The CCC should recommend a simple format for shippers to declare customs information for all UC Low Value Articles. This format could be included in a UC carrier's airwaybill or applied as a separate adhesive form, like the UPU C2/CP3 form. The format should include the following elements:*

- *Shipper's name/address*
- *Addressee's name/address*
- *Value*
- *Country of origin*

- *Description/quantity*
- *Weight*
- *Statement that the shipment is not one of a class of full entry or restricted articles.*
- *Signature, name, and address of declarant and agreement to indemnify the carrier for any penalty due to misdeclaration.*

(iv) Carrier's advance declaration to Customs

88. As with UC Non-Dutiable shipments, the advance declaration by the UC carrier to Customs need not be as detailed as the shipper's declaration, which contains additional information to facilitate physical inspection and statistical surveys. In particular, a standard rate of duty obviates the need for tariff classification information. In general, the advance declaration for a Low Value shipment can be the same as for a Non-Dutiable shipment, with the addition of the value:

(J) *Advance declaration for UC Low Value Articles. For UC Low Value Articles, the UC carrier should be required to declare the following information, a reasonable period in advance of the arrival of the UC shipments:*
- *Shipper's name/address*
- *Addressee's name/address*
- *Weight, if in excess of 5 kilograms*
- *Shipment, bag, or container number*
- *Value*
- *Country-specific information*

By "country-specific information," we refer to additional data that may be required for individual countries only. This would allow the classification and entry of multiple level standard VAT rates, for instance.

89. Finally, the simplified advance declaration does not preclude a Customs administration from requiring subsequent filing of additional information, such as, for example the VAT number of the addressee. This accounting information should not be needed prior to customs clearance, however. Nor should a more detailed declaration be needed for statistical purposes. Statistics are now unreliable in any case; they are not kept at all for postal traffic and prepared too quickly by other UC carriers. More accurate statistical data can be gathered in periodic surveys of UC traffic, conducted by Customs (perhaps at the UC carriers' expense, as with overtime work).

d. Full Entry Articles

90. The last subcategory of UC shipments is "Full Entry Articles." This subcategory would include those UC articles for which the simplifications suggested above are inappropriate. These articles might be too high in value or too highly rated to qualify as Low Value Articles. Or they might be one of a number of "restricted articles," such as narcotics or textiles. To qualify as UC

Full Entry Articles, however, these shipments would still have to be transported by the carrier with the same urgent, end-to-end service provided UC documents and small parcels.

91. The appropriate customs treatment of Full Entry Articles is not the primary subject of this presentation because Full Entry Articles are both less frequent and more complicated than other UC shipments. Nonetheless, it would be helpful if the Customs administrations would recognize the commercial reality of such shipments, if only as a matter of general principle. We would suggest acceptance of the following general principles as a first step:

(K) *UC Full Entry Articles would include all UC articles not appropriate for the simplified procedures described above, including high rated articles inappropriate for a standard rate of duty.*

(L) *If a shipment is provided true end-to-end UC service in the same manner as now provided for urgent documents and small parcels, and if the UC carrier provides Customs with an advance declaration of all the information necessary to make full entry, then Customs administrations should provide such UC Full Entry Article with the most expeditious clearance possible, consistent with the other responsibilities of Customs.*

3. UC PROCEDURES ARE NOT NEW OR REVOLUTIONARY

92. We would like to stress one point. Many customs administrators are perplexed and upset when faced with the burden of clearing a container or an aircraft full of UC shipments for the first time. The procedures demanded by an impatient (and perhaps not too sophisticated) UC carrier may seem revolutionary. A more reassuring view emerges, however, after one undertakes a broad review of all types of UC traffic and the practices devised by a number of customs administrations to deal with this traffic. This, indeed, is the great benefit of the CCC's study.

93. A calm, rational consideration of UC traffic demonstrates the "special" procedures appropriate to UC shipments are *not* truly special or revolutionary. They have already been accepted in principle by many administrations in Annex F.5 of the Kyoto Convention. Even more reassuring, they have been tested and are in use by many customs administrations for *some* forms of UC traffic. These simplified procedures are denoted in the customs world by terms such as "informal entry," "paperless entry," "courier baggage," "standard rate," and "Forms C1 and C2/CP3." Each of these individual reforms has already constituted an important step forward. What is needed now is only the full development and nondiscriminatory standardization of these customs innovations. The suggestions that we have developed in this section are, we believe, reasonably and logically related the nature of UC traffic.

III. SINCE RAPID, CENTRALIZED SORTATION AND DOCUMENTATION IS CRUCIAL TO THE FACILITATION OF UC TRAFFIC, CUSTOMS ADMINISTRATIONS SHOULD *NOT* MODIFY THE DEFINITIONS OF UC SUBCATEGORIES NOR THE BASIC DOCUMENTATION REQUIREMENTS; WITHIN THIS FRAMEWORK, HOWEVER, VERY SUBSTANTIAL NATIONAL POLICY VARIATIONS ARE POSSIBLE.

94. To a greater degree than for other types of traffic, facilitation of the worldwide flow of UC traffic depends as much on standardization as simplification. Pickup and delivery vans only travel so fast; airplanes only fly so fast. The great losses in time occur when flights or delivery schedules are missed due to delays in sorting shipments by destination and generating appropriate customs information.

95. For UC shipments, most sortation and documentation preparation does *not* take place at the port of entry. It begins at the point of pickup, and continues at the UC carrier's station in the origin city or, perhaps, at an intermediate hub. At this stage, the UC carrier is sorting shipments and eliciting customs information for all shipments worldwide, not only for those shipments to be sent to a single customs administration. This process of sorting and eliciting customs information is done as fast as humanly possible; there is no other way to operate a UC service. In this respect, as in others, UC traffic is unique.

96. Since sortation and information gathering is necessarily performed very rapidly and on a multi-country basis, it is obvious that standardization of UC customs categories among nations will produce important gains in the facilitation of international UC traffic. Further, standardization should also produce a significant improvement in the ability of UC carriers to provide Customs with early and reliable customs information.

97. The need for standardization of some basic customs policies towards UC traffic does *not*, however, preclude the possibility of very radical differences among customs administrations in their treatment of UC traffic, as may be dictated by their differing national policies. What is necessary is only that these national policy variations be expressed in procedures and requirements that do not disrupt the possibility of rapid, worldwide processing in a "central sort."

98. The most obvious area for individual national variations is in the definition of UC Full Entry Articles. This category effectively permits an administration to exempt classes of articles from the simplifications appropriate for most UC shipments. While national variations should be kept to a minimum, it is clear that this category is designed to accommodate national differences.

(A) *Individual Customs administrations may exempt articles from most simplifications by defining UC Full Entry Articles differently.*

99. More fundamentally, definition of UC traffic proposed above allows

individual administrations substantial discretion regarding what traffic it will or will not accept as UC traffic. For reasons of national policy, one administration might take a more liberal or restrictive position than another. Such national variations might mean that a given UC carrier would qualify for UC customs treatment in some countries but not in others. While this would create difficulties for the individual UC carrier, it would not disrupt the technical possibility of rapid sortation, even for the carrier affected. Naturally, we encourage the CCC to continue its efforts to foster a liberal, and reasonably uniform, approach to the definition of UC traffic, but we also recognize that there is a need to allow for national differences even in such basic matters.

(B) *Individual Customs administrations may take different positions on the fundamental issue of the specific conditions that must be met for shipments to qualify as UC shipments.*

100. Our suggestions also permit virtually unlimited variation in the amount of taxation to be applied to UC shipments. Not only could different countries have different standard rates, but a single country could impose different standard rates depending upon the address of the shipper. This situation could arise, for example, in respect to shipments sent by shippers located outside, versus inside, a customs union such as the EEC. Furthermore, the standard rate concept can accommodate the situation in which the effective tax faced by an import is the combination of a duty common to all members of a customs union, and a VAT or other tax that is specific to a particular country. The standard rate for each destination country would be the product of the standard duty rate and the individual VAT or other tax rate effective in each country. Indeed, as we have noted, by making use of the "country-specific" item in the declaration for UC Low Value shipments, even further refinements can be made on a country by country basis.

(C) *Individual Customs administrations may tax UC shipments at very different rates—as determined by national policy and, if applicable a common customs tariff—and may distinguish between shipments from points inside or outside a customs union.*

101. Statistics is another area in which nations reasonably adopt differing policies. The proposals set out above attempt to introduce the benefits of simplification without undercutting the ability to generate appropriate statistics. The relatively detailed shippers' declarations allow the possibility of sampling without unduly interfering with the flow of shipments. It is also possible that an individual administration may insist upon more detailed post clearance reports for statistical or accounting purposes. While such additional information requirements would add to the cost of UC shipments into that administration's territory, they would not interfere with the basic scheme we have proposed.

(D) *Individual Customs administrations may introduce different sampling and post clearance reporting requirements in order*

to generate statistics and accounts as may be required.

IV. CUSTOMS ADMINISTRATIONS SHOULD MINIMIZE TRANSIT FORMALITIES FOR UC SHIPMENTS.

102. More than ordinary air cargo or air mail, the extreme time-sensitive nature of UC shipments means that they are transported by using a *network* of flights rather than simply a collection of direct flights from origin to destination. Let us consider a simple example. The last flight from Europe to the U.S. affects all UC shipments in Europe, and not simply the UC shipments in the country of origin of the flight. Suppose the last three flights from Europe to New York are one from Paris leaving at 1600, one from Amsterdam leaving at 1730, and a one from London leaving at 1830 (local time). The result will be a strong commercial incentive for UC traffic from all over Europe to transit London, because the London connection will allow the UC carrier to pickup shipments an hour or two later in the origin city. Now assume that there is a 0300 flight from Frankfurt to New York the next morning. This flight will generate a further flow of UC shipments from all over Europe via Frankfurt, for the "late pickups" and the ultra time-sensitive financial shipments (most shipments, however, will still board the London flight in order to make onward connecting flights in the U.S.). Some UC shipments will be flown from Europe to Frankfurt (i.e., away from the U.S.) in order to meet this still later connection.

103. This simple example illustrates why UC shipments are more heavily dependent on simplification of transit formalities than ordinary cargo or mail. Such indirect routing would be irrationally wasteful for ordinary air cargo or air mail. UC shipments face unique problems both from the standpoint of the need to use transit routing and the short time in which transit must be accomplished.

104. While UC traffic has special requirements as far as transit formalities are concerned, it is also true that certain characteristics of UC shipments can be relied upon to simplify the administrative problems of Customs administrations. UC shipments move so quickly that the "inventory" of transiting shipments can be kept quite low compared to ordinary cargo and mail. Furthermore, UC carriers can generally specify in advance the time and date of export, thus largely eliminating concerns about locating the transit shipments. Lastly, UC carriers are, of necessity, regular, daily operators at the major ports of entry, so it should be possible to eliminate some of the formalities that are designed to ensure customs revenues will be paid.

105. We would suggest that transit formalities could be simplified by the following principle:

(A) *Customs authorities should permit the unbonded transit of all UC shipments provided that, upon import, the UC carrier makes a declaration of the time, date, and mode of export and such export is accomplished not more than three days after import. The UC carrier should at all times be able to locate*

transit shipments immediately upon inquiry.

106. Such a simple approach to transit shipments is already acceptable to many countries for postal and airline traffic. Some European countries permit the simplified transit of air cargo shipments as well. By specifying the time, date, and mode of export, the UC carrier is, in effect, presenting the shipment to Customs for export at the same time that it is presented for import. Thus, one declaration should serve both for import and export of a UC shipment. This unified declaration is limited to shipments which are exported within three days after import to reduce administrative problems that might be faced by maintaining a large number of transit shipments in a country at any one time.

107. The procedure we suggest could be easily monitored by Customs since Customs will know in advance how and where the shipment will be exported and the UC carrier is responsible for being able to locate the shipment immediately upon request. The procedure will be easily and effectively enforced by the threat of spot checking, as opposed to the burden of detailed documentation. The threat of losing expedited transiting rights is, after all, a very powerful commercial incentive against abuses.

CONCLUSION

108. We are convinced that a simple, "user friendly" system for transporting urgent international consignments will produce dramatic, and now largely unforeseen, benefits for the world economy, as has already occurred in several large domestic economies. We believe, as well, that Customs facilitation of UC traffic will result in significant benefits for both Customs administrations and the worldwide postal system. Most importantly, we submit that, to a much greater degree than for traditional cargo and mail, customs facilitation for UC traffic can *only* be accomplished by the CCC, acting on a multilateral basis. Clearly, the best time for such multilateral reform is now, while the UC industry is still relatively new and undeveloped. In short, the CCC's present study is of very considerable significance for international commerce.

109. For these reasons, we, as an industry, have made a particular effort to participate fully and responsibly in this CCC study. We hope that, when CCC's review of these issues is complete, the Council will formally encourage its member administrations to support appropriate, simplified, non-discriminatory customs procedures for all Urgent Consignment traffic.

110. We are ready to cooperate with the CCC in any additional aspects of this important study.

ADDITIONAL COMMENT BY FEDERAL EXPRESS CORPORATION

Federal Express Corporation (FEC) strongly supports the foregoing Statement of Position in all respects. However, FEC would like to make one additional comment. FEC believes that additional emphasis should have been placed on the need to facilitate higher weight and higher value Urgent Consignments. Higher weight and/or higher value UC traffic is as important

as any other subcategory of UC traffic and is no less amenable to customs facilitation. Such shipments could be cleared with procedures substantially similar to those proposed for UC Low Value Articles, supplemented by the filing of such additional post clearance documentation as Customs administrations might require.

Part 6

International Remail

CHRONOLOGY

30 Apr 1984	USPS declares remail to violate postal monopoly.
10 Oct 1985	USPS proposes amendment to postal monopoly regulations to ban remail definitively.
1 May 1986	President Reagan signs 1984 UPU Convention and orders USPS to promote remail.
19 Aug 1986	USPS amends postal monopoly regulations to permit international remail.
22 Apr 1987	Remail Conference: European and U.S. post offices organize to block remail.
27 Oct 1987	Post offices agree on CEPT terminal dues scheme.
13 July 1988	EU *Remail Case*: IECC complaint.
Fall 1988	EU Commission begins *Postal Green Paper*.
Mar 1988	UPU report on remail and terminal dues.
1 Jan 1989	International Post Corporation established.
6 Apr 1989	UPU round table on terminal dues and remail.
14 Dec 1989	1989 UPU Convention signed.
11 Jun 1992	*Postal Green Paper* proposes procompetitive position on remail issues.
5 Apr 1993	*Remail Case*: Statement of Objections upholds IECC complaint in all respects.
17 Feb 1995	*Remail Case*: Commission dismisses IECC complaint in three decisions (Feb, Apr, and Aug).
Late 1996	EU Commission apparently rejects Reims I.
16 Sep 1998	*Remail Case*: CFI rejects interception of ABA remail.
15 Sep 1999	EU Commission approves Reims II.
10 Feb 2000	*GZS Case*: ECJ limits total postal charges on "nonphysical ABA" remail to domestic postage.
1 Jan 2001	REIMS II sets terminal dues at 70 percent of domestic postage.

15

Overview: International Remail

I am asking that you do all within your power . . . to permit and promote marketplace competition in international mail, and to influence other nations to do likewise.

- President Ronald Reagan (1986)

Remail, a relatively obscure hybrid service, became a crucial policy battleground in the late 1980s in the larger effort to "permit and promote" a competitive marketplace for global delivery services. Remail is the practice of shifting mail from one country to another where it is tendered to the post office for forwarding and delivery either domestically or internationally. Because remail undercut the traditionally complete allocation of national postal markets to national post offices, postal officials fought fiercely to block its growth, drawing on anticompetitive provisions in national and international laws. After fifteen years, policy reforms prompted by private express companies have substantially eroded, but not wholly eliminated, legal restraints against remail.

In a normally competitive market, a mailer would employ a global delivery service to transport international mail "downstream"—i.e., to a post office nearer addressees—whenever he could obtain a service or price superior to that available from the national post office. Since national post offices focus primarily on optimizing local and national services, it appears plausible that global delivery services, competing with one another, could serve to join national postal systems in a more efficient and coordinated manner than post offices working individually with international airlines. Moreover, by improving economies of scale, the addition of international mail to the traffic of global delivery services could help lower the cost of other services. Remail thus offered the prospect of significant improvements in the system of global delivery services.

Remail, however, threatened the comfortable shared monopoly of international postal services. For postal officials, it was an article of faith that each national post office had a "natural right" to collect and dispatch outbound international mail produced by individuals and companies residing in its national territory. Arrangements for the exchange of international mail were determined by postal officials in long negotiating sessions in the Universal Postal Union (UPU); old hands had been attending such gatherings for decades.[1] Remail, if freely permitted, would subvert the entire UPU system, since arrangements set at the UPU were inconsistent with the costs of production and the demands of international commerce.

The policy debate over whether to permit or restrain remail was conducted in the United States, Europe, and the Universal Postal Union. Before describing this debate, however, the concepts of remail and terminal dues must be explained.

REMAIL DEFINED

To be precise, "remail" is a legal concept, referring to any mail which qualifies for interception or penalty under an antiremail provision of the Universal Postal Convention. Since 1924, the Convention has included a provision to discourage mailers from taking domestic mail out of country A and giving it to the post office in country B for posting back into country A as international mail, i.e., "ABA remail." In 1979, this provision was extended to cover all mail taken from country A to country B for posting to addressees in country B ("ABB remail") or country C ("ABC remail"). The Universal Postal Convention authorized post offices to intercept remail and return it to the origin post office or to surcharge it with domestic postage, a substantial penalty since the charge for domestic postage would be in addition to the international postage already paid the origin post office. The aim of these provisions was to ensure that international and domestic mail produced by persons resident in country A would be tendered to the post office in country A. The UPU antiremail provision was, in practical effect, a market allocation agreement enforceable through discretionary actions by individual post offices. As a German postal official succinctly noted in the 1979 congress of the UPU, "The Convention did not deal with competition between administrations."

In the 1984 version of the Universal Postal Convention, the antiremail provision was Article 23. Paragraphs 1 to 3 constituted the 1924 provision relating to ABA remail. It was originally adopted as one long paragraph and later confusingly divided into three paragraphs. Paragraph 4 is the 1979 amendment relating to ABB and ABC remail. Article 23 provided in full:

> 1. A member country shall not be bound to forward or deliver to the

[1]The Universal Postal Union is an intergovernmental organization based in Berne, Switzerland. The major act of the UPU is the Universal Postal Convention, a convention renegotiated and readopted every five years. See Part 9, below.

> 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 that 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.

Article 23 of the 1984 Convention was readopted as Article 25 of the 1989 Convention, Article 25 of the 1994 Convention, and Article 43 of the 1999 Convention. Successor articles were similar but (except for the 1989 version) not identical to Article 23 of the 1984 Convention.

The range of mail subject to the antiremail provision of the Universal Postal Convention is broader than may appear at first glance. Postal officials can characterize mail as remail under a variety of circumstances. For example, a company with an office in country A might prepare envelopes and transport them in bulk by private express to country B for posting to addressees in that country or another country. Alternatively, the company could ship materials for a mailing to a letter shop in country B and hire the letter shop to combine the materials into envelopes and tender them for posting. Today, it is also possible for the company to send the information content of a mailing—e.g., data from which statements of account are produced—from one country to another by electronic means. In each case, the mail posted in country B can be characterized as "remail" by postal officials. The most powerful and anticompetitive implications of the antiremail provision arise from the last examples, its application so-called "nonphysical" remail.

"Nonphysical" remail refers to remail which is not physically produced in country A and transported to country B for posting. The reach of the nonphysical remail doctrine turns on the concept of "residence." Under the first part of Article 23, a post office is authorized to intercept or surcharge inbound international mail which "senders *resident* in its territory . . . caused to be posted" in another country. In interpreting this provision, post offices have adopted a broad definition of "residence" so that any company with a significant commercial presence in country A may be considered resident in country A. Since every company which sends a substantial amount of international mail to country A is likely to have an office or agency in country

A, Article 23 effectively permitted the post office in country A to intercept almost any large inbound commercial mailing. The German post office, in particular, used Article 23 to try to force multinational companies with offices in Germany to produce mail for German addressees in Germany rather than consolidating mail production in an international center outside of Germany. By virtue of the nonphysical remail doctrine, Article 23 may be deemed to allocate not only mail delivery but also mail production.[2]

ROLE OF TERMINAL DUES

Although the Universal Postal Convention of 1984 discouraged remail, it also provided an economic incentive for remail by prescribing "terminal dues" unrelated to domestic postage rates. Post offices did not charge the same fee for delivery of identical pieces of domestic and international mail. While charges for delivery of domestic mail were set out in domestic postage rates, "terminal dues" were assessed for delivery of inbound international mail. Terminal dues were specified in international agreements, primarily the Universal Postal Convention. Prior to the 1989 Convention, terminal dues were established at a uniform rate per kilogram for all countries and all types of mail. Since postage rates varied widely from country to country, terminal dues were invariably higher or lower than domestic postage. Moreover, since the cost of delivering fifty 20-gram letters is more expensive than the cost of delivering two 500-gram magazines, terminal dues based solely on the weight of mail bore no relationship to actual cost of delivery in any country.

For almost all industrialized countries, terminal dues for delivery of light weight *letters* were significantly lower than domestic or international postage; terminal dues rates for delivery of heavier *publications* were roughly equal to or higher than domestic postage. Since post offices which accepted remail were competing with one another, the rates charged for forwarding remail to third countries were set only a little above terminal dues rates. Under these circumstances, discrepancies between terminal dues and domestic postage provided incentives for remail as follows:

- ABA remail. A large mailer in country A could save money by sending *letters* to country B for posting back to addressees in country A.
- ABB remail. A large mailer in country A could save money by sending *publications* to country B for addressees in country B.
- ABC remail. A large mailer in country A could save money by sending *letters*, and possibly *publications*, to country B for posting to addressees in country C.

Such savings, however, could be negated by service considerations. Since

[2]Under paragraph 4 of Article 23 (and successor provisions) domestic mail can be deemed nonphysical ABB remail, i.e., mail which a sender resident in country A causes to be posted in large quantities in country B for delivery in country B. In practice, such an interpretation of paragraph 4 would play havoc with domestic mail services. As a practical matter, the concept of "residence" in Article 23 is necessarily applied selectively by post offices.

the journey for remail was more circuitous than for ordinary mail, remail often took longer to arrive. Possibility of delay discouraged remail of letters in particular. Prior to 1980, remail was primarily a service for publications. For decades, European post offices had shipped newspapers and magazines in bulk to the United States for posting at domestic postage rates. Since the 1950s, the Dutch and British post offices had developed remail of American publications to European addressees. Thus, ABB and ABC remail of publications was an established practice prior to 1980.

Remail of letters depended on improvements in quality of service. Introduction of international express services made ABC letter remail feasible. Letters sent in bulk by express from New York to, say, Brussels, for posting to Paris could arrive sooner than letters posted directly from New York to Paris because the transportation from New York to Brussels by express was rapid and reliable whereas the U.S. Postal Service was slow in sorting international mail and tendering it to international airlines. In addition to arbitraging economically incorrect terminal dues, 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 provided additional services such as collection of mail at the office of the sender, sortation of mail, application of postage, and monthly billing.

Even if ABC remail could rival the quality of service of regular international mail, ABA remail could not, as a general rule, compete with domestic mail. To export mail from country A to country B and post it back to country A resulted in a significantly slower service than provided domestic mail in country A. Moreover, many mailers and couriers regarded ABA remail as an illegitimate circumvention of domestic postage whereas ABC remail seemed a legitimate commercial option. Hence, ABA remail was not, in the 1980s, a significant commercial threat to post offices. In the next two decades, "nonphysical" ABA remail would become a more substantial threat as improvements in telecommunications and personal computers made "distant printing" of letters in a foreign country a practical commercial alternative to domestic mail.

U.S. EXEMPTS REMAIL FROM MONOPOLY, 1986

The U.S. Postal Service became concerned about the growth of remail competition for outbound American mail in 1984. Since international postal service from the United States was poor, remail services enjoyed significant competitive advantages in both quality of service and price. In a series of legal rulings, the Postal Service declared that use of international couriers to send U.S.-origin mail to foreign post offices violated U.S. postal monopoly law. Defenders of remail pointed that, for transportation of a *shipment* of letters, couriers charged more than twice the U.S. domestic postage that would otherwise be applicable to the entire shipment; hence, the shipment of letters

as a whole qualified for the postal monopoly suspension for urgent letters adopted in 1979.[3] Postal Service lawyers objected, however, that each *letter* in the shipment must qualify under the price test for urgency set out in the regulations:

> when a group of letters, intended for different addressees, is carried to an intermediate point in order to be sent elsewhere . . . the cost test . . . would have to be calculated on . . . each letter or group of letters intended for *ultimate* delivery to a single addressee. . . . This computation would apply to letters which are shipped to a foreign country for delivery to different addressees by means of one or more foreign postal administrations.[4]

In brief, the Postal Service held that a courier must charge at least $3.00 per remail letter, rendering remail commercially impossible.

When couriers ignored threats of Postal Service lawyers, the Postal Service, in December 1984, asked the Department of Justice to enjoin remail services. The Department of Justice demurred, suggesting the urgent letter exception could indeed be interpreted to permit international remail. To remedy this situation, in October 1985, the Postal Service proposed a "rule" (i.e., a revised regulation) which would "clarify" postal monopoly regulations so as to bar the practice of international remail.[5] As required by U.S. law, the Postal Service sought public comment on its proposed rule.

Chapter 16 reproduces the comment of the International Remail Committee, an ad hoc defense group composed of courier companies offering international remail services. The Remail Committee encouraged customers and government agencies to file comments in opposition to the proposed rule. The Department of Justice, Department of Commerce, Council of Economic Advisors, and dozens of remail customers responded. The Remail Committee also commissioned a poll of users to demonstrate the economic value of remail. Drawing on such sources, the lengthy comment of the Remail Committee summarized the policy reasons for permitting international remail.

The climax to the American remail debate came in the form of a presidential letter on May 1, 1986. Because of White House staff unhappiness with antiremail provisions of the 1984 Universal Postal Convention, the Postal Service had delayed transmitting the Convention to President Reagan for ratification (the Postal Service implemented the Convention without presidential ratification on January 1, 1986). On May 1, with assistance from the Department of State, the Postal Service bypassed White House staff by submitting the Convention to the President for signature while he attended an "economic summit" in Tokyo. At the same time, other Administration officials persuaded the President to issue a letter to Postmaster General Albert Casey instructing him to administer the Convention in a procompetitive manner.

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[3]See Part 1, above.

[4]Letter from J. Belenker, Senior Attorney, USPS Law Department, to L.D. Bozzelli, Manager, Goodyear Tire & Rubber Company, dated May 4, 1984 (PES 84-5).

[5]50 FR 41462 (Oct 10, 1985).

President Reagan wrote to the Postmaster General as follows:

> I have signed the Acts of the Nineteenth Congress of the Universal Postal Union, negotiated at Hamburg in 1984, but I want us now to make sure that the Acts, and particularly Article 23, are not used to stifle healthy private competition in the international mail arena. The policy of this Administration is to encourage free enterprise in ways that will improve services and reduce costs to our citizens, and I know I can count on your support to carry out this policy.
>
> Therefore, I am asking that you do all within your power, working closely with the Executive Branch, especially the Secretary of State and the Attorney General, to permit and promote marketplace competition in international mail, and to influence other nations to do likewise.

Following President Reagan's letter, the Postal Service Board of Governors decided to reverse course. On June 17, 1986, the Postal Service proposed a revised rule that would *permit* international remail. Meanwhile, the Postal Service launched a new service, International Priority Airmail, that offered discounts for bulk international letter mail in direct competition with remail.[6] Although the International Remail Committee generally supported the proposed rule, it opposed continuing restrictions on ABA remail:

> . . . it is inappropriate to use the postal monopoly law to prevent Americans from enjoying postal rates offered non-Americans. If USPS offers below cost rates to foreigners, this problem should be addressed forthrightly, rather than patched over by means of the postal monopoly law.[7]

On August 19, 1986, the Postal Service adopted the new rule in final form. In its notice, the Postal Service summarized public comment on the practice of remail as follows:

> The comments came primarily from American commercial enterprises, including financial institutions and publishers, that use the services of international remailers in conducting their business abroad. The comments were almost universally consistent in their observations regarding the level of service provided by remailers. Specifically, the comments asserted that remailing was faster than U.S. airmail and that this time savings is often critical to the ability of American businesses to compete in foreign markets. Moreover, the comments asserted that remailing services were provided for a lesser cost than U.S. airmail, thereby also enhancing the ability of American firms to compete abroad. . . . Numerous commenters noted that this time and cost differential was critical in order for letter matter being sent abroad to retain its commercial value. Several commenters also stated that, without faster and cheaper services provided by remailers, it would not be feasible for their businesses to compete in the international markets.

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[6] 51 FR 17017 (May 8, 1986).

[7] International Remail Committee, "Comments of International Remail Committee" (Jul 17, 1985) (submitted to Postal Service in re proposed rule on international remail, 51 FR 21929, Jun 17, 1986).

In light of such comments, the Postal Service adopted a rule

> to permit the uninterrupted carriage of letters from a point within the United States to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside of the United States.

Despite the comments of the couriers, the rule did not permit carriage of letters out of the mails to a foreign country for subsequent delivery to an address within the United States (ABA remail).[8]

Commercial remailing of letters from the U.S. increased dramatically, climbing, according to rough estimates, from an annual rate of about 1,250 tonnes per year to about 3,200 tonnes per year, 40 percent of USPS's international airmail letter traffic. Prices also fell. In 1986, USPS charged an average of $35 per kilogram of international air mail. By July 1987, the average price for bulk international mail, whether transported via private remail or via the Postal Service's International Priority Airmail service, had fallen to about $15 per kilogram, a 58 percent price decline.

ANTIREMAIL CONSPIRACY, 1987

The flowering of international remail from the United States soon implied consequences for other postal systems. Several European post offices, most prominently the Belgian Post Office, were emboldened to participate more vigorously in international remail, whether of American origin or not. Post offices were actually beginning to compete in the international mail market.

On March 12, 1987, the U.K. Post Office invited leading European post offices to a special meeting to consider ways to counter remail competition:

> The amount of activity by private remailers is rapidly on the increase. 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. Administrations will no doubt adopt their own individual policies in response to this threat but equally it is vital to consider whether there is a common policy we can adopt to counter the activity of these companies.
>
> We feel this important subject needs to be discussed urgently and we therefore propose to hold a full one day meetings . . . to consider what should be our response to the remailers. . . .
>
> In view of their special interest, w plan also to invite the United States to sit in on this meeting as observers.

Accordingly, on April 22, 1987, the "Remail Conference," as it was styled, met at London's Heathrow Airport. Major European post offices participated despite two last minute letters from the European Commission warning that "the object or effect of this meeting could be in conflict with the EEC rules on competition."[9] As is evident from subsequent events, in the

[8]51 FR 29636 (Aug 20, 1986).

[9]Letter from H.C. Overbury, Director, Directorate General IV B (abuse of dominant position), European Commission, to M. Coss, Acting Head of International Relations Division,

Remail Conference post offices did indeed embark on a course in violation of European competition law that lasted for at least a decade. The U.S. Postal Service also attended. After permitting remail in August 1986, the Postal Service honored President Reagan's injunction—"to permit and promote marketplace competition in international mail, and to influence other nations to do likewise"—almost exclusively in the breach rather than in the observance.

In opening the Remail Conference, Sir Ronald Dearing, chairman of the U.K. Post Office, explained the background for the meeting as follows:

> 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 changes, 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.[10]

After several meetings, members of the Remail Conference settled upon a four-pronged response to remail. First, post offices agreed to increase terminal dues in such a way as to increase sharply the cost of remail without substantially affecting the cost of regular international mail services. Second, some post offices resolved to use enforcement or threats of enforcement of Article 23 of the 1984 Universal Postal Convention to discourage remail. Third, some post offices apparently agreed on a "code of good conduct" according to which they would decline to work with private express companies offering remail services. Fourth, post offices resolved to develop new international postal services better adapted to the needs of international business.

The terminal dues agreement developed by the Remail Conference became known as the "CEPT agreement" because it was subsequently

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Royal Mail Letters, dated Apr 15, 1987.

[10]Remail Conference, Draft minutes of the 22 April 1987 meeting, Annex A (Apr 28, 1987).

endorsed by the Conference of European Postal and Telecommunications Administrations, a regional association of postal administrations. The CEPT agreement increased the cost of remail but did not significantly affect the costs of regular international mail exchanged among post offices. This effect was accomplished by modifying the level of terminal dues charges but not the uniformity of terminal dues rates. For example, the CEPT agreement raised the terminal dues charge for a 20-gram letter (typical size of cross-border letters) about 180 percent, from SDR 0.052 to SDR 0.145. Since remail represented additional mail for the remailing post office (i.e., mail in addition to international mail generated by national residents), its fee for forwarding remail to a destination post office was based on the marginal cost, the terminal dues rate. Increasing terminal dues on a 20-gram letter by SDR 0.093 directly raised the price of remail by that amount. On the other hand, since the uniformity of terminal dues rates was left untouched, the total *net* cost of exchanging ordinary international mail between post offices was little changed. Most of what post office A owed post office B for delivery of international mail sent from A to B was offset by what post office B owed post office A for delivery of return mail. In the regular exchange of international mail, higher terminal dues rates affected only the relatively small amount of mail not in balance so the average cost of delivery for normal international mail was little changed. For remail companies, in contrast, higher terminal dues meant higher costs for outward mail but no offsetting income from inward mail, since remail companies did not deliver inbound international mail.

After the initial meetings of the Remail Conference, members extended their efforts to suppress remail competition to their work in the Universal Postal Union. The 40-member UPU Executive Council included eight members of the Remail Conference who could, as a practical matter, exert substantial control over the Council. The most important common members were the postal administrations of France, the United States, and Germany; the German postal administration chaired the Executive Council.

In May 1987, the UPU Executive Council decided to conduct a survey of remailing activities. In August 1987, the Director General sent a circular letter to UPU members expressing concern about remail.[11] In September, the UPU distributed an initial report and questionnaire prepared by the U.S. Postal Service.[12] In March 1988, the final report outlined competitive difficulties posed by remailing and noted that about half of the post offices surveyed favored increased use of Article 23.[13] Post offices "almost unanimously" agreed on greater cooperation to address the remail problem. The report concluded, "On the whole, the remail issue seems to have become a significant

[11]Circular No 0115(B/C)1745 (Aug 14, 1987). For an explanation of types and numbering of UPU documents generally, see the note in the Bibliography at the end of this book.

[12]Circular No 3370(B/C)1790, Annex 1 (Sep 2, 1987).

[13]CE 1988 C 4 Doc 9, "Study on remailing - Results of Consultation" (Mar 30, 1988).

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.[14]

On this basis, the Executive Council, in August 1988, called for an extraordinary UPU roundtable on remail and terminal dues, to be held at the end of the next annual meeting of the full Executive Council in April 1989.[15] In November 1988, the UPU secretariat circulated an outline of a common antiremail position for consideration in this roundtable, noting the leadership roles in this effort played by the postal administrations of France and the United States.[16] This proposal reflected a compromise developed in a series of meetings among postal officials of developed and developing countries. The compromise was that smaller post offices would not be included in higher terminal dues rates. The UPU circular specifically noted the connection between the higher terminal dues proposed for developed countries and remail:

> The Working Party considered the matter closely and felt that a distinction could be usefully made between low-traffic and heavy-traffic countries. The former could continue to come under the existing terminal dues system . . . ; the latter, which were the most affected by the remailing threat, would come under the new system with three separate rates.[17]

In January 1989, the U.S. Postal Service, at the behest of the UPU Executive Council, distributed a second questionnaire on remail to members of the Executive Council.[18]

At its April 1989 meeting, the last before the 1989 Washington Congress, the Executive Council agreed on a general strategy to suppress remail. This strategy was embodied in an Executive Council report entitled "Remailing."[19] The report made clear that postal administrations understood the reasons for the success of remail but refused to confine themselves economically neutral remedies, such as improved service quality and cost-based terminal dues. The Executive Council concluded that remailing "is a very important problem which calls for close collaboration among all administrations . . . [and] flexible, varied and swift measures . . . to face up to the competition." The Executive Council then proposed a six-part strategy to respond to remail: (i) preferential postage rates to big customers; (ii) higher terminal dues; (iii) improved postal quality control; (iv) new services, such as collection, bulk mail facilities, etc.;

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[14]CE 1988 C 5 Doc 9, "Other aspects to be considered in the study on terminal dues" (Mar 30, 1988).

[15]Circular No 3395.3(B)1719 (Aug 5, 1988) enclosing a compilation of documents entitled "Terminal dues Round table, Berne, 6 and 7 April 1989."

[16]Circular No 3395(B)1978 (Nov 9, 1988).

[17]Executive Council, "Terminal dues Round table," Add 1, at 1 (Nov 4, 1988).

[18]Circular No 3370(B)1071 (Jan 20, 1989).

[19]1989 Washington Congress, Doc 56, "Remailing"(Jul 7, 1989).

(v) "solidarity," including collection and sharing of intelligence about remail activities; and (vi) encouraging use of (but not strengthening) Article 23.

In November 1989, the Washington Congress convened amidst an atmosphere of alarm over increasing competition between post offices and private operators and, particularly, among post offices. A central preoccupation of the 1989 UPU Congress was "the harmful effects for the world postal service of the expansion of remailing."[20] In this mood, the Congress readily supported the counter measures proposed by the Executive Council in its June report. Terminal dues among industrialized countries were raised substantially to discourage remail but their uniformity was maintained so that postal administrations could still trade inward delivery services. As a result, as with the CEPT agreement, the economic major distortions produced by the UPU terminal dues scheme were continued and only remail competition was attacked. Article 23 was reenacted without change, and Congress elliptically instructed the Executive Council to continue work "on the question of remailing."[21]

The antiremail strategy of the 1989 Washington Congress was essentially the same as that of the 1987 Remail Conference with one additional element. The Congress amended the UPU Convention to encourage post offices to offer "preferential rates to major users" provided such rates were not "lower than those applied in the internal service to items presenting the same characteristics (category, quantity, handling time, etc.)."[22] In related documents, the Executive Council explained that the proposed amendment was directed against remail:

> Large industrial and commercial firms are the customers most accessible to and sought after by the competition. These customers often complain that the tariff policy applied by the Post is too egalitarian. . . . It therefore seems necessary to introduce a facility allowing postal administrations to give preferential rates to major users. This measure would contribute to increasing postal service competitiveness in order to retain or regain its market share in the letter-post sector which is particularly threatened by the competition. . . .[23]
>
> In Proposition 3019.11, the EC [Executive Council] aims expressly to authorize postal administrations to grant preferential rates to their large mailing customers so that they can compete better with remail firms for the most lucrative traffic.[24]

The pricing standard embodied in this article—domestic postage rates for large mailers—was unrelated to the actual cost of providing international postal

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[20]1989 Washington Congress, Doc 21,"Implementation of the Declaration of Hamburg," paragraph 99 (Jun 5, 1999).

[21]1989 Washington Congress, Resolution C 88. This resolution was one of several omitted from the published record of the Congress, apparently inadvertently. *See* UPU, 1 *Annotated Code (1989)* 144.

[22]Convention § 19(12bis) (1989).

[23]1989 Washington Congress, Proposal 3019.11.

[24]1989 Washington Congress, Doc 56, "Remailing" § 19 (Jul 7, 1989).

service. Domestic rates for large mailers may benefit from substantial cross subsidies from smaller mailers held captive by the postal monopoly. Moreover, domestic rates do not include international transportation costs, terminal dues charges, and other UPU charges, which collectively can raise international costs substantially above corresponding domestic costs.

As in the Remail Conference, participants at the 1989 Washington Congress encouraged a boycott of private operators. The UPU Director General reemphasized this theme in a document entitled "Attitude towards the Competition." He advocated extreme caution in establishing commercial relations with private delivery services and urged the UPU "to lay down policy as regards any relations with the competition so as to end the present confusion which can only serve to benefit the competition."[25]

The rise of remail spurred procompetitive as well as anticompetitive efforts. At the CEPT meeting held in Copenhagen on September 4, 1987—the same occasion 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, a working party, chaired by U.K. Postmaster General Sir Ronald Dearing, proposed establishment of a new corporation to take the lead in managing and marketing international postal services. A meeting of postal directors in Ottawa agreed, and the International Post Corporation (IPC) was formed on January 1,1989, in Brussels.[26] IPC's functions included coordination of business policies, harmonization and improvement of international postal services, monitoring of service quality, development of tracking and tracing systems, planning of competitive responses to remail, and advancement of the market share of EMS, an air cargo system for postal express mail. IPC also served as the lobbying arm for post offices at the European Commission.

REMAIL CASE FILED, 1988

The International Express Carriers Conference (IECC) was aware of the antiremail activities of post offices as early as April 1987. Based on its legal analysis, the IECC believed that these activities were inconsistent with European competition rules. After informal means failed to dissuade post

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[25]1989 Washington Congress, Doc 48.1 Add 1, "Attitude towards the Competition" (Nov 3, 1989). A 1989 UPU report stated that approximately two-thirds of postal administrations refused to accept remail from private operators. CE 1988 C 4 Doc 9, "Study on remailing - Results of Consultation," § 18 (Mar 30, 1988). As late as June 28, 1990, the UPU Director General wrote to postal administrations, "[I]n view of the vital importance of the problem of remailing, which is destabilizing the international service, the Executive Council recently instructed me to issue a further warning. . . . I am asking you to terminate any relations which your administration may have with remail companies. . . ." Circular letter 3390(B)1550 (Jun 28, 1990).

[26]Members were 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. On December 28, 1989, the firm name of IPC Brussels was changed into "Uniposte."

offices from their course, on July 13, 1988, the IECC filed a formal complaint with the European Commission charging post offices with violations of European competition law.

Chapter 17 reproduces the complaint lodged by the IECC. The complaint identifies eight European post offices who, according to documents available to the IECC at the time, had explicitly agreed to participate in anticompetitive activities growing out of the efforts of the Remail Conference. In this complaint, the IECC alleged three types of violations of European competition law:

- the post offices' agreement to revise terminal dues pursuant to the CEPT terminal dues scheme violated the prohibition against anticompetitive agreements;
- the post offices' agreement to intercept and allow interception of remail reflected in Article 23 of the 1984 UPU Convention violated the prohibition against anticompetitive agreements; and
- the post offices' efforts to enforce Article 23 by intercepting remail, asking other post offices to intercept remail, and use of Article 23 to threaten customers of remail companies, violated the prohibition against "abuse of discretion" by an undertaking in a dominant position.

Post offices responded by urging the Commission to undertake a comprehensive review of European postal policy. Although the Commission had, in 1987, ruled out such a study, in late 1988 it began work on what would become the Postal Green Paper. Post offices and their supporters then used the pendency of the Postal Green Paper as a justification for urging delay in addressing the Remail Case.

While the Postal Green Paper investigation proceeded, the European Commission effectively suspended the Remail Case even though the Competition Directorate was prepared to decide the case. By the end of January 1989, European competition officials were reportedly "nearly finished gathering evidence."[27] In June 1991, Sir Leon Brittan, the member of the European Commission responsible for competition policy, confidently predicted that the competition rules would soon be applied to abolish obstacles for remail services.[28] In September 1991, the post offices of Denmark, the Netherlands, and Germany published a detailed study describing how terminal dues could be aligned with domestic postage to meet criticisms raised in the Remail Case.[29] In October 1991, an official of the Competition Directorate observed at a postal conference in London that, "We are just about [to] send

[27] "EC Likely to Rule on Remail Complaint Soon," *Financial Times*, Jan 31, 1989.

[28] "Competition and Quality Postal Services" (Jun 4, 1991) (Speech 91/66 at the World Express Freight and Distribution Conference).

[29] "Approaches to Pricing for Intra-Community Postal Services" (Sep 1991) (produced in conjunction with Coopers & Lybrand Deloitte). This reforms advocated in this study were, in essence, the approach adopted in REIMS II in 1999.

the postal administrations our formal objections."[30] In May 1992, Sir Leon again declared publicly that the IECC complaint appeared justified and that he intended to take action in the matter.[31] Despite such reassuring pronouncements and repeated protests by the IECC, no action was taken in the Remail Case while the Postal Green Paper was in preparation, a period of almost five years.

POSTAL GREEN PAPER, 1992

Although providing an overall review of postal policy, the Postal Green Paper particularly addressed the specific issues posed by the Remail Case. As the IECC contended in the complaint, the Postal Green Paper concluded that Community post offices should not set terminal dues at a uniform rate because of the disparity in costs among post offices; instead, terminal dues should be related to domestic postage rates in each Member State.

> The existing systems [sic] of charging between post offices (called terminal dues) is not cost based, leading to significant distortions between remuneration and actual delivery costs incurred. The same principle of basing tariffs on costs should apply to the financial compensation system between post offices.
>
> The compensation charges between post offices for delivering each other's mail (terminal dues) ought to reflect actual inward costs. . . . Since inland tariffs will be related to costs, the compensation charges between post offices ought to be based on the delivery proportion of the inland tariff, with some supplement for the extra handling necessary and for profit.[32]

The Green Paper recognized and accepted that new technologies and increased centralization of European mail preparation would result in a shift of some mail from domestic distribution to cross-border distribution:

> 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.
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> The fact that such mail might formerly have been domestic and therefore

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[30]R. Bartelot, "The Development of Competition in EEC Postal Services, in European Postal Services: The Way Ahead" at 6 (Oct 29, 1991) (Financial Times Conference).

[31]"Competition Policy and Post and Telecommunications" (May 19, 1992) (Speech 92/50 at the Center for European Policy Studies).

[32]*Postal Green Paper* 251-52.

> 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?[33]

The Green Paper recognized that some post offices considered such cross-border mail to be "nonphysical" remail but disagreed with this characterization. According to the Green Paper, if mail is produced in a Member State, then it is properly posted in that Member State; where a post office may consider the sender to "reside"is immaterial. Any other approach, the Green Paper declared, would allow post offices to distort the Community printing and mail preparation sectors:

> . . . in postal terms, the mail should be treated as items originating in the country of printing. Not to treat the mail in this fashion would be to permit decisions by some postal managers to affect the Community's trade in printing.
>
> A similar point can be made about text, data or images that are transmitted electronically across a border for conversion into hard copy which may then be sent back as a letter to the first country. Here, postal rules must not be allowed to influence trade in information or in telecommunications. (Assessing flows of information can be an important factor in the location strategy of companies.)[34]

The Postal Green Paper also considered in detail the merits of Article 25 of the 1989 Universal Postal Convention (same as Article 23 of the 1984 Convention). It condemned postal resort to Article 25 except in limited circumstances. The Green Paper began by observing that remail benefits the user; it can overcome delays caused by slow cross-border postal procedures and accommodate the needs of mailers by adding extra services. Given positive economic benefits and the Treaty's emphasis on protection of competition, the Green Paper concluded application of paragraph 4 of Article 25 against intra-Community mail could never be consistent with the EC Treaty. The Green Paper left open the question of whether Article 25(4) could be used to turn back extra-Community remail, i.e., mail that a 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 would encourage certain industries that were heavily reliant on postal services to relocate outside the Community.[35]

The Postal Green Paper also expressed doubts about using paragraph 1 of Article 25 to turn back "physical ABA" remail, that is, mail physically taken out of Member State A to Member State B and posted back into Member State

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[33]Ibid, 135.
[34]Ibid, 199-200.
[35]Ibid, 129-34, 209-10, 247.

A. The Green Paper noted that Article 25(1) could be defended as an appropriate means of enforcing the postal monopoly but concluded that it was the task of the regulator, not the post office, to enforce the law and observed that Article 25(1) was not limited to postal monopoly items. Another difficulty noted by the Green Paper was that Article 25(1) could be used to prevent a company from posting its own mail where it deemed appropriate, a use inconsistent with the Green Paper's view that a person should always be able to post his own mail.[36]

REMAIL CASE: STATEMENT OF OBJECTIONS, 1993

In April 1993, the Commission finally adopted a Statement of Objections, a form of preliminary decision, addressing the 1988 IECC complaint initiating the Remail Case. The Statement of Objections upheld the complaint in all respects, condemning 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 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.

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[36]Ibid, 134-36, 210-12, 247.

> 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].[37]

REMAIL CASE DISMISSED, 1995

Notwithstanding its unqualified condemnation of the post offices' antiremail conspiracy in the Statement of Objections, in 1995 the European Commission, under new leadership, dismissed the IECC's complaint in a series of three short decisions. The tortuous legal reasoning in these decisions suggests strongly that they were motivated by political rather than legal considerations.

In regard to terminal dues arrangements, the Commission made clear that it regarded the CEPT agreement as inconsistent with the competition rules:

> Our key objection [in the Statement of Objections] to the system of terminal dues outlined in the 1987 CEPT agreement was that it was not based on the costs incurred by a postal administration in processing incoming international mail. Instead, such agreement fixed a rate for the processing service to be applied by all signatory postal administrations. *As a consequence, customers seeking service from postal administrations faced a system of artificially fixed prices rather than competitive prices reflecting the costs of different postal administrations*. Therefore, the Statement of Objections emphasised that charges levied by postal administrations for processing incoming international mail should be based on their costs. [38]

Even though post offices were found to have engaged in price-fixing on a Community-wide scale for seven years, the Commission declined to

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[37]Case IV/32.791-Remail, Statement of Objections, §§ 64-82 (Apr 5, 1993) (emphasis added).

[38]Decision n° SG(95)D/1790 at § 5 (Feb 17, 1995) (emphasis added). Note, however, the puzzling characterization of this passage by the European Court of Justice on review: "As regards the IECC's argument that the Commission has no discretion . . . where there is a manifest restriction of competition following a price-fixing agreement, it is sufficient to observe . . . that . . . *the existence of such an agreement was not established by the Commission in the contested decision*." Case C-449/98, *IECC v. Commission*, [2001] ECR I-__ , par 40 (emphasis added).

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 might, at some point in the future, resolve competition law issues raised by the complaint. The Commission concluded that requiring post offices to adhere to the competition rules would delay correction of competition law violations.

> On 17 January 1995, 14 public postal operators (PPOs), 12 of which belonging to the European Union, signed a draft agreement on terminal dues with a view to implementation on 1 January 1996. According to information provided on an informal basis by the International Post Corporation, the recently signed draft envisages a system whereby the receiving PPO would charge the originating PPO a fixed percentage of the former's domestic tariff for any post received. The receiving PPO may reduce that percentage if certain processing of the mail is carried out before its reception, e.g. pre-sorting or presentation by format.
>
> The Commission thus notes that the PPOs are actively working towards a system of new charges and at this stage believes that the parties are endeavouring to address the Commission's concerns under competition law shared by your complaint against the old system. It is the Commission's view that pursuing the infringement procedure with respect to the soon to be defunct 1987 CEPT scheme would hardly bring about a more favourable result for your clients. Indeed, the likely result of a prohibition decision would merely be to delay if not disrupt the wide-ranging reform and restructuring of the terminal dues system currently taking place, whereas the revised system should be implemented in the near future. . . . [T]he Commission considers that it would not be in the interest of the public of the Community to devote its scarce resources to moving, at this stage, towards resolving the terminal dues related aspect of your complaint by means of a prohibition decision.[39]

For these reasons, the Commission dismissed the IECC complaint insofar as it addressed the fixing of terminal dues at rates which distorted trade between Member States.

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 the IECC had failed to produce subsequent evidence that post offices had failed to live up to this pledge.

> On 21 April 1989 the UK Post Office gave assurances to the Commission that it had not itself used powers under Article 23(4) UPU, nor did it intend in future to do so. Likewise, the then German Bundespost Postdienst informed the Commission on 10 October 1989 that it no longer applied Article 23(4) to ABC remail between Member States. The assurances given by both postal administrations to the Commission in the context of its examination of the IECC complaint were specifically referred to in the

[39]Ibid, §§ 8-9.

> Statement of Objections. . . .
>
> . . . there is no evidence that the two postal operators referred to in the IECC's complaint of 1988 (in the context of interceptions on the basis of Article 23(4) of the UPU Convention) have not abided by the undertaking which they each gave to the Commission in 1989 to refrain from invoking Article 23(4) with respect to ABC remail. . . .
>
> . . . The German and UK post offices made undertakings that they would not seek to use Article 23(4) of the UPU Convention as a justification for intercepting ABC remail, and the IECC has not provided any evidence of such activities since the date of those undertakings. The Commission considers that, if such infringements of the undertakings had taken place, the IECC would have been in a position to provide prima facie evidence of them: as the IECC has not provided any such evidence, this reinforces the Commission's conclusion that there is no real risk of a resumption of the anti-competitive practices.[40]

The Commission's decision was carefully worded. As the Commission notes, post offices gave assurances in 1989 that they would not use paragraph 4 of Article 23 to intercept ABC remail; the post offices did not forswear interception of ABC remail using other provisions of Article 23 (indeed, the German Post Office strongly implied that it would make such interceptions). As the Commission notes, the Statement of Objections informed the IECC of the 1989 undertakings; the Commission fails to note the Statement of Objections found the undertakings insufficient to satisfy the competition rules or that the Commission refused to disclose terms of the undertakings to the IECC. As the Commission notes, the IECC did not provide evidence that post offices had violated their 1989 undertakings; the Commission fails to note that it had, for seven years, failed to ask either post offices or the IECC for such evidence and that, in any case, it was impossible for the IECC to produce such evidence without knowledge of the terms of the undertakings.

In fact, as the Commission was aware, post offices intended to continue interception ABC remail whenever they considered it in their commercial interest to do so. Rather than citing paragraph 4 of Article 23, post offices were citing paragraph 1 and the elastic concept of "nonphysical remail."[41] Indeed, in the 1994 congress of the Universal Postal Union, post offices amended the successor to Article 23 to reinforce the broad applicability of the nonphysical remail doctrine.[42] Notwithstanding the fact that post offices could and did use

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[40]Commission Decision SG(95)D/10794 at §§ 11, 13, and 17 (Aug 14, 1995).

[41]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. Thus, ABC remail can also be characterized as "nonphysical CABC remail" (or more commonly, "nonphysical ABCA remail"). By characterizing the mail in this fashion, the post office in country C can intercept ABC remail citing authority under paragraph 1 of Article 23.

[42]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

Article 23 to intercept ABC remail as "nonphysical remail," the Commission, for the purposes of decision, adopted the position the term "nonphysical remail" could not, by definition, include mail transported by private express:

> In the Commission's view, . . . so-called "non-physical remail" involves the following scenario: a multinational company, for example a bank, having subsidiaries and/or branches in several Member States, 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." It should be stressed that in this scenario, there is no physical collection of letter-items in country B, but simply a flow of data via the telecommunications network from subsidiaries in country B to the central service centre in country A. . . . .[T]here are in our view no indications as to how the IECC's members could be involved in this type of arrangement.[43]

Having adopted this incomplete definition, the Commission held that the IECC could not complain against interception of ABC remail as "nonphysical remail" because the IECC had no "legitimate interest" in the interception of nonphysical remail, a legal requirement for a complaint.

Finally, in respect to postal use of Article 23 to intercept mail that had been physically exported and reimported into country A—deemed "ABA remail"—the Commission, in direct contradiction to the Postal Green Paper, declared that interception of such mail was justified because under the CEPT agreement post offices charged less than domestic postage on incoming cross-border mail and therefore lost money on ABA remail.

> . . . such circumvention of the national monopoly is "rendered profitable because of the present unbalanced levels of terminal dues" and that it is precisely for this reason that some form of protection is justifiable at this stage. In any event, the imbalance which you refer to is a result of the fact that the 1987 CEPT terminal dues scheme was not cost-based; in the Commission's view, where a circumvention of the postal monopoly has taken place, as is the case with commercial physical ABA remail, the postal operator charged with delivering such mail to its final destinations can . . . legitimately intercept such mail in order to recover the actual costs of delivery.[44]

The Commission thus came to the remarkable conclusion that a price-fixing

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domiciliés in the official French text to *résidents*. The UPU Executive Council, which drafted the 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, § 5.

[43]Commission Decision SG(95)D/4438 at § 7 (Apr 6, 1995).

[44]Ibid, § 6. The Commission ignored entirely the third element of IECC's complaint, that Article 23 constituted an agreement in violation of the competition rules.

agreement, that was itself unjustifiable under the competition rules, justified postal interception of ABA remail, an action otherwise unjustifiable under the competition rules.

RIEMS II: TERMINAL DUES REFORMED, 1999

Dismissal of the Remail Case was not, however, the end of the European Commission's effort to foster reform. The Commission continued to press post offices to complete a new terminal dues agreement that would eliminate distortions found in the CEPT agreement. In December 1995, post offices finally submitted to the Commission a tentative version of the REIMS terminal dues agreement supposedly concluded the previous January. Because terms of the agreement remained inconsistent with European competition law, especially provisions for a lengthy transition period, post offices asked the Commission to exempt the agreement from the competition rules based on certain public interest criteria. In early 1996, the Commission requested public comment on the draft RIEMS agreement.[45]

Chapter 18 reproduces the comment on the REIMS agreement submitted of the European Express Organisation (EEO), a group of European express companies associated with the IECC. EEO urged the Commission to reject the proposed agreement. The proposed agreement would have prolonged many of the anticompetitive practices complained against in the Remail Case for as long as six years and wholly failed to remedy other practices. In this comment, EEO sought to demystify the public policy issues surrounding terminal dues. In particular, EEO sought to strengthen procompetitive advocates in the Commission by clarifying the effects of immediately implementing terminal dues reform and the relatively minor measures needed to alleviate genuine financial distress.

In late 1996 or early 1997, the Commission apparently rejected without public notice the post offices' application for an exemption from the competition rules for the December 1995 version of REIMS.

Post offices then substantially revised REIMS, shortened the transition period, and presented a "REIMS II" agreement to the Commission for approval in late 1997. In February 1998, the Commission again sought public comment without making public the content of the agreement. This time EEO urged the Commission to give limited and conditional approval to the agreement. On September 15, 1999, the Commission granted the revised version of REIMS an exemption from the competition rules.[46]

In principle, the REIMS II agreement largely, but not completely, addresses one of the issues raised in the IECC complaint of 1988. On January

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[45]Notification of an Agreement on terminal dues (Reims) between postal operators, OJ 1996 C 42/7. Several parties conditioned their participation in REIMS on participation by the Spanish post office which had so far refused to agree. The Spanish post office never agreed to original version of REIMS.

[46]Commission Decision of 15 September 1999, *Reims II*, OJ 1999 L 275/17.

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. The most anticompetitive and distortive elements of the CEPT agreement were thus eliminated. The second issue raised in the Remail Case complaint, market allocation through postal interception of remail, was not resolved in the Commission's decision on REIMS II. The Commission did not adopt the suggestion of the EEO to make non-interception of remail a condition of exemption. Nonetheless, it appears likely that, with rationalization of terminal dues, the Commission will eventually prohibit post offices from intercepting remail transmitted among European post offices.

GZS AND IECC CASES: INTERCEPTION OF REMAIL BARRED

Although the European Commission declined to restrict postal interception of remail in the context of the Remail Case or REIMS II, two legal judgements may have produced an equivalent legal effect.

On September 16, 1998, the Court of First Instance reversed a key element in the Commission's decisions dismissing the Remail Case. The Court held that, contrary to the decision of the Commission, neither losses resulting from non-cost based terminal dues nor a need to prevent circumvention of the postal monopoly justified a post office in using Article 23 to intercept ABA remail. The Court declared:

> The existence of the postal monopoly and, consequently, its alleged circumvention by ABA remail cannot be regarded as justifying in themselves interception of this type of remail. . . .
>
> Contrary to the Commission's contention, the interceptions in dispute cannot be objectively justified by the fact that the terminal dues, which constitute the public postal operators' remuneration in the case of ABA remail, do not enable those operators to cover their costs of delivering the mail.
>
> Although there is an imbalance between the costs which a public postal operator bears in delivering incoming mail and the remuneration which it receives, this imbalance is the result of an agreement concluded among the public postal operators themselves, including the three public postal operators involved in the present case, under which the terminal dues are fixed amounts, determined without taking into account the costs actually borne by the public postal operator of the country of destination.
>
> Such a practice, which in the case of an undertaking in a dominant position helps to offset the adverse effects of a convention which it itself helped to draft and to which it is a party, cannot be regarded as an objective justification for excluding interception of commercial ABA mail from the scope of Article 86 of the Treaty.
>
> Furthermore, it does not appear that the interception of incoming mail is

> the only means by which the public postal operator of the country of destination can recover the costs involved in delivering that mail, as is demonstrated by the fact that Deutsche Post has, on several occasions, simply recovered the costs from the senders. It does not appear from the contested decision that the Commission examined whether other measures might be regarded as less restrictive than interceptions.[47]

An appeal of this holding by the German Post Office was rejected by the European Court of Justice on May 11, 2000.[48]

On February 10, 2000, in the GZS case,[49] 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 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, claiming the mail was "non-physical ABA remail" and citing UPU Article 25. The banks refused to pay domestic postage in addition to the cross-border postage already paid the Danish and Dutch post offices, noting that the German post office would receive terminal dues from the origin post offices to cover the cost of delivery.

The Court held it was a violation of European competition law for the German post office to enforce the remedies provided by UPU Article 25, i.e., to return the mail to the origin post office[50] or to charge the sender full domestic postage.[51] 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 post office to fulfill its obligation under the Universal Postal Convention to deliver inward international mail.[52] Therefore, the Court held that the German post office may charge the mailer the *difference* between the domestic postage that it would have received and the terminal dues that it actually received.

> . . . in the absence of an agreement between the postal services of the

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[47]Joined Cases T-133/95 and T-204/95, *IECC v Commission*, [1998] ECR II-3645 (UPU Article 23). *See also* Case T-110/95, *IECC v Commission* [1998] ECR II-3605 (CEPT agreement), §§ 96, 99-102. On appeal, the Court of First Instance deferred, in most respects, deferred to the Commission's discretion not to decline to investigate complaints. On further appeal to the European Court of Justice, the Court affirmed the broad discretion of the Commission to decline enforcement of the competition rules. Cases C-449/98 and C-450/98, *IECC v. Commission*, [2001] ECR I-__ .

[48]Case C-428/98, *Deutsche Post AG v IECC*, [2000] ECR I-3061.

[49]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-825. This case involved questions referred to the Court from a German court.

[50]Ibid, § 60.

[51]Ibid, § 58.

[52]Ibid, § 51.

> Member States concerned fixing terminal dues in relation to the actual costs of processing and delivering incoming trans-border mail, it is not contrary to Article 90 of the Treaty, read in conjunction with Articles 86 and 59 thereof, for a body such as Deutsche Post to exercise the right provided for by Article 25(3) of the UPC, in the version adopted on 14 December 1989, to charge, in the cases referred to in the second sentence of Article 25(1) and Article 25(2) thereof, internal postage on items of mail posted in large quantities with the postal services of a Member State other than the Member State to which that body belongs. On the other hand, the exercise of such a right is contrary to Article 90(1) of the Treaty, read in conjunction with Article 86 thereof, in so far as the result is that such a body may demand the entire internal postage applicable in the Member State to which it belongs without deducting the terminal dues corresponding to those items of mail paid by the abovementioned postal services.[53]

In short, the Court found that the German post office would be justified in treating nonphysical ABA remail as domestic mail:

> In such a case, it must be regarded as justified, for the purposes of the performance, in economically balanced conditions, of the task of general interest entrusted to Deutsche Post by the UPC, to treat cross-border mail as internal mail and, consequently, to charge internal postage.[54]

In combination, these two judgements imply that a post office may not refuse to forward or deliver remail nor impose punitive surcharges on remail. While the cases pertain specifically to ABA remail, there is no reason why the conclusions should not apply to other remail. On the other hand, it is clear that 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 had been posted domestically.

SUMMARY

What the long public policy battle over remail has been about is breaking down the traditional division of the international mail market into national territories reserved for national post offices. Since 1984, U.S. and European post offices have fought fiercely to prevent global delivery services from participating in the international mail market. After more than fifteen years, legal restraints on remail have substantially eroded but not disappeared. In the United States (as a matter of law) and in Europe (as a matter of fact) postal monopoly law no longer prevents the export of remail. In Europe, post offices must align terminal dues with domestic postage and refrain from interception of intra-European remail except to ensure collection of domestic postage. Thus, in Europe an end to distinctions between domestic mail, international mail, and

[53]Ibid, § 61.
[54]Ibid, § 52.

remail (at least within Europe) is foreseeable. In the U.S., reform remains incomplete. Although outward remail is permitted, the Postal Service, immune from antitrust law, continues to threaten interception of remail, to levy different charges for delivery of international and domestic mail, and to oppose pro-remail reform at the UPU. Even in the U.S., however, barriers to international remail are coming under increased governmental scrutiny.

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IRC Comment on Proposed Anti-Remail Rule (1985)

THE PROPOSED RULE

By notice published October 10, 1985, the United States Postal Service (USPS or Postal Service) proposes to make it a federal crime for a private company to offer "international remail" service in competition with the Postal Service. 50 FR 41462.

More specifically, the proposed rule would modify the USPS administrative regulations which state that private carriage of "urgent" "letters" is excepted from federal criminal laws (primarily, 18 USC 1696) that otherwise prohibit the private carriage of all "letters" over "post routes." The Postal Service states that it "does not consider this as a change in substance of the suspension but rather as a clarification of the rule which has been in effect." 50 FR 41464. The Postal Service further states that the effect of the proposed rule will be to "leave no room for question" that the urgent letter exception does not permit private companies to provide "international remail" services. International remail is a specialized mail preparation and air freight forwarding service used by American businesses to effect worldwide distribution of large mailings, such as brochures, statements of account, newsletters, and so forth. USPS states the justification for the proposed rule is that it will increase postal revenues by eliminating competition.

Unfortunately, the Postal Service's notice incorrectly characterizes both the rule and its consequences. The Postal Service is *not* "proposing" a rule; it has already stated to both Congress and the USPS Board of Governors that it has decided to adopt the rule. The public rulemaking is a sham. The proposed rule is *not* a "clarification" of the existing urgent letter rule. It is a partial repeal

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International Remail Committee,."Comments of the International Remail Committee." (December 1985) (submitted to United States Postal Service). Appendix omitted.

of the urgent letter rule, since international remail is to be banned even though it is, in many cases, demonstrably time-sensitive and even though it is now transported across the territory of the United States (the reach of the U.S. postal monopoly) with exactly the same urgency as other urgent documents. Indeed, the proposal is anything but a non-substantive clarification. The proposed rule would significantly hinder the conduct of U.S. international commerce and drastically injure the business of the international remail companies. Moreover, it would establish a remarkable (and dubious) principle that the postal monopoly may be invoked against a shipment based on events that take place after it has left the "post routes" and, indeed, after it has left the United States entirely. Furthermore, the proposed rule will *not* generate significant additional net revenues for the Postal Service. There is no evidence whatsoever that USPS can satisfactorily handle the business now performed by the international remail industry. Finally, contrary to the whole premise of the notice, the effects of the proposed rule are *not* limited to international remail. The proposed rule would impose substantial new administrative burdens on the private carriage of all urgent international documents by couriers and express companies.

Public comment on the "proposed" rule has been requested by December 12, 1985. 50 FR 46464 (Nov 8, 1985). The International Remail Committee hereby comments in opposition to the proposed rule. The Committee is an informal group of small companies, many of "Mom and Pop" origins, which engage in international remail. Some members of the Committee pioneered the concept of international remail by applying "imagination and creativity" (to use Assistant Postmaster General Duka's phrase) to the problem of large international mailings more than a decade ago. The commercial success of this concept has "forced" (again, Mr. Duka's phrase) the Postal Service to introduce new, but still not comparable, international services in response.

SUMMARY OF COMMENTS

As international commerce has grown, so has the need for American banks, manufacturers, retailers, universities, churches, and other organizations to send large worldwide mailings. Building upon inbound commercial precedents, in the last ten to fifteen years a number of small American entrepreneurs have developed an outbound "international remail" service that provides American firms with faster, more reliable, and more cost effective distribution of their worldwide mailings.

Typically, a remail company operates as follows. A large mailing weighing from ten to hundreds of pounds will be picked up at the shipper's office on the same day he calls for service. The shipment will be sorted, prepared, and dispatched out of the U.S. via international air freight that same night. The mailing will immediately be introduced into a carefully chosen foreign post office with whom the remail company has previously negotiated favorable rates and services. The documents are then transmitted via the international air mail or surface mail systems and ultimately delivered to

hundreds or thousands of addresses worldwide.

International remail involves four basic improvements over traditional international postal service. First, by using bulk air freight, rather than direct flights or sea freight, to transport large mailings from continent to continent, the service is more economical than traditional air mail and much faster than traditional surface (sea) mail. Second, the pick up, sorting, freight forwarding, and other customer services provided in the U.S. are much superior to those generally available from the U.S. Postal Service. Third, the remail company charges an "unbundled" price, charging only for air freight without inclusion of the nationwide collection cost built into the traditional air mail rate for a single letter. Fourth, by playing one foreign post office off against another, the remail industry has, for the first time, forced national post offices to compete for the right to handle large American mailings. The result has been better service at lower prices.

In the last few years, the U.S. Postal Service has grudgingly introduced new services specifically designed for large international mailings. At a September 6, 1985, Board of Governors meeting, the Postal Service explicitly admitted that it was the "imagination and creativity" of the remail companies that had "forced" them to introduce these new services.

As American international industry has become increasingly service and information based, international remail has become quite significant to U.S. international commerce. A recent independent poll of some 300 large and small U.S. companies conducting international business, and using remail, revealed that ninety-nine percent feel that alternative international mailing services are "important," eighty-one percent responding "very important." Ninety-four percent oppose a postal monopoly on any international shipments. Sixty percent believe that restrictions on international remail will "injure the international commerce of the U.S." The New Postal Policy Council, a coalition of about twenty of the largest U.S. financial institutions, recently unanimously adopted a statement stating that prohibitions on private international remail would be "devastating to American business."

Legally, the proposed rule would amend the administrative exception to the postal monopoly which allows private carriage of "urgent letters," adopted in 1979 after strong Congressional pressure. At the same September 6th Governors meeting mentioned above, the General Counsel stated that USPS had already decided to adopt the "proposed" rule and ask the Department of Justice to enjoin the remail companies.

We submit that the Postal Service's proposal to crush the small businessmen who have provided some "imagination and creativity" in the global document delivery business is plainly contrary to the economic best interests of the U.S. For the Postal Service to use the police power of the United States to takeover an industry pioneered by "Mom and Pop" entrepreneurs of the remail industry is outrageously unjust. Further, the testimony of many large companies and the poll of users, not to mention the

fact that international remail is a commercial success, makes it plain beyond doubt that monopolization will injure current U.S. international trade. The most fundamental economic damage, however, will be the loss of future innovation by the snuffing out of the entrepreneurial fringe from which "imagination and creativity" may be expected.

Contrary to the Postal Service's expectations, the proposal to eliminate the remailer competition will not significantly enhance net postal revenues. More likely results include the driving of U.S. jobs and printing activities overseas and a loss of revenues now received from inbound international remail. In some cases, U.S. companies will wind up using other, more cumbersome, less efficient remail procedures which are clearly beyond the reach of the monopoly—rather than using still less efficient postal services. Even if the entire $60 million per year international remail business (estimated gross) were handled by the Postal Service, it may be estimated that the *net increase in annual postal revenues would be no more than three million dollars, about one fortieth of one percent (O.025%) of total postal revenues,* and probably much less. This is obviously an exceedingly small benefit for the costs and injustices imposed.

Justice, international commerce, and net postal revenues aside, the proposed rule also fails to comport with sound postal policy. Contrary to the postal rule's statement that international remail is not within the "intent" of the urgent letter exception, international remail does indeed fall squarely within the letter, the rationale, and the principle of the urgent letter exception. The basic rationale of that exception was that letters could be carried out of the mail if the private carrier significantly outperformed the Postal Service and/or charged significantly more than domestic first class postage, which is the proper measure of what the United States Postal Service contributes to international service (international postage includes substantial air freight and foreign delivery costs). International remail companies meet both of these tests of the urgent letter exception *in exactly the same manner as international couriers.*

If the remail company handles its shipments with greater speed and reliability than the Postal Service, just like a courier, why should not international remail qualify for the urgent letter exception? The Postal Service's answer is to look at what happens abroad, where the letters are deposited in the foreign mails. The Postal Service's reasoning is, in effect: So what if the remail company does its job faster and better than the Postal Service can do the same task? So what if this difference in performance is what results in overall service for the customer that is faster, more reliable, and more cost effective? Postal Service says the "intent" of the urgent letter rule delimits the exception, not according to how well the Postal Service does its job, but according to some vague standard of True Urgency ("taking extraordinary steps to ensure particularly rapid delivery").

On the contrary, the fundamental principle of the urgent letter exception was, simply, "The postal monopoly does not apply if not earned." By this

principle, the international remail industry clearly has won its place under the wing of the urgent letter exception. Moreover, a careful examination of the historical policies underlying the postal monopoly—universal letter service at a uniform rate—reveals no possible countervailing argument. The Postal Service's remarkable suggestion that the postal monopoly may be defined, not by what happens on the postal routes of the U.S. but by what happens to an urgent shipment after it leaves the United States, is a Pandora's Box. The next step would be for foreign post offices to restrict the transportation of urgent U.S. documents based on what happens after they arrive in the U.S. (in fact, this case has already come up and is being fought by the U.S. Trade Representative).

The proposed rule is a bad idea. So much so that the proposed rule and whole manner in which it has been handled by the Postal Service demand a testing against the principles of the Constitution.

The Postal Service has set itself up as a virtual Interstate Commerce Commission for the domestic and international transmission of all physical information (except books). It decides which companies may and may not enter the business. It decides what they may carry (and, according to the proposed rule, what they can do with it after they leave the U.S.). Did Congress ever give this authority to the Postal Service? An analysis of the history and purpose of the statute cited by the Postal Service, 39 USC 601(b), raises very serious doubts.

Even more fundamentally, is it fair and reasonable under constitutional standards for the Postal Service, as a commercial competitor, to administer the police power of the United States in respect to its competitors? An examination of the principles of Due Process, as explained by the Supreme Court, leads to a certain negative answer.

In the international sphere, the Postal Service is immune from scrutiny by the Postal Rate Commission, free of statutory service duties, beyond the reach of the antitrust laws, outside the scope of presidential regulatory reform orders, and largely exempt from normal political review. Add the power to define the postal monopoly and the power to regulate private competitors, and it is utterly unrealistic to expect that such powers will not tempt ordinary mortals, competing in a commercial world, into abuses and inefficiencies. The efficient transmission of international documents is self-evidentially vital to the United States, and becoming more so. The time has come, we submit, to recognize that the postal monopoly over international documents (if any) should be—and constitutionally *must* be—administered by an impartial, disinterested administrator and *not* by the U.S. Postal Service.

I. STATEMENT OF FACTS

The following Statement of Facts is lengthy because there appears to be substantial misunderstanding, or incomplete understanding, about what international remail is, why it developed, and what role it plays in the

international commerce of the United States. The background of the proposed rule is recounted in some detail because it bears on the postal policy and Due Process considerations discussed later in the comment.

A. WHAT "INTERNATIONAL REMAIL" IS AND WHY IT DEVELOPED

American international trade has evolved and grown tremendously in the last twenty-five years. Today, American banks, shipping companies, manufacturers, retailers, governmental agencies, universities, publishers, and charitable institutions routinely do business with persons located all over the globe. To support this business, these organizations from time to time must send out large worldwide mailings of brochures, catalogs, order forms, operating instructions, statements of account, newsletters, annual reports, and the like. Increasingly, their distribution needs are being met by the rise of a new service industry, the "international remail" companies. These companies have pioneered a new approach to the problem of inexpensive worldwide distribution by developing an innovative hybrid of the international air transportation and international postal systems. In so doing, they have provided American international businessmen with the best possible international delivery services for their bulk mailings.

Why did international remail develop? Historically, the Postal Service offered only two sorts of international service. One was a very expensive "air mail" service that was supposed to be as fast as reasonably possible. "Air mail" was expensive because the Postal Service used direct flights to the many destination countries. The other postal option was "surface mail" transported by sea. Surface mail was slow, inexpensive, and intended primarily for printed matter.

As early as the 1930's, European publishers circumvented the 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 then distributed by the U.S. Postal Service. In the late 1950's, McGraw-Hill and KLM Royal Dutch Airlines began experimenting with outbound remail of U.S. publications.

As international commerce expanded in the 1960's and, especially, in the 1970's, more and more industries began to demand an intermediate worldwide delivery service that was faster than surface mail, cheaper than air mail, and better value for money than either. Step by step, a small group of entrepreneurs responded to this need by introducing a series of distinct improvements over traditional postal operations and, for that matter, over the early remail operations of the publishing houses. Looking back, four types of innovations stand out.

First, the remail industry recognized that postal operations failed to take full advantage of the modern air transportation network. Rather than using air or sea freight from the United States directly to various destination countries, it made more sense, at least for large mailings, to use international air freight

to transport bulk shipments from continent to continent and then normal "surface mail" within a continent. When the Postal Service ignored the demand for an air freight/surface mail service, private industry stepped in.

A second innovation of the remail industry was the addition of old fashioned customer service to the bulk mailing market. Instead of demanding that the customer deliver his mail to the airport, the remail company picks it up at the customer's door. Instead of requiring the customer to sort his mail and fill out endless forms, the remail company takes over the sorting and paperwork—and may even address and envelope the documents. Instead of demanding four day's notice before accepting a shipment, the remail company picks up Monday morning's shipment on Monday afternoon. And instead of using Monday afternoon's shipment to fill up next Thursday's air freight booking, the remail company makes sure that it gets on Monday night's departing aircraft. The results of this attention to service were dramatic. Reliability of delivery from end to end improved greatly and speed of delivery increased substantially.

The third significant innovation of the remail industry was the concept of "unbundling" international delivery services. The Postal Service's international postal service is really a two stage process. In the first phase, "the collection phase," the Postal Service collects letters and documents from post offices and post boxes around the nation, sorts them, and gathers them into shipping bags for air transportation to their destination cities. In the second phase, "the air freight phase," the Postal Service draws upon its air freight agreements with the various international airlines to ship the bags to foreign post offices. The foreign post office unpacks the postal bags and delivers the letters and documents to their addresses for an effective price of about $0.87 per pound. This is the so-called "terminal dues" rate established by the Universal Postal Union. By mutual agreement, all the post offices are "exclusive agents" of each other. In the second stage, the Postal Service is, in effect, selling its air transportation contracts and access to its network of exclusive agents. In the first stage, the Postal Service is providing the traditional postal-type service; that is, it is gathering, sorting, and transporting individual envelopes. In the second, the Postal Service operates like any other freight forwarder; it is tendering to the airlines shipments weighing up to several hundred pounds.

There is no logical reason why the "collection" phase and the "air freight" phrase need to be priced together. If a large mailer, with enough letters and documents to make up a respectable air freight sized shipment, were to sort its letters and documents itself, pack them into shipping bags, and deliver them to the post office at the international airport, the Postal Service could sell its air freight service at a price calculated by adding the air transportation charge and the terminal dues, plus a reasonable profit. When sending out a large international mailing, what the customer needs is only the "air freight" service and not the "collection" service. The Postal Service did not respond to this particular requirement of large mailings, so private entrepreneurs did.

The fourth key improvement devised by the international remail industry—and ultimately the most important of all—was the introduction of competition to the worldwide postal system. Not unnaturally, the individual national post offices have taken advantage of their position as the "exclusive agent" of the worldwide postal system in their respective countries. A quick comparison of USPS's domestic and international air mail rates suggests how much room there is for improvement in the Postal Service's traditional international air mail price/service options. (We use the USPS's rates only because they are the most easily available, and not to suggest USPS is in any way worse than any other post office.) The following table compares the domestic first class (or zone 8 priority) rate for delivery to destinations throughout the United States with the general international postal rates. Since air transportation is less than half the total cost of end-to-end delivery, even for international air mail, it is hard to resist the conclusion that international rates are too high.

Weight	Domestic	International
0 to 0.5 ounce	$0.22	$0.44
0.5 to 1 ounce	$0.22	$0.88
1.5 to 2 ounces	$0.39	$1.76
3.5 to 4 ounces	$0.73	$3.32
Up to 1 pound	$2.40	$12.68
Up to 2 pounds	$2.40	$25.68

Yet even at these prices, it is well known that international air mail is neither reliable nor speedy enough for many document distribution needs of modern business. Furthermore, contrast these monopolistic air mail prices with USPS's prices in the highly competitive international express mail market: USPS's International Express Mail rate to Hong Kong, for example, is only $27.90 for up to 2 pounds of documents. Surely, something is wrong somewhere.

For large international mailings, the failure of competition is worse yet. If a shipper tenders air freight sized shipments of sorted and bagged international air mail, the Postal Service would incur only international transportation costs of about $2.75 per pound. Hence, for large international mailings, the average international air mail rate of about $9.79 per pound is absurd (although, admittedly, no allowance is made in this calculation for inbound delivery costs). Moreover, this huge markup on large mailings is "earned" by the Postal Service with essentially no work at all. All the Postal Service has to do is transport the bags to the airport; the airline and the foreign post offices do the rest.

The commercial impact of a reduction in the cost of disseminating a worldwide mailing can be very significant. Lower costs mean, in turn, more mailings for the dollar. Fifty percent more solicitations, for example, can mean

fifty percent more exports. The benefits of more cost effective communications are therefore magnified throughout international commerce.

The remail industry has injected a new wind of competition into the staid and stale atmosphere of the international postal system. The international remail industry carefully monitors the services and prices available from the world's post offices. The industry is constantly demanding better service and lower prices, playing one post office against another, before channeling large American mailings through a given post office. In effect, the remail industry is representing American business in the international postal world, demanding and obtaining competitive bidding among the world's post offices for the right to handle the large international mailings. In so doing, the remail industry has forced down the price and pushed up the level of service available to U.S. international commerce.

As international commerce became more and more information oriented, in the late 1970's and early 1980's, customers began to demand the advantages of international remail for other, more time-sensitive bulk mailings, such as newsletters, brochures, statements of account, order forms, etc. Perhaps, a key commercial event was the 39 percent increase in international air mail rates in 1981. In any case, it became clear that by combining prompt air freight service to a carefully chosen foreign postal distribution point with the international air mail postal system, it was possible to extend the remail idea to include air freight/air mail service that was faster, cheaper, and more reliable than the Postal Service's international air mail.

Who, in fact, started these new remail enterprises? Most of the companies were started by individuals with little more than an idea and a desire to operate their own business. Andy D'Angelo (Distrimail) in New York worked by himself in a borrowed office for more than a year before he could hire a secretary. Roy Harry (Airsystems) in New York hired his first employee when his wife, Karen, refused to drive the car any more for free (he hired her). Aeromail (now Sky Courier) also began as a one-man operation. Jet Courier in Chicago is still Jerry and Elaine Floom and an answering service. IDM in Bloomington, Minnesota, is little more than the get up and go of young Dan Alderson. In the unusual case, existing air freight (e.g., Mercury) or courier (e.g., TNT/Skypak) companies extended their operations into remail.

B. THE GRUDGING COMPETITIVE RESPONSE OF THE POSTAL SERVICE

Slowly, the Postal Service has responded to the customers' needs it has so long ignored. The Postal Service's attitude towards international mail and the remail companies is revealed in an illuminating exchange between Mr. Duka, Assistant Postmaster General for International Affairs, and members of the USPS Board of Governors at a open Board of Governors meeting *only three months ago* (September 6, 1985):

ASSISTANT PMG DUKA. Let me turn now to the quality of international

mail service and say that we believe strongly that the quality of that service has improved significantly in recent years. . . . Yet at the same time, *we freely acknowledge that international service can and certainly should be better and we continue working to that end*. . . .

If I may let me turn to some of the trends in international mail. You'll see from this graph that *over the last five years, the volume trend for international has been disappointing*, and that it has been in vivid contrast to the growth of the domestic side. . . . Preliminary date for the first three quarters of this fiscal year show the same trends prevailing. . . .

We attribute the overall pattern of volume decline to several factors. First, *customers have shown an increased desire for speed and consistency in delivery*. . . .

Second, a *39 percent increase in our international postage rates in 1981 had a very damaging effect*. . . .

Our current activity with Postal Service Headquarters is concentrated on trying to reverse this trend. . . .

As part of our marketing development strategy, we're examining a number of *new possibilities*. These include the possible development of *new airlift services that would fill the gap between current surface and air delivery times and current surface and air international rates*. . . .

Two programs are underway right now that demonstrate our desire to get international mail back on a healthy track. *The first is an international presort airmail program, a test program, that began last week* in four cities. *Our purpose is to match the delivery claims made by the so-called remailing companies*. . . .

A second current initiative involves our international surface airlift service which we call ISAL. In response to *a sharp volume decline in recent months, we are taking several steps to streamline the restructure [sic] of that service* and to expand the number of countries to which we send ISAL mail.

We believe that publishers and other mailers of printed matter will respond positively to these changes so that we can arrest our ISAL volume decline.

To sum up, international mail operates in a very competitive environment. *We certainly realize that we've experienced significant volume losses and that we must make our offerings more competitive*. . . .

GOVERNOR RYAN. Mr. Duka, you mentioned a presort air mail test program in conjunction with this and *my understanding is that this is to counter revenue or volume losses because of presortation or private presortation activities* of some sort where the [garbled transcript] shipped in a bag overseas and then mailed over there?

ASSISTANT PMG DUKA. *That's correct . . . The activities of the so-called remailing companies who engaged in precisely the practice you talk about* . . .

[A this point there is a discussion by USPS General Counsel Cox about plans to amend the urgent letter rule to eliminate the remail companies. This discussion is quoted below]

> GOVERNOR VOSS. . . . I must say, however, that since the Postal Service was in the business of international mail long before any of us were born, it's really a little disappointing that we allowed the private sector to once again beat us out of an innovative approach.
>
> *It appears out of the need for better delivery, the private sector organized these remailings [sic] companies who offered what we did not*. . . . I'm one that feels if the private sector can do it and do it well, possibly we shouldn't even be in it but *we should have done this 5 years ago when remailing began* and we have to recognize . . . . as every corporation in the country recognizes, to really be competitive, you have to be innovative. . . .
>
> ASSISTANT PMG DUKA. May I comment if you're finished? *I quite agree with you that we are coming too late, I think, to try to apply some imagination and creativity and try to be more competitive with these private firms* and I certainly agree with you that *we should have been out ahead of them in providing a better service before they in effect have forced us to do this.* [Transcript at 44-52 (emphasis added).]

The foregoing USPS explanation to the Board of Governors makes crystal clear that the Postal Service recognizes that, several years earlier, private remail companies pioneered a new service that responded to the international document distribution needs of American firms better than any Postal Service offering. Mr. Duka also makes clear that the Postal Service is only now seriously addressing these needs. He notes that ISAL is being substantially restructured and air mail presort was started as a test program only *one week* earlier. In answer to Governor Voss's observations, Mr. Duka notes that the Postal Service is "too late" to provide the "imagination and creativity" supplied by the private remailers. He acknowledges that the Postal Service is providing new price/service options tailored to the needs of American international commerce only because the remail industry has "forced" the Postal Service into doing so.

The two new postal services which the "imagination and creativity" of the private entrepreneurs "forced" the Postal Service to introduce are International Surface Air Lift (ISAL) and Presort International. In order to appreciate how minimal the Postal Service's response to its customers still is, these programs must be described in some detail.

ISAL is an unbundled air freight/surface mail system for large mailings of printed documents. It was introduced in June 1980 on a very limited scale; even today most postal personnel in the field offices have no idea what ISAL is. Using the ISAL program, the customer must call the Postal Service *four days* in advance of his shipment. If the Postal Service accepts the shipment, the customer must sort, bag, tag, and weigh the shipment according to destination country and fill out a tedious set of forms. The customer then transports his shipment to one of only ten airport postal facilities designated to handle ISAL shipments (New York, Boston, Philadelphia, Washington, Chicago, Dallas, Houston, Miami, Los Angeles, and San Francisco). Not all ten postal facilities provide service to all ISAL countries, however; each facility accepts ISAL for

a different group of foreign countries. At the airport facility, the customer pays the Postal Service and then *the customer* must transport his bags to the various airlines' facilities where the airlines take custody of the shipment. Throughout the entire process, the Postal Service has performed no service other than arranging the air freight contracts with the airlines in the first place. The price of the service is about $2.50 per pound, depending upon destination and city of origin. *See* USPS, "International Surface Air Lift for Publications and Printed Matter: Service Description & Customer Operating Instructions" (December 1985).

Presort International is a new, still experimental, program which is available in six cities (New York, Boston, Washington, Chicago, Los Angeles, and San Francisco). Under this program, the Postal Service promises quicker than normal airmail service if the customer will sort, bag, and tag international letters by destination country, with a minimum of at least six letters per country. The Postal Service says it will pick up Presort International not later than the day after being called. Presort International service is priced at the same rate as regular international air mail service, although the Postal Service is considering introducing a discount.

C. INTERNATIONAL REMAIL SUBSTANTIALLY FACILITATES UNITED STATES INTERNATIONAL COMMERCE.

In its comprehensive 1983 report on trade in international services, the U.S. Trade Representative concluded:

> Two trends in particular have brought services more to the forefront of economic concern. First, the types of goods that are traded are changing. . . . A growing number of sophisticated manufactured imports require continued service input to keep them in operation. . . . Second, as economics become more information based, the demand for traded services is increasing. . . . *As services grow in importance, communications are becoming more central to the global company. Communications serve the same function for trade in many services as the transportation system does for trade in goods*. [*U.S. National Study on Trade in Services* at 15 (emphasis added)]

Echoing this theme, a January 1985 report by the Business Roundtable noted:

> With the rapid growth in the use of telecommunications and information technologies, *the transfer of information is becoming as significant as the transfer of goods and capital* in the economic relations among nations. [International Information Flow: A Plan for Action at 1]

It is thus impossible to overestimate the importance to the United States of developing efficient and innovative methods for distributing information on a worldwide basis. Along with the telecommunications and courier/express industries, the remail industry may fairly claim to have made its own small contribution to the improvement of means for distributing international information. The rapid and economical distribution of order forms, operating

manual updates, sales brochures newsletters, statements of account, and the like is, obviously, of no small importance to the success of any company or organization attempting to do business internationally.

Several hundred American companies, universities, governmental institutions, and religious organizations—representing a broad cross section of American international commerce in its widest sense—use international remail services. The International Remail Committee has received letters indicating opposition to the proposed rule from companies as diverse as Riggs National Bank (banking), Hambrecht & Quist (securities), MCA/Universal Studios (film), Boeing Company (aeronautics),Dupont (chemicals). Port of Houston (shipping), Pannell Kerr Forster (accountants), Maurice Pincoffs Company (marketing and distribution), Amdahl Corporation (computers), and Hewlett Packard (electronics), to name a few.

The New Postal Policy Council is a group of about twenty of the largest U.S. banks, securities firms, and public utilities, led by American Express and Citibank. These major institutions (and hence, major mailers) unanimously adopted a resolution strongly supporting private international remail. The Council noted that the proposed rule

> *could severely impede international trade. [It is] ill conceived, untimely, and unjustified*. . . . American business currently relies on these private carriers whose service has proved to be far superior to that of the United States Postal Service. The effect of the proposed rule would be *devastating to American businesses engaged in international trade; it would hamper effects to improve our balance of payments; and it is not likely to increase U.S. postal revenues in the long run. In short, it benefits no one*. [Resolution of November 15, 1985 (emphasis added).]

The International Remail Committee also retained an independent polling firm, Hickman-Maslin, to poll users of remail on the role of remail within their businesses. The survey pool consisted of about 300 remail users, the entire customer base of most of the members of the Committee and, we believe, most of the customers of the industry as a whole (in the short time period in which the poll was planned and executed a few members were unable to assemble customer lists due to illness or travel schedules of key executives). When asked which type of service is most often used for a large international mailing, the companies polled split about equally between the USPS and remail. According to Hickman-Maslin, the group appears to be a reasonable, although not scientific, cross section of U.S. organizations engaged in international commerce; the survey is, however, a scientific sampling of the group polled. In short, while an exhaustive study was impossible in the time frame of the comment period, this poll is a accurate reflection of the opinions of a reasonably representative group of some 300 U.S. organizations engaged in international commerce.

The poll first asked users which service, international remail or the comparable postal service, was better, according to various categories. The

results follow. Note that we have inflated the USPS figures by adding in all of the "about the same" answers to give USPS every benefit of the doubt.

	USPS better or about the same	Remail better (much better)	
Speed of delivery	23%	55%	(49)
Reliability	26%	49%	(46)
Keeping cost down	22%	57%	(54)
Convenience of use	38%	46%	(44)
Value for money	19%	60%	(57)
Flexibility in unusual situations	11%	50%	(47)

Obviously, a substantial majority of those who had an opinion felt that international remail constitutes a superior method of distributing a large worldwide mailing.

The more pertinent question for the instant rulemaking, however, is not which type of service is better, but whether competition between the two types of services is beneficial to American international commerce. On this issue—which is the issue posed by the proposed rule—the judgment of international businessmen was absolutely clear. *Ninety-nine percent* of the respondents feel that alternative international mailing services are important, eighty-one responding "very important." *Ninety-four percent* oppose a postal monopoly on *any* international shipments. *Sixty percent* believe that restrictions on international remail will "injure the international commerce of the U.S." The entire Hickman-Maslin poll is reproduced as an Appendix to these comments.

D. THE POSTAL MONOPOLY AND THE LEGAL BACKGROUND OF THE PROPOSED RULE

The Postal Service has a monopoly on the carriage of "letters" by virtue of an 1872 criminal statute that prohibits the establishment of a "private express" that regularly transports "letters" over "post routes" or "from any city, town, or place to any other city, town or place, between which the mail is regularly carried." 18 USC 1696. A "post route" is the "appointed course or prescribed line of mail transportation" and thus is a more limited concept than the similar term "post road." *Blackham v Gresham*, 16 F 609 (C.C.N.Y. 1883). The Postal Service, however, maintains that all "post roads" are "post routes." 39 CFR 310.1(d) (1984). A "post road" is defined as the waters of the U.S., railroads, air routes, canals, public roads, and letter-carrier routes. 39 USC 5003. The penalty for establishing a "private express" is $500 and/or six months in jail; a user of an illegal private express may be fined $50.

The postal "monopoly"—more precisely, the federal criminal law cited above—may be enforced by certain limited search and seizure powers authorized by Congress. A postal inspector is authorized to search only a "store

or office, other than a dwelling, used or occupied by a common carrier or transportation company, in which an article may be contained" (and vehicles or sacks recently having left a post office). 39 USC 603. Similarly, a postal inspector is authorized to seize letters carried in violation of the monopoly "which are being carried contrary to law on board any vessel or on any post road." 39 USC 604.

The scope of the crucial term "letters" has been a matter of considerable debate over the years. In the several decades following the 1872 act, the Post Office repeatedly held that the term "letter" means nothing more than "the common, ordinary acceptation of the term." 5 Ops Sol POD 193 (1909). Currently, however, the Postal Service holds that the term "letters," as used in the monopoly law, has a different meaning from its meaning in all the other criminal and postal laws of the United States. For the purposes of the postal monopoly, "letters," says the Postal Service, includes virtually any tangible object bearing information to any identifiable person or address, including all documents, checks (except between banks), photographs, printed matter (except books and newspapers), blueprints, drawings, electronic media, computer programs, and dataprocessing cards. Some—such as the Department of Justice, the Interstate Commerce Commission, Judge Wilkey of the D.C. Circuit Court of Appeals, and various scholars—have noted that the Postal Service appears to have expanded its definition of its monopoly considerably.

Since 1872, there has been one, and only one, judicial decision which offers even modest support for this position. In *Associated Third Class Mail Users v Postal Service*, 600 F2d 824 (DC Cir 1979), cert den 444 U.S. 837 (1979), a troubled and divided court reluctantly accepted the Postal Service's position that printed advertisements were "letters" even though they would be third class matter if posted. No judicial case has involved a user of a private express.

Another statutory provision pertinent to the instant rulemaking is the so-called "suspension power." In 1852, Congress permitted the private carriage of letters to which postage had been affixed and "cancelled" (i.e., defaced so as to render the stamp not reusable). In 1864, Congress authorized the Postmaster General to suspend this exception to the postal monopoly when the public interest so required. The "post paid" exception to the postal monopoly and the power to suspend it are found at 39 USC 601. In 1974, the Postal Service announced for the first time that §601(b) authorizes it to suspend the postal monopoly itself—that is, the criminal law that establishes the monopoly. (This discovery is discussed in detail below, section V.A.)

Using this "suspension power," the Postal Service has since 1974 issued regulations which purport to "suspend" the postal monopoly under certain conditions and impose certain marking and record keeping duties on the carriers. 39 CFR 320 (1984). The Postal Service states that it may withdraw this "suspension" in respect to an individual carrier or shipper for violation of the prescribed conditions in a proceeding prosecuted by the Postal Service

before an officer of the Postal Service. 39 CFR 320.6(e). The suspensions are sometimes defined in terms of selected persons (e.g., banks or colleges and universities), sometimes in terms of the types of "letters" being transported (e.g., shipping documents related to cargo), and sometimes in terms of the type of service provided for the letters (e.g., the exemption for letters transported with urgency).

It is the last suspension which is most relevant to the instant rulemaking. The "urgent letter" suspension, 39 CFR 320.6, was adopted in 1979 after hearings in both houses of Congress indicated widespread support for legislation to permit, among other things, the private carriage of urgent letters. The Senate Governmental Affairs Committee proposed legislation and stated in its report:

> The committee is persuaded that the limited exemption to permit time-sensitive letters to be carried out of the mails . . . will establish an appropriate balance between the interests of the Postal Service and the public in maintaining the revenue base for a national mail system and the interests of the business community in obtaining required time-sensitive delivery services. [S. Rpt. No.S Rept NoS Rept No 95-1191, 95th Cong, 2d Sess, at 18 (1978)]

Addressing the USPS General Counsel in hearings, Chairman Charles H. Wilson of the House Subcommittee on Postal Operations and Services put the matter in plainer terms:

> I am just telling you, Mr. Cox, *if you don't become more realistic about the needs of business with their time-sensitive materials and have a more realistic approach toward this interpretation of letter, you are going to lose the whole doggone thing* [monopoly]." [*Private Express Statutes: Hearings*, 96th Cong, 1st Sess, at 22 (1979) (emphasis added).]

In its notice proposing the urgent letter suspension, the Postal Service conceded:

> The main argument for such a relaxation is that the Private Express Statutes should not be used to restrict the private conveyance of letters *in cases where the Postal Service cannot provide a service that will meet the senders' needs*. [44 FR 40076 (July 19, 1979) (emphasis added).]

What is known as the "urgent letter" exception is, in fact, two separate, but related, exceptions to the U.S. postal monopoly. The first, paragraph §320.6(b), allows the private carriage of any letter or document if it is demonstrably time-sensitive, that is, if the "value or usefulness of the letter would be lost or greatly diminished" if not delivered within certain time limits. The time limits exclude transmission time outside the continental United States in order to permit the carriage of urgent international letters without regard to delays suffered outside the United States. This first exception is commonly referred to as the "loss of value" exception. The second exception, §320.6(c), permits private carriage if the carrier charges at least $3.00 or twice domestic

postage, whichever is more. "If a single shipment consists of a number of letters that are picked up together at a single origin and delivered together to a single destination," the minimum charge applies to the entire shipment. The second exception is referred to as the "cost test" exception.

The Postal Service has taken the position that the "cost test" does not refer to the postage for an entire shipment if the shipment contains smaller envelopes or documents that are to be distributed to other addresses beyond the "single destination."

> *The concept which underlies the references to "single origin" and "single destination" in §320.6(c) is that the former represents a single sender, or source, and the latter represents a single addressee, or recipient,* i.e., a single entity (whether an individual, an association, or company) for whom the letters are intended. Therefore, when a group of letters, intended for different addresses, is carried to an intermediate point in order to be carried elsewhere, the intermediate point is not the single destination which is contemplated by the language in question. [USPS Assistant General Counsel, PES Letter 83-7 at 4 (May 11, 1983) (emphasis added).]

It is a fundamental principle of American administrative law that a federal agency is bound by its own rules. *United States v Nixon*, 418 U.S. 683 (1974)(and many cases cited therein). By the above quoted letter, then, USPS must be saying that the phrase "a number of letters . . . delivered together to a single destination" somehow indicates to the reader that letters which are subsequently shipped somewhere else are not being referred to. This USPS position is transparently disingenuous.

In December 1984, the Postal Service requested the U.S. Department of Justice to seek an injunction against international remail companies based upon its reading of the urgent letter rule. The Department of Justice declined, pointing to the urgent letter exception.

On September 6, 1985, in the midst of the long colloquy about the inadequacies of international postal service quoted above, Mr. Louis Cox, USPS General Counsel, explained the Postal Service's intention to modify its regulations to prohibit international remail:

> [T]he Justice Department takes a line that there's a kind of shadow of ambiguity over the question of whether a suspension of the private express statutes which is described in our regulations for extremely urgent letters may be misinterpreted to cover the sorts of international mailing outside the country only to remail back into the country that we are talking about [i.e., a third country].
>
> We have, in training [sic] and would expect within the next several days, to have published in the Federal Register, comment—a clarification of the regulation in question *to make it ever so plain that such an interpretation is not intended. Once that is done, I think we'll be able to go back to the Justice Department and say, now that little shadow of ambiguity has been cleared away, let's get on with it.* [Transcript at 49-50 (emphasis added)]

The proposed rule is, of course, the Federal Register notice Mr. Cox was referring to. It would amend §320.6 in two ways. The "cost test" would be amended so that it actually does say what USPS has, incorrectly, been saying it says. Specifically, the "cost test" exception would be changed to say that the carrier must charge at least $3.00 or twice the postage for each individual item in the bulk shipment if the individual items are *ultimately* to be delivered to different addresses. The proposed rule would also amend the "loss of value" exception for demonstrably time-sensitive letters. This exception would be changed so it is inapplicable to international letters, even if they are demonstrably time-sensitive.

The reasoning behind the rule is set out in the preamble. The legal rationale for the proposed rule is simply that it would restrict the 1979 regulations to situations that were contemplated by the Postal Service in 1979. The only reference to any sort of policy consideration is the following:

> *Large numbers of international letters originated by American firms are being shipped privately* to foreign countries for deposit in the mails of those countries. This carriage, which is typically performed for less than the amount of U.S. postage for international air mail, has the effect of diverting from the United States Mails letters which are not extremely urgent, thereby *depriving the Postal Service of revenues in a manner not intended* when the suspension was proposed and adopted. [50 FR 41462 (emphasis added)].

It should be recognized that the intent which the proposed rule ascribes to the urgent letter exception is strikingly different from the intent revealed by the actual history of the exception. To recapitulate briefly, the urgent letter exception was adopted to let private carriers undertake services that the Postal Service could not do as well and that were found beneficial to commerce. The focus was on the prices and services of the *U.S. Postal Service*. The "loss of value" exception was defined in terms of the value that would be lost while the letter is in the hands of the Postal Service, that is, within the continental U.S. or Alaska or Hawaii. The "cost" exception was defined in terms of domestic postage rates, even for international shipments.

In contrast, the preamble to the proposed rule now explains that the basis of the urgent letter rule was something quite different—that the exception was only written to benefit letters that meet some high standard of urgency: "taking extraordinary steps to ensure particularly rapid delivery." 44 FR 41462. The preamble to the proposed rule thus explains that international remail is not "urgent" because it enters the international postal system at some point. *Id*. The discussion of the "cost" exception implies that, for international letters, the "truly comparable" postage rate is the international rate (which includes the costs of non-USPS services by the international air carriers and the foreign post offices) and not merely USPS's domestic rate. *Id*. at 41463. Can the Postal Service provide *its part* of the international service as quickly and as efficiently as private industry? Does private competition in this area benefit U.S. commerce? These issues were the basis of the rationale that led to the urgent

letter rule. Yet the preamble of the proposed rule now "explains" the intent of the urgent letter exception as though these questions were never considered. We shall amplify upon this point when we discuss whether the proposed rule is, indeed, sound postal policy. See section IV.A., below.

In light of the foregoing identification of the specific legal effects of the proposed rule, it must be stated, as a matter of fact, that the proposed rule is substantive in nature. The proposed rule is *not*, as the Postal Service states in its public announcement, "a clarification of the rule which has been in effect since adoption of the suspension in 1979." 44 FR 41464.

II. THE POSTAL SERVICE'S PROPOSAL TO CRUSH SMALL BUSINESSMEN WHO HAVE PROVIDED "SOME IMAGINATION AND CREATIVITY" IN THE GLOBAL DOCUMENT DELIVERY INDUSTRY IS PLAINLY CONTRARY TO THE ECONOMIC BEST INTERESTS OF THE UNITED STATES.

It is clear from the historical record that the remail industry was pioneered by private companies, most of them literally starting with nothing. Today, after five, ten, or more years of hard work, in a very uncertain competitive and regulatory climate, these companies collectively employ only about 200 persons. The managers of these companies have thought through the problem of economically and efficiently distributing large mailings worldwide and applied "imagination and creativity," to use the phrase of USPS's Assistant Postmaster General for International Affairs. So far, they have devised several significant improvements over the services provided by the U.S. Postal Service.

The Postal Service, in contrast, has a vast workforce of experienced and secure managers and employees. The Postal Service itself has some two hundred years' experience in the document delivery and forwarding business, market dominance, and virtually unlimited resources. Yet the Postal Service's report to the Board of Governors in September 1985 makes clear that even top postal officials concede that the international remail companies developed service innovations which stimulated better postal services. Moreover, they recognize the continued superiority of international remail services.

For the Postal Service now to resort to the police power of the United States in an attempt to takeover the business of the remail companies would be the grossest injustice.

Oddly, perhaps, for the same reasons that it would be unjust, it would also be plainly contrary to the economic best interests of the United States. The failure of the Postal Service to develop international remail services is not, we believe, necessarily indicative of unusual negligence on the part of the Postal Service management. The evolution of American industry over the last twenty years suggests a different, more fundamental, explanation. According to Professor Drucker, during the last two decades, U.S. industry has produced some 40 million new jobs, a virtual economic miracle during a period when

most of the rest of the world was stagnate and no other country (not even Japan) came close to a comparable performance. Of these 40 million jobs, *none* were created by the largest corporations in the U.S., the Fortune 500. On the contrary, the Fortune 500 *lost* some 5 million jobs.

For whatever reasons, it has been the experience of the United States that basic "imagination and creativity" seems to be associated with the small entrepreneur. Of course, this is not to question the important role of large companies. Still, over the medium to long run, it appears that the U.S. economy is substantially dependent upon a fringe of small entrepreneurs for the new and unusual ideas that produce long term efficiency for the economy as a whole.

The remail industry is simply a specific example of this general phenomenon. The rise of the courier/express industry is, of course, another example in the document delivery field. Without the original ragtag entreprenuers in the courier/express industry, it is inconceivable that Express Mail would have developed as it has. It is also incontestable that American industry is more efficient because of the contributions of *both* the courier/express industry and the Postal Service's Express Mail. Even the Postal Service is better off. First class mail has grown healthily ever since the urgent letter rule was adopted, and Express Mail now grosses almost $500 million. Similarly, by the Postal Service's own admission, the Postal Service never would have developed ISAL and Presort International, but for the agitation of the remail industry.

There is no possible doubt that the remail industry is *today* benefitting U.S. international commerce. Why else would businessmen use international remail companies? Abundant testimony from American industry buttresses this obvious conclusion, as does the poll of customers commissioned by us. The proposed rule does not merely suggest a little inefficiency in some minor, out of the way sector of the American economy. It attacks *the* major opportunity for the United States in international trade in the years to come. Fully *86 percent* of the growth in America's international trade jobs comes from the information dependent service sector. U.S. Trade Representative, *U.S. National Study on Trade in Services* at 21 (1983).

The proposed rule thus directly contradicts a major element of U.S. international policy, the effort to promote exports by promoting freer trade in international services. While the United States is doggedly trying to promote a new GATT round to liberalize trade in services, the proposed rule not only hinders the very industries the USTR is trying to assist, but it also gives to our trading partners a handy precedent to use against the United States in international trade negotiations.

The clear and present danger to American international commerce and commercial negotiations presented by the proposed rule does not, however, tell the whole story. The most important threat to American international commerce posed by the proposed rule is the threat to future innovation. The

proposed rule would eliminate an entrepreneurial fringe to the international document delivery industry from which future ideas and improvements may be expected and would discourage the development of future fringe groups. Suppose, for example, that the Postal Service's anticourier campaign had succeeded when the Postal Service began to be discomforted by the competition, in 1977-78? What would have been lost? *This* is the most basic harm for international commerce raised by the proposed rule. At bottom, the proposed rule is an attack on "imagination and creativity" per se.

The injustice of the attack on small innovators, the injury to the present efficiency of U.S. international commerce, the threat to future innovation—all of these are, of course, tangible examples of the wisdom of the Nation's "fundamental national economic policy" in favor of maximum feasible competition, "the polestar by which all must be guided in ordering their business affairs." *United States v Philadelphia National Bank*, 374 U.S. 321, 372 (1963); *City of Lafayette v Louisiana Power & Light Co*., 435 U.S. 389, 406 (1978).

To the extent that the Postal Service has legal discretion to permit or prohibit competition, it is legally bound to give effect to this national policy. This is not to say that there is no public policy basis for a decision to prohibit private competition to the Postal Service. The fact that there is a postal monopoly statute in the first place indicates a firm, although now quite old, Congressional judgement to the contrary. Nonetheless, even where Congress has clearly established a regulatory scheme to limit competition, it is the *duty* of the regulator to identify a "serious . . . need, necessary to secure important public benefits" before eliminating the potential benefits of competition. *Federal Maritime Commission v Svenska Amerika Linien*, 390 U.S. 238, 243 (1968). The Postal Service must discharge this duty with especial diligence because (at least according to lower court rulings) its commercial activities are not subject to the usual review by an antitrust court. *Sealand Service Inc. v The Alaskan Railroad*, 659 F2d 243 (DC Cir 1981), cert den 455 U.S. 919 (1982).

In light of the definite injury to American international commerce that would flow from the proposed rule, adoption of the proposal would only be justified by clearly identified, overwhelming public benefits. As we show in the next two sections of these comments, no such benefits can be shown, either in the narrow (perhaps too narrow) sense of substantially increased postal revenues or in the more general sense of furthering national postal policy.

III. INTERNATIONAL REMAIL DOES *NOT* DEPRIVE THE POSTAL SERVICE OF SIGNIFICANT NET REVENUE.

The preamble to the proposed rule states that remail is "depriving the Postal Service of revenues in a manner not intended." 44 FR 41462. Although it is the only justification of the proposed rule that even hints at public policy, this conclusory statement is nowhere supported by evidence. Clearly, "more postal revenue," standing alone, is hardly a complete statement of the postal

policy of the United States (see next section). In the instant rulemaking, the presumption of significant additional net revenue is not even factually correct, as explained in the following analysis.

The remail industry, we estimate, will gross about $60 million in 1985, not counting traffic in books and magazines (this is a very rough guess). Of this amount, more than half derives from the handling of printed matter; the remainder, perhaps $25 million, involves the remail of "first class" items. We shall discuss the effect of the proposed rule on each type of document traffic, and then address the negative revenue effects of foreign retaliation against the Postal Service.

A. REMAIL OF INTERNATIONAL PRINTED MATTER

The Postal Service appears to believe that one consequence of the proposed rule will be the transfer of some $35 million dollars in printed matter remail business to the Postal Service's account. This is highly unlikely, however, both as a matter of law and as a matter of commercial reality.

As a matter of postal monopoly law, there is nothing to prevent a U.S. citizen from air freighting a large box of unaddressed printed documents to a foreign destination. The addressing of the documents can be performed overseas, using address lists telecommunicated to the foreign destination. Indeed, the original printing of the documents can be easily moved overseas, and this movement is, in fact, already occurring. Given the importance of rapid and reliable document distribution to international commerce, it appears highly probable that American international businessmen will find these alternatives preferable to using an inferior worldwide distribution service from the U.S. Postal Service (and the threat of still worse service because of the lack of competitive alternatives). It may be seen, then, that the most plausible legal consequence of the proposed rule on printed matter remail will not be to stop it, but to transfer a certain number of jobs now performed in the United States to foreigners.

Yet, even assuming *arguendo*, that half the business, $38 million dollars, would be captured by the Postal Service, it would make only a miniscule difference in the Postal Service's net revenues. The postal service equivalent to international printed matter remail is ISAL. At about $2.50 per pound, ISAL is priced very close to the underlying air transportation costs plus terminal dues. Recently, USPS has been discounting ISAL still further, despite a 45 percent increase in the terminal dues rate. It is hard to believe, therefore, that a hypothetical $18 million in additional ISAL business could possibly yield the Postal Service more than $1 or $2 million in profits (indeed, it looks to the remail companies that ISAL is being sold at a loss).

B. REMAIL OF INTERNATIONAL FIRST CLASS MATTER

International remail of first class matter grosses on the order of $25 million. If the proposed rule became effective, would a substantial fraction of

this $25 million be taken from the remail industry and adorn the bottom line of the Postal Service? Again, the answer is a definite no.

It is settled law that the postal monopoly does not prohibit the private carriage of a letter or document which is nonmailable. *Ex Parte Jackson*, 96 U.S. 727 (1887). The weight limit for the international equivalent of first class mail ("letterpost") is 4 pounds. If one tried to air mail a 5 pound letter to London, the Postal Service would refuse to accept it. Therefore, a private carrier may carry any international letter weighing more than four pounds. Of course, the Postal Service might argue that the the weight limit for international mail can be extended up to 22 or 44 pounds, depending upon the destination country, if international *express* mail is taken into account. It strains credulity, however, to believe that a manifestly non-monopoly service, express mail, has expanded a postal service monopoly over international letters from 4 to 44 pounds. Since virtually all first class international remail is transported in shipments weighing more than 4 pounds, the amount of first class revenue that could legally be credited to the proposed rule is highly questionable.

Then, again, we can consider the problem from a practical, commercial standpoint. Large mailings of first class matter tend to be computer generated items, such as statements of account and other financial papers. Even more than printed mailings, these individualized mailings tend to be time-sensitive. Since the cost of delay is proportionately greater, so is the economic incentive to move the production center to a location with access to the best possible postal connections. If the U.S. Postal Service fails to provide the best possible service (as it does) and prohibits private air freight connections to other access points into the worldwide postal system, then the only solution will be to move the site of production to another country. Instructions may still be generated in the U.S., but the conversion to hard copy will be shifted by means of telecommunications. This solution would be better than losing customers, and losing customers is the quite serious fear of users of the first class international remail, such as the large financial institutions in the New Postal Policy Council.

Still, suppose we ignore legal and practical considerations. If absolutely forced to use the Postal Service and somehow barred from the telecommunications lines—and assuming a loss of customers did not reduce the flow of first class matter too drastically (as businessmen fear)—how much additional net revenue would be generated for the Postal Service if all current first class international remail were handled by the Postal Service? Not much. Under these assumptions, it would be profitable to ship large mailings to Canada via International Express Mail just to get them out of the grasp of the U.S. Postal Service. Once in Canada, the large shipments could be forwarded via the air freight system just as today.

Even though the Postal Service seeks to prohibit private companies from consolidating envelopes bound for different destinations, it engages in exactly this practice itself. Indeed, according to the Postal Service's testimony in the

Aggregate Letter Rule case, "Forcing First-Class mailers to pay postage on a per letter basis when they want to mail letters together as one piece is simply unfair." Postal Rate Commission, Opinion in the Aggregate Letter Rule, MC 82-2 at 14 (1983). Indeed, USPS argued that postage charges based upon multiple letters inside a larger shipment would violate the "fairness and equity" requirement of 39 USC 3623(c)(1). This USPS position was accepted by the Rate Commission and upheld by the Board of Governors on July 8, 1983.

Of course, breaking down air freight shipments weighing up to several hundred pounds into the 44-pound bags used by express mail would be absurdly uneconomical. Nonetheless, the mathematical calculation will set an upper limit to any conceivable net gain by the Postal Service from the proposed rule. The cost of International Express Mail to Canada is $91.80 for a 44-pound shipment, or about $2.09 per pound. Since the Postal Service's International Express Mail rate is less than one-half the rate set by the competitive private courier market, it is very hard to believe that the Postal Service is earning more than a few cents net profit per pound on such traffic. (Indeed, once again, it is easy to believe that International Express Mail is priced below cost.) Nonetheless, assume (contrary to commonsense) that the Postal Service is earning a 10 percent profit on express mail to Canada. First class remail probably totals only about 2.5 million pounds (an average price of $10 per pound is reasonable). The express mail bill to ship 2.5 million pounds to Canada in 44-pound bags would be about $5 million, yielding a net profit of a mere $500,000. Hence, even if the remail industry were forced to use the Postal Service as an air freight agent (the commercial role it would occupy), the Postal Service's net profit on the first class remail would be only about one half million dollars. (Obviously, there are other possible variations on this approach; some might turn out to be more feasible in practice. The thrust of the argument is, however, clear.)

C. LOSS OF INBOUND REMAIL

Still another factor that must be taken into consideration in assessing the financial impact of the proposed rule is potential loss of postal revenue due to probable retaliation by foreign post offices. In some cases, foreign post offices quietly tolerate mass mailings being transported by private carrier into the United States, because they are the beneficiaries of remail carried from the United States to their countries. The Postal Service benefits financially from the domestic postage collected on such inbound remail and incurs only minimal marginal costs, other than the loss of terminal dues. While no traffic figures are known, it is believed that inbound remail represents a significant business, with a lower volume but a higher marginal profit than outbound ISAL or International Express Mail. By demanding a monopoly over what the Postal Service does poorly, it may jeopardize revenues earned on what it does well. An unknown negative effect from a possible loss of inbound remail must therefore be added into the calculation of the supposed benefit to the Postal

Service from the proposed rule.

D. NET ADDITIONAL USPS REVENUE WOULD PROBABLY BE ZERO AND COULD NOT BE MORE THAN $3 MILLION PER YEAR.

Based upon the foregoing, the most plausible financial projection of the effect of the proposed rule is that it will yield *no* appreciable additional net revenues for the Postal Service. The Postal Service will most probably fail to capture most of the current printed matter remail. The Postal Service will probably not force all of the first class remail into express mail and probably will not earn a 10 percent profit on the express mail business it does capture. The Postal Service will probably lose at least some inbound remail business as a result of retaliation.

Even if the Postal Service is exceedingly fortunate on all fronts, the proposed rule could not net the Postal Service more than $3 million per year. Clearly, $3 million dollars would make no significant contribution to the $24 billion USPS annual budget. Indeed, in the Aggregate Letter Rule proceeding mentioned above, the Postal Service stated that a loss of $3.5 million or even $35 million was outweighed by the public interest in a "fair and equitable" postal rate structure. Surely, the Postal Service should place no smaller value on the public interest and enhancement of U.S. international commerce (and the satisfaction of allowing the customers of the international remail companies the benefits of the same "aggregate letter" concept).

IV. THE PROPOSED RULE CONTRAVENES THE LETTER AND SPIRIT OF THE URGENT LETTER EXCEPTION AND IS UNSUPPORTED BY TRADITIONAL POSTAL POLICIES.

The foregoing comments demonstrate that the proposed rule is contrary to the general public interest of the United States and would not significantly add to postal revenues. In this section, we shall address the soundness of the proposed rule in light of the particular logic and concepts of the urgent letter exception and the postal monopoly generally. Even aside from the broader considerations described above, the proposed rule is, we submit, bad postal policy.

A. INTERNATIONAL REMAIL IS FULLY JUSTIFIED BY THE PUBLIC POLICY PRINCIPLES DEVELOPED IN THE URGENT LETTER RULE PROCEEDINGS.

The Statement of Facts set out the terms of the urgent letter exception and its legislative history. As shown there, international remail operations are included in the literal terms of the urgent letter rule. International remail companies do charge more than twice what the Postal Service would charge for transporting a shipment containing multiple envelopes. Much of the items carried are, indeed, demonstrably urgent. As indicated, the Department of Justice apparently agrees. Indeed, not even USPS disagrees. Rather, the Postal Service's position relies upon the intention of the rule rather than its text. The

mere fact that the proposed rule is being offered should, we believe, strongly suggest that the literal terms of the current urgent letter rule do, indeed, apply to international remail operations.

The Postal Service's reliance on origin intent to support the proposed amendment to the urgent letter exception is also misplaced. This argument, however, is a more serious issue. After more than two years of public debate, a hard won consensus on postal policy was indeed reached in fall 1979. By its nature, the consensus was not embodied in any document other than the text of the urgent letter rule itself. The Postal Service is now, in effect, saying, "Let's not open up the agreement again; let's just apply the understanding to the case at hand." It sounds quite reasonable. The problem is that, as shown in the Statement of Facts, the proposed rule has incorrectly restated and applied the reasoning and the policy consensus that led to the urgent letter exception.

For further confirmation, we may quote a recent speech to the Brookings Institute by former Postmaster General William Bolger, who headed the Postal Service in 1979. Mr. Bolger explained the reasoning and the result of the urgent letter exception as follows:

> Let me state here and now though I will not defend the Postal Service maintaining the letter mail monopoly under any conditions. To paraphrase John Housemann, if [they] wish to enjoy the benefit of the Private Express Statutes they must do it the "Old Fashioned Way"—they must "Earn It." . . .
>
> The Postal Service has a history of administratively amending the requirements of the letter mail monopoly *when it can't perform the service the public needs.* The last major effort along this line had to do with the urgent letter changes made in 1979. These changes which allowed Federal Express, Emery, Airborne, and a host of other companies to compete better in the Express Mail business had *the desired beneficial results for the public and indeed helped the whole market for hard copy urgent messages grow not only for the private sector but also for the Express Mail of the Postal Service.*
>
> This major change was made by the Postal Service *after listening to the public, the private sector companies and members of the Congress who had an interest in the subject*. [Mimeographed text at 6 (emphasis added).]

After a proper review of the evolution of the urgent letter exception, formulation of the basic motivating principle is not difficult: the Postal Service should not have a monopoly over a delivery service if the Postal Service cannot meet the needs of the public and private competition will produce public benefits. Or put more simply, "the postal monopoly does not apply if not earned." The focus of this principle is quite properly on the performance of the Postal Service. If it cannot do the job, if it does not innovate, then it should not use the monopoly to handicap those who can and do. Otherwise, as Chairman Wilson warned the Postal Service in 1979, it "will lose the whole doggone thing."

The proposed rule clearly is at odds with this principle, the policy

consensus embodied in the urgent letter rule. The history of the remail business demonstrates that it was the small entrepreneurial remailers, not the Postal Service, that pioneered remail service. The commercial success of the industry, the support of customers, and the poll of customers all demonstrate that the Postal Service is not adequately fulfilling the needs of the customers today. As noted above, only last September, Assistant Postmaster General Duka stated to the Board of Governors, "we freely acknowledge that international service can and certainly should be better." And certainly, the facilitation of American international commerce qualifies as a definite and important public benefit.

The more specific reasoning behind the urgent letter exception further, and emphatically, indicates that international remail properly qualifies as "urgent letters." One strand of the reasoning behind the urgent letter exception was that if a private carrier could transport a letter from one point to another within certain narrow time limits, then it was performing better than the Postal Service and should be allowed to continue to do so. Clearly, the competition was in terms of transmission time across the continental U.S. and in Alaska and Hawaii, that is, over the territory where transmission was under the control of the Postal Service itself. Under the current urgent letter rule, an international remail company is, no less than an international courier, required to accomplish exactly the same physical feat of rapid transportation across U.S. territory. To exactly the same degree, the international remail company is doing what the Postal Service cannot do. Clearly, the remail company is entitled to the same relief from the postal monopoly as the international courier, and the domestic courier.

The urgent letter exception was also grounded in the idea that it is unreasonable for the Postal Service to insist upon a monopoly if the shipper is willing to pay the private carrier much more than the first class postage the Postal Service would have charged for the same movement. As noted in the Statement of Facts, 'what the Postal Service charges for what *it* does is measured by domestic postage, not international postage, both in real life and in the urgent letter exception. Again, by this reasoning, the urgent letter exception should apply equally to international remail and international couriers. The Postal Service (if it could do the job at all) would use the weight of the entire shipment as the basis for its charge to transport a large shipment containing multiple letters. Under the urgent letter rule, the international remail company is required to charge much more than this amount, exactly the same as the courier.

Yet another, largely unspoken, thought behind the urgent letter exception was that it was a waste of societal resources to force a businessman to route a letter via the Postal Service if, by so doing, the society incurred substantial costs due to late delivery of the letter. If a businessman saved $50 because a letter was delivered in one day by courier instead of two days by post, it appeared self evident that the businessman should not be forced to use the Postal Service. Yet, consider the situation of international remail. A single

shipment might typically contain a thousand shipments, which are delivered in four days by private remail instead of six days via the Postal Service. If remail delivery saves a businessman only $10 per letter (almost the cost of preparing the letter in the first place), then the company, and the society, have saved $1000. Surely, viewed from the perspective of social efficiency, the remail shipment is even more entitled to private carriage than the single letter.

More generally, it should be obvious that American international remail is only viable to the extent that it fills commercial needs not met by the U.S. Postal Service. The Postal Service's international service would be identical to that of the international remail industry if it (i) provided the same level of service in the pick up, sorting, and other customer support functions, (ii) transported the mail as quickly and reliably to the international airlines, (iii) priced its services as reasonably, and (iv) bargained as vigorously on behalf of its customers with the foreign post offices. There is no magic to the success of the international remail industry.

Nor is there anything metaphysical about the urgent letter exception. At bottom, the exception is based on the failure of the Postal Service to perform an important social task as well as a competitive market, a market in which the Postal Service itself may participate and, ultimately, prosper. This focus on the performance of the Postal Service is precisely as it should be, for the principle thereby provides a spur to improve postal performance in all areas of operations. The principle underlying the urgent letter exception was, and is, a very sound addition to the principles underlying the U.S. postal monopoly .

In sum, the current urgent letter exception requires the international remail companies to outperform the U.S. Postal Service in exactly the same manner, and to exactly the same degree, as the international couriers (and, for that matter, the domestic couriers). The basic principle behind the exception—put simply, that the postal monopoly is lost if not earned—applies equally to the international remail and international courier, as it should.

B. THE PROPOSED RULE IS NOT SUPPORTED BY THE TRADITIONAL PUBLIC POLICY PRINCIPLES SUPPORTING THE POSTAL MONOPOLY.

More generally, we may look behind the principle established by the urgent letter exception to the traditional policy principles which underpin the postal monopoly. The sound development of the monopoly law depends upon constant referral to the principles which justify the monopoly in the first place.

The most authoritative statement of these principles is the 1973 Board of Governors' report to Congress, *The Private Express Statutes and Their Administration*. In this report, the Governors begin by noting the statutory mission of the Postal Service to "bind the Nation together" and "provide prompt, reliable, and efficient service to patrons in all areas." Page 4, *citing* 39 USC 101(a). The report notes the duty to provide for letters sealed against inspection at a postage rate "uniform throughout the United States." *Id.*, *citing* 39 USC 3623(d). From these statutory duties, the report reasons:

> A prohibition on rates varying with distance creates competitive opportunities for skimming the cream of those postal operations that are most attractive from a business standpoint. *It would make little sense to allow letter mail competition without simultaneously authorizing variable rates on letters so that the Postal Service may compete equitably in the marketplace.* But uniform nationwide rates for letter mail should not be lightly discarded. Rates varying with distance would be complicated and confusing for many citizens, would point to increases in regulatory red tape, and could lead to untoward political pressures for changes in zone limits and the like.
>
> The law requires that the Postal Service serve all the nation [quoting 39 USC 101(b)]. This is a key requirement—perhaps *the* key requirement—if the Postal Service is to discharge its basic function to "provide prompt, reliable, and efficient service to patrons in all areas . . . and render postal service to all communities." *This means that the Postal Service must serve those areas and customers for which operating costs are not recoverable under a uniform pricing policy. If the Private Express Statutes were repealed, private enterprise, unlike the Postal Service, would be free to move into the most economically attractive markets while avoiding markets that are less attractive from a business standpoint.*
>
> . . . Without abandoning the policy of self-sufficiency and re-introducing massive subsidies, it is hard to see how the Postal Service could meet rate and service objectives in the face of cream-skimming competition against its major product. But abandonment of this policy would impose an unjustifiable burden of costs on the tax-paying public and might lead to the erosion of universal postal service.
>
> We believe that the uniform rate and nationwide service requirements are sound. . . . Accordingly, the service and financial policies that are rightly embodied in the Postal Reorganization Act require the restrictions on private letter-mail carriage be maintained. [Pages 5-7 (emphasis added)]

The Governors' report goes on to cite other, secondary reasons for the postal monopoly including the need to finance the postal inspection service, which insures the safety of the mails and protects the public from undesirable mail matter. Page 7. The report further notes that without a monopoly "international mail reciprocity agreements would also suffer . . . Foreign governments would have the problem of whether to deal with several, rather than one, originating mail suppliers. The Postal Service would remain under the obligation of delivering all incoming international mail with less than total compensation for outgoing first-class mail." Page 8.

Reasonable men can, and have, disagreed with some of these principles of postal policy, but that debate is beyond the scope of the current rulemaking. An important and valid question, however, is whether the proposed rule is reasonably related from these traditional principles. We submit that is not.

Clearly, the proposed ban on international remail has no logical relationship with the Postal Service's ability to "bind the Nation together" through universal postal service at a uniform price. "Binding the nation" refers

to domestic service; international postal service can hardly claim to partake of the same special importance to the nation. The need to maintain uniform first class mail rates is irrelevant to international remail. There is no international equivalent to the uniform rate rule. On the contrary, the Postal Service adjusts its rates, especially its ISAL rates, market by market, depending upon demand and can very well "compete equitably in the marketplace."

Nor is there any international equivalent to the duty to serve small towns at a loss. The Postal Service is "free to move into the most economically attractive markets while avoiding markets that are less attractive from a business standpoint." It has done so, offering ISAL, Presort International, and International Express Mail service only in certain cities in the United States and only to certain destinations overseas. More generally, the Postal Service's costs for international service are more or less unaffected by the remoteness of any given city. Service to the farthest corner of Scotland costs the Postal Service the same as service to downtown London. The Postal Service just puts the mail on the airplane to London and lets the British Post Office deliver it.

Of course, the Postal Service can, and has, noted that a monopoly on international remail would generate additional revenues to pay for losses incurred in providing domestic service to remote cities in the United States. But this argument would justify the monopolization of any activity, for example, the telecommunications business (as indeed it has, in other countries). Under traditional American principles, however, the scope of a monopoly should be reasonably related to the activity which generates losses, as the rationale articulated in the Board of Governors' report does.

It is clear, then, that the fundamental postal policy bases for the postal monopoly—universal service and a uniform first class mail rate—do not reasonably support a monopoly over international remail.

The Governors' report goes on to mention two secondary bases for the monopoly: the need to support the postal inspectors program and certain international mail requirements. Obviously, the need to pay for postal inspectors is only tangentially related to international remail. It is doubtful that the inspection service is much concerned with what is mailed out of the U.S., and the Customs Service is the primary guardian against incoming contraband. Hence, the inspection service does not provide a rationale basis for a monopoly over international remail.

The matter of international postal agreements is more complicated. The Governors' report argues that "Foreign governments would have the problem of whether to deal with several, rather than one, originating mail suppliers." This is not a problem with the remail industry. The only post office that must deal with the remail company is one that is doing so voluntarily and at a profit. The Governor's report goes on to note that "the Postal Service would remain under the obligation of delivering all incoming international mail with less than total compensation for outgoing first-class mail." The Postal Service, of course, would be obliged to deliver incoming mail, an activity for which it is

compensated by the foreign post offices according to the internationally agreed "terminal dues" standard. Since the basic infrastructure of the Postal Service is paid for by the domestic postal service, it appears probable that "terminal dues" compensate the Postal Service for the marginal costs of delivering incoming mail. In any case, the Postal Service benefits from a low terminal dues rate—and has fought for one over the years—because it exports more mail than it imports. Even if it did not, surely the solution is for the Postal Service to negotiate higher terminal dues, rather than imposing a restrictive monopoly on outgoing American mail in order to pay for below cost delivery of foreigners' inbound mail.

Nor does a vague allusion to "international agreements" provide an independent policy basis. If not grounded in an identifiable American public interest, the international agreement becomes no more than a self-serving market sharing agreement between post offices. The Postal Service would have no excuse for entering into such an agreement.

In short, the traditional rationales for the postal monopoly do not provide a sound basis for extending the monopoly to include the air freighting of bulk international mailings.

C. THE PROPOSED RULE INTRODUCES A DANGEROUS NEW PROPOSITION INTO THE MONOPOLY LAW: THAT THE MONOPOLY MAY BE INVOKED BASED UPON EVENTS OUTSIDE THE UNITED STATES.

As described in the Statement of Facts, above, the postal monopoly is legally defined in terms of the private carriage over "any post route." Similarly, the scope of the search and seizure powers authorized by Congress to enforce the postal monopoly are limited to the premises of common carriers and vessels. The law, therefore, clearly defines the concept of the monopoly in terms of what may and may not be carried over post routes. The proposed rule, however, takes this simple concept much further. The proposed rule rests upon the premise that whether or not an object may legally be transported over a post route may be determined *by the use to which the object is put after it leaves the post road.*

The anomaly of this proposition may be seen by considering two ten pounds shipments, A and B, which are identical in every respect except that, after arrival at the destination, B is opened and its contents are distributed to more than one building. According to the proposed rule, A could be carried out of the mails if the shipper pays the carrier double the domestic postage that would be due. Shipment B could not be transported by private carrier for the same rate, however. Why? What gives the Postal Service the right to inquire into what happens to the shipment after it has left the post route, much less the U.S.? Once the shipment has left the post route, it is, or should be, beyond the jurisdiction of the Postal Service.

The need to protect postal revenues does *not* justify the concept that the monopoly may depend upon what happens after the shipment leaves the post

road. As noted above, the Postal Service itself charges for the transportation of a shipment based upon its physical aspect while being transported over the post roads. The postal revenue is the *same* for both shipments A and B, that is, regardless of whether the shipment contains smaller shipments ultimately bound for multiple addressees.

This remarkably intrusive principle would present impossible practical problems for *all* urgent letters, not only the remail industry. Do the documents in the normal courier pouch ever get separated by the addressee and distributed to other destinations? Of course they do. A bank forwards financial documents to corresponding banks. A shipping company sends on the cargo details to the importer. An engineer immediately distributes the next set of blueprints to his subcontractors. How does a private courier possibly police his customers into abiding by the artificial, unworkable dictates of the proposed rule? How will the courier know? How will the Postal Service? Indeed, if the Postal Service may restrict use after the shipment leaves the postal route, what will the next rulemaking say? How about restricting the "urgent letter" exception to those letters that are, in fact, read and acted upon within one hour of delivery?

Not only is the proposed principle of doubtful legality and impossible administrability, it would also establish a very unfortunate international precedent that could be used against the United States by foreign post offices, with a resulting general tightening on the flow of international information. For example, suppose a foreign post office decreed that a private company may transport—or telecommunicate—messages to the United States only on condition that the American addressee did not forward some of the information on to third countries. Would the U.S. be willing to accept such restrictions on the international flow of information into the United States? Probably not. Indeed, exactly such a restriction has been proposed on private courier services operating from one foreign country into the United States, and the U.S. Trade Representative has protested vigorously.

The proposal to define the postal monopoly in terms of what happens to a shipment after it leaves a postal route—and indeed, after it leaves the United States entirely—is a Pandora's box. It should be firmly rejected *in toto*.

Upon reflection, it will be seen that this difficulty is the obverse of the points made above in the discussion of the applicability of the reasoning underlying the current urgent letter exception to international remail. The Postal Service is driven to trying to define the monopoly in terms of what happens *after* the shipment leaves the postal routes precisely because it is unwilling to look at what happens *on* the postal routes. On the postal routes, international remail and other urgent letters are handled in exactly the same manner. And on the postal routes, both services outperform the Postal Service.

V. DUE PROCESS REQUIRES THAT THE INTERNATIONAL POSTAL MONOPOLY (IF ANY) *MUST* BE ADMINISTERED BY AN DISINTERESTED, IMPARTIAL ADMINISTRATOR AND *NOT* BY THE U.S. POSTAL SERVICE.

In addition to policy considerations, there are more fundamental, constitutional flaws in the Postal Service's efforts to regulate the marketplace for the transmission of virtually all physically embodied information except books, magazines, and newspapers. While these problems might be mooted in the current rulemaking, as they were in the urgent letter rulemaking, by explicit acceptance of international remail, they will have to be faced sooner or later.

A. THE POSTAL SERVICE'S LEGISLATIVE AUTHORITY TO REGULATE WHO MAY OR MAY NOT TRANSPORT PHYSICAL INFORMATION IS EXTREMELY QUESTIONABLE.

Since 1974, the Postal Service has asserted *regulatory* authority over the carriage of "letters" over "post routes" by private persons. That is, the Postal Service has claimed it may issue rules which permit persons to carry "letters" over "post routes" under certain conditions when, absent the regulations, they would be barred from doing so by the criminal law. A letter is held to be virtually any tangible object bearing any information. In the exercise of this authority, the Postal Service has issued "class certificates" to carry "letters" based upon the occupation of the carrier, the nature of the thing carried, and the speed with which it is carried or the price charged.

The resulting legal scheme is tantamount to a classic regulatory scheme. In effect, the Postal Service has declared itself to be an Interstate Commerce Commission for the transmission of physical information. This is far different from merely "interpreting" the scope of the law. Since the generation and transmission of information have become central to the economy of the United States, the regulatory role assumed by the Postal Service is correspondingly crucial.

Congress, however, does not seem to have delegated such regulatory authority to the Postal Service. Under the U.S. Constitution, it is elemental that only Congress, not an administrative agency, may originate such regulatory power. "The rulemaking power granted to an administrative agency charged with administration of a statute is not the power to make law." *Ernst & Ernst v Hochfelder*, 425 U.S. 185, 213 (1976). "[A]n agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory authority." *FMC v Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). The Postal Reorganization Act of 1970 did not set up the Postal Service as a regulatory authority to decide who may or may not transport physical information. On the contrary, the thrust of the act was to get the Postal Service out of the governmental sphere and into a more strictly commercial role. "In what it *does*, . . . the Post Office is a business [emphasis in original]," said the Kappel

Commission report that led directly to the 1970 act.

Section 601, title 39, U.S. Code, is the sole statutory authority cited by the Postal Service as its legislative basis for issuing regulations defining who will or will not be permitted to transmit physical information. The obliqueness of this statutory reference stands in marked contrast to the elaborate statutory framework for other regulatory agencies—the certification procedures, the criteria for "public convenience and necessity, and the procedural checks against abuse of power. It is unsurprising therefore, that a detailed analysis of §601 throws serious doubt on whether Congress has, in fact, ever delegated any such regulatory power to the Postal Service.

Section 601 of the postal code provides, in full:

> (a) A letter may be carried out of the mails when—
>
> (1) it is enclosed in an envelope;
>
> (2) the amount of postage which would have been charged on the letter if it had been sent by mail is paid by stamps, or postage meter stamps, on the envelope;
>
> (3) the envelope is properly addressed;
>
> (4) the envelope is so sealed that the letter cannot be taken from it without defacing the envelope;
>
> (5) any stamps on the envelope are canceled in ink by the sender; and
>
> (6) the date of the letter of its transmission or receipt by the carrier is endorsed on the envelope in ink.
>
> (b) The Postal Service many suspend the operation of any part of this section upon any mail route where the public interest requires the suspension.

This section generally allows the private carriage of stamped letters, thereby creating an exception to the general prohibitions against the private carriage of letters. Subsection (b) states that the Postal Service may suspend the operation of "*this section*," referring to section 601, of course. It seems plain that subsection (b) thus allows the Postal Service to suspend the exception for stamped letters created by subsection (a). If "the operation" of §601(a) is suspended, then the result is that stamped letters may not be carried out of the mails by virtue of §601(a).

Under §601(b) the Postal Service can *expand* the postal monopoly in a relatively minor manner; it cannot *contract* it at all. Moreover, the suspension power in subsection (b) is clearly designed to be exercised on a route-by-route basis. The Postal Service cannot, as in the proposed rule, exercise its limited suspension power based upon the use of the shipment after it reaches its destination.

The legislative and statutory history of the §601 fully support the plain meaning of the words. The stamped letters exception, §601(a), and the suspension clause, §601(b), were enacted by Congress separately. Section 601(a) was enacted by section 8 of the Act of August 31, 1852, ch. 113, 10 Stat 141, as an exception to the postal monopoly for letters in government embossed

envelopes enacted. This statute provided, in pertinent part, as follows:

> [L]etters enclosed in . . . envelopes as shall be provided and furnished by the Postmaster General, . . . (and with postage stamps on such envelopes being equal in value and amount to the rates of postage to which such letters would be liable, if sent by mail, and such postage-stamps and envelopes not having been before used,) may be sent, conveyed, and delivered otherwise than by post or mail, notwithstanding any prohibition thereof, under any existing law: Provided, that said envelope shall be duly sealed, or otherwise firmly and securely closed, so that such letter cannot be taken therefrom without tearing or destroying such envelope, and the same duly directed and addressed; and the date of such letter or of the receipt or transmission thereof, to be written or stamped, or otherwise appear on such envelope.

By virtue of this 1852 act, letters in government embossed envelopes could be carried out of the mails by private carriers.

The suspension clause, now §601(b), was not enacted until 1864. Act of March 25, 1864, ch. 40, § 7, 13 Stat 37. This provision originally read as follows:

> And be it further enacted, That the Postmaster General be, and he is hereby, authorized and empowered to suspend the operation of so much of the eighth section of the Act of the thirty-first of August, 1852, as authorizes the conveyance of letters otherwise than in the mails on any such routes as in his opinion the public interest may require.

The Congressional debate preceding the 1864 act make clear that the reason for this suspension authority was that the Post Office Department was having difficulty enforcing the requirements of the embossed envelopes exception passed 12 years earlier. Indeed, the Senate wanted to abolish this exception entirely. The House, however, resisted, and the conference committee compromised on a provision that allowed the Postmaster General to suspend the exception on those routes where abuses were greatest. The compromise was explained quite lucidly by Congressman Alley, one of the conferees:

> [The Senate proposed a] section [which] repeals the law of 1852 so far as it authorizes the conveyance of letters otherwise than in the mails. By the law of 1845, all mail matter was prohibited from being carried upon post routes by any one out of the mails. By the law of 1845, all mail matter was prohibited from being carried out of the mails. In 1852, that law was amended so as to provide that letters and other mail matter might be carried by express companies or by individuals, provided legal postage was prepaid and the envelopes in which the matter was carried were stamped. The Senate proposed . . . to repeal that law. In case of the repeal of that law, we should fall back upon the law of 1845. That law was regarded as working a hardship, at the time of the enactment of the law of 1852, upon the business interests of the country, and the reasons alleged by the Senate for its repeal were, that upon the Pacific coast, in many instances, great abuses had been practiced.

> [The conference committee compromise] leaves the matter entirely in the discretion of the Postmaster General, and he may adopt the remedy so far as it may seem necessary to promote the interest of the public service. [*Cong.Cong Globe,* 38th Cong, 1st Sess.Sess, 1243 (1864).]

It cannot be doubted that "the remedy" which Congress authorized in the 1864 amendment was to allow the Postmaster General to suspend the exception for letters in government embossed envelopes and *not*, as the Postal Service now claims, to allow the Postmaster General to create new exceptions to the monopoly out of whole cloth.

The 1852 and 1864 acts were combined into section 239 of the Postal Code of 1872. Act of June 6, 1872, ch. 335, §239, 17 Stat 312. Section 239 was then reenacted in 1874 as Revised Statutes §3993. In both reenactments only stylistic changes were made.

Section 3993 of Revised Statutes remained unchanged until 1938, when *Congress* enlarged the exception to allow the private carriage of letters in envelopes which had been "stamped" by means of affixing "postage stamps" instead of the more traditional, and literal method of embossment. Act of June 29, 1938, ch. 805, 52 Stat 1231-32. The House committee report indicates that the 1938 amendment was drafted by the Post Office Department and enacted by Congress apparently without change. HR Rept No 2785, 75th Cong, 3d Sess at 1 (1938). In his March 1937 transmittal letter to the Speaker of the House, the Postmaster General stated, "*The purpose of this measure is to liberalize the conditions under which letters may be transported outside of the mails upon payment of postage.*" *Id*.

The legislative history of the 1938 amendment is significant because it demonstrates that the Postmaster General thought that he did not have the authority to create a new exception to the postal monopoly by administrative suspension. If the Postmaster General had already been delegated such power by Congress, it would, of course, been nonsensical for him to petition Congress and wait fifteen months for a minor legislative enlargement of the exception to the monopoly created by §601(a).

The foregoing history certainly casts serious doubt on whether the Postal Service's claimed regulatory power does, in fact, exist. Congress does not seem to have delegated to the Postal Service the power to decide who may and may not carry information across the public roads.

B. DUE PROCESS PROHIBITS THE POSTAL SERVICE FROM ADOPTING A RULE WITH CRIMINAL CONSEQUENCES IF IT HAS A DIRECT FINANCIAL INTEREST IN THE RULE.

In general, the Due Process clause of the Fifth Amendment, U.S. Constitution, requires that "No man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136. The "interest" required is that which is sufficient to offer "a possible temptation to the average man." *Tumney v Ohio*,

273 U.S. 510, 532 (1927). An official's interest in the revenues of his agency is clearly sufficient. *Ward v Village of Monroeville*, 409 U.S. 57 (1972).

In the present rulemaking, the Postal Service is proposing to adopt a rule that would render an identifiable and identified group of companies, the international remail companies, as well as others, liable to criminal penalties and loss of their businesses. The USPS rule is not merely an exercise in postal theory. The courts have given substantial deference to USPS's monopoly regulations even when those regulations were the product of an ambiguous and inconsistent application of the law. *Associated Third Class Third Mail Users v U.S. Postal Service*, 600 F2d 824, 830 (DC Cir), cert den 444 U.S. 837 (1979) ("we do not believe that whatever ambiguity or inconsistency existed is grounds to set aside the rule that is argued for today [application of the "letter" monopoly to wholly printed advertisements]"). The General Counsel of the Postal Service has already announced to the Board of Governors that he will request the Department of Justice to enforce the proposed rule once it is adopted. Moreover, even before a judicial decision is obtained, the proposed rule will, as a practial matter, immediately injure the business of the remail industry. Since the private express statutes apply to customers and suppliers (the air carriers) as well as remail companies themselves, 18 USC 1696(b), 1697, the remail industry reasonably expects an immediate disruption of commercial relations if the proposed rule is adopted.

The Postal Service has a direct, financial interest in the decision to adopt or not adopt the proposed rule. In a recent letter to Congress and in the preamble to the proposed rule, the Postal Service explicitly recognized this financial interest. On November 22, 1985, Mr. William T. Johnstone, Assistant Postmaster General - Government Relations, wrote Congressman Mickey Leland, Chairman of the House postal subcommittee, "The proposed amendments [to the postal regulations] . . . will benefit the public in a rather direct way *by increasing postal revenues*. . . . [emphasis added]" In the preamble to the proposed rule, the Postal Service notes that the intended effect of the proposed rule is to stop international remail companies from "*depriving the Postal Service of revenues*." 44 FR 41462 (Oct 10, 1985). Moreover, a review of both the Johnstone letter and the preamble to the proposed rule review no other public policy consideration as a basis for the proposed rule.

Nor is this financial interest the dispassionate interest of an official merely enforcing the law, such as, for example, a mayor deciding traffic court cases, as in the *Monroeville* case. The Postal Service is emotionally involved in this revenue because it expects to collect the money from its competitors. The statements of the Postmaster General - International Affairs and the General Counsel at the September 1985 Board of Governors meeting (quoted at pages 17 - 19, above) clearly reveal this competitive spirit: "Our purpose is to match the delivery claims made by the so-called remailing companies." Indeed, these statements indicate even more—deep chagrin at being bested by newcomers who, without any of the resources of the post office, proceeded to apply

"imagination and creativity" to the international document delivery business and capture a new market, "forcing" the Postal Service to change its practices.

The blatant procedural unfairness of the instant rulemaking evidences the interested status of the decision maker. The Postal Service has made up its mind already; the public rulemaking is viewed as mere formality. The Postal Service has made no attempt whatsoever to ascertain the true facts of the matter, for example "significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign based enterprises in domestic or export markets," as sound and reasonable administrative procedures would demand. *See* Executive Order 12,291, §1(a)(b)(3), 3 CFR 127 (1985). This failure to investigate the impact of the proposed rule on the public interest was not an oversight. Prior to the notice of proposed rulemaking, the Postal Service was advised of the threat to international commerce by the New Postal Policy Council, a group including some of the largest international companies in the nation.

The application of the Due Process clause to the instant rulemaking is best seen by a careful study of the Supreme Court's decision in *Gibson v Berryhill*, 411 U.S. 564 (1973). In that case, the Court considered an appeal of a district court's injunction against the conduct of license revocation proceedings by the Alabama Board of Optometry. The legal issue in the Board's proceeding was whether the licenses of thirteen optometrists should be revoked because of "unprofessional conduct" within the meaning of the state statute. The thirteen optometrists gave professional advice to patients while working for a company that sold eyeglasses, Lee Optical. Although the Optometry Board was adjudicating a specific case, the Court found that "the aim of the Board was to revoke the licenses of all optometrists in the State who were employed by business corporations." *Id*. at 578. That is, the Board was, in effect, establishing a "rule." At the time of the proceeding, the Board had substantial grounds to believe it was on sound legal ground. Recently, the state statute has been amended "so as to eliminate any direct reference to optical departments maintained by corporations." *Id*. at 566-67. Moreover, a state trial court had just upheld the Board's position on "unprofessional conduct" and enjoined the Lee Optical from employing the thirteen optometrists (a decision reversed by the Alabama Supreme Court, but only after the federal district court had issued the injunction under review). In light of these supportive legal developments, the Board proceeded to consider whether or not to revoke the licenses of the thirteen optometrists. License revocation did not carry any criminal implications. *Id*. at 576.

The federal district court enjoined the Board from conducting the license revocation proceeding because it found "the administrative practice was so defective and inadequate as to deprive the [thirteen optometrists] of due process of law." *Id*. at 570. The gist of the district court's concern was that the members of the Board were biased because they were all "independent"

optometrists, not employed by a company. The Supreme Court affirmed, explicitly resting its opinion on one particular source of bias, the fact that "the pecuniary interest of the members of the Board of Optometry had sufficient substance to disqualify them." *Id*. at 579. The Court recognized this pecuniary interest was not direct and immediate; the Board members were only a few of the one hundred independent optometrists who might fall heir to the business of the disqualified optometrists. *Id*. at 571. Nonetheless, the Court cited the *Monroeville* case for the proposition that the financial interest need not be "direct or positive." *Id*. at 579.

The absence of Due Process in the instant rulemaking is, surely, far more egregious than that which was presented in *Berryhill*. The Postal Service has a direct financial interest in the proposed rule, not merely a possible interest as one of many remaining competitors who might benefit. Unlike the Board of Optometry, the Postal Service cannot point to recent indications of legislative or judicial approval of its position on the legal issues involved. The Congress clearly expressed dissatisfaction with the Postal Service's overbearing approach to its monopoly in 1979; the courts have never considered the particular issues presented by the proposed rule. Moreover, unlike the *Berryhill* case, the Postal Service's position may have criminal implications for the remail industry. However much we may disagree, the Postal Service's position is clearly that the proposed only *clarifies* current law. Hence, in a subsequent prosecution, the remail executive may be faced with penalties for violating the postal monopoly *prior to* adoption of the proposed rule.

In the Due Process cases dealing with impermissible bias by virtue of a "closed mind," the courts have accorded administrative agencies considerably more latitude when acting as rulemakers, as opposed to adjudicators. *See Association of National Advertisers, Inc. v FTC*, 627 F2d 1151 (DC Cir 1979), cert den 447 U.S. 921 (1980)("the legitimate functions of a policymaker, unlike an adjudicator, demand interchange and discussion about important issues"). This distinction, however, is inapposite to the type of bias in the instant case. The Postal Service has indicated a firm disinterest in "interchange and discussion" of the policy issues involved. Moreover, there is no hope that interchange and discussion will cure the source of the problem, the financial interest of a competitor, as it might in the case of a closed mind. Indeed, the absence of an evidentiary hearing only enhances the evil of financial bias. There is no formal record and no legal process available to the "accused" to answer questions like: How much will the proposed rule benefit the Postal Service? How much will international trade be damaged? How large are the advantages of the price/service options of private industry compared to those of the Postal Service? Yet, when the law is actually applied, all of these important factual predicates will have already been decided as a matter of law and the only question will be: Did you, in fact, compete with the Postal Service? The *Berryhill* court recognized that the purpose of the Board of Optometry was to establish a general ban against "employed optometrists."

Certainly, the Court would not have come to a different result if the Optometry Board had acted by rule instead of by test case.

C. THE QUESTIONABLE LEGISLATIVE BASIS, DUE PROCESS PROBLEMS, AND THE SPECIAL CONDITIONS OF INTERNATIONAL MAIL SERVICE ARE MUTUALLY REINFORCING CONSIDERATIONS WHICH MUST BAR REGULATION OF THE INTERNATIONAL POSTAL MONOPOLY BY THE POSTAL SERVICE.

In *Associated Third Class Third Mail Users v U.S. Postal Service*, 600 F2d 824 (DC Cir), cert den 444 U.S. 837 (1979), Judge Wilkey's insight dissent summarized the Postal Service's approach to interpreting its monopoly as follows:

> I dissent from the court's affirmance of the Postal Service *current* [emphasis in original] interpretation of the word "letter" because, in my reading of the lengthy details back of the majority opinion's terse summary of 150 years of statute and statutory construction, *there emerges only one consistent theme from the Postal Service—it has always latched onto whatever interpretation of the word "letter" which would give it the most extensive monopoly power which Congress at the time seemed disposed to allow.*
>
> *[T]he desired scope of the Postal Service's monopoly is entirely a question of public policy, properly to be determined by Congress, and this court should not countenance the Postal Service's power and revenue grabbing* simply because the statute, the statutory history, and the agency's own administrative interpretations are conflicting and obscure. [600 F2d at 830-31 (emphasis added).]

In response to this particular point in the dissent, the majority opinion stated:

> *We completely agree with the dissent that "the desired scope of the Postal Service's monopoly . . . is entirely a question of public policy," . . . and share the view that Congress is the appropriate body to set the nation's policy in this regard. Indeed, we are hopeful that our recital of the ambiguities and uncertainties will spur Congress to give the matter some attention.* [600 F2d at 827 n 10 (emphasis added).]

In essence, then, both the majority panel and the dissenting judge were troubled by the extreme unevenness of the Postal Service's "interpretation" of the scope of its monopoly, and both urged Congress to take an independent look into the issue.

However, as the Public Counsel of the Postal Rate Commission foretold when the suspension power was first discovered (or rather, invented) by the Postal Service in 1974, the fundamental vice of the suspension power is precisely that it can be used to thwart outside review of the monopoly by Congress. The Public Counsel, Mr. Norman Schwartz, wrote:

> *The suspension technique is rather ingenious tool for achieving what appears to be the Postal Service's goal, i.e., gathering under its exclusive*

> *domain nearly all mailable matter. It permits the immediate adoption of a broad definition of the scope of its monopoly while keeping potential ire of mailers under control*. No mailer can really complain so long as there is a suspension in force. If the Postal Service were to withdraw its suspension some years hence, it should cause no surprise when the Postal Service argues in court that the *long standing administrative interpretation* of the scope of the postal monopoly should be given great weight. ["Legal Memorandum of Assistant General Counsel, Litigation Division, Concerning the Role of the Postal Rate Commission in the Exercise of the Legal Controls over the Private Carriage of Mail and the Postal Monopoly," at 33, Postal Rate Commission Docket No. MC 73-1 (1974) (dismissed by the Postal Rate Commission for lack of jurisdiction, docket RM 76-4, Order No. 133 (1976))]

As described in the Statement of Facts, in 1979 the Postal Service used the suspension power to thwart political oversight in the manner predicted. By issuing a "suspension" and appeasing the political support for a new statute, the Postal Service effectively blocked otherwise inevitable Congressional action to permit private carriage of urgent documents. And as predicted, the proposed rule, which is a partial repeal of the urgent letter exception, is now being justified as a simple "clarification" of long standing administrative interpretation.

Viewed in this historical perspective, the proposed rule may be rationally explained. It is an attempt by the Postal Service (or, at least, by some at the Postal Service) to limit the scope of the urgent letter exemption not to its principles, but to its politics. As shown in section IV.A, above, the principles and reasoning behind the urgent letter exception fully support the acceptance of international remail competition. The remail companies were not, however, significant players in the political battle to obtain the urgent letter exception. Hence, they were not, in this sense, within the original "intent" of the exception. And so, the proposed rule suggests, they should be excluded from its ambit.

The political problems posed by the suspension power are exacerbated by the absence of other legal checks on the Postal Service's international conduct. It appears that the Postal Service, unlike the Alabama Board of Optometry, would be immune from the antitrust laws. *Compare Sealand Service Inc. v The Alaskan Railroad*, 659 F2d 243 (DC Cir 1981), cert den 455 U.S. 919 (1982) *with City of Lafayette v Louisiana Power & Light Co*., 435 U.S. 389, 406 (1978). The Postal Service also seems beyond the reach of the procedural checks set out in Executive Order 12,291, which requires a careful cost/benefit analysis before implementing burdensome or anticompetitive regulations. Moreover, in contrast to the domestic situation, the Postal Service's international rates and practices are outside the scrutiny of the Postal Rate Commission. *See* 39 USC 407 (at least as interpreted by the Service and the Commission so far). Further, the Postal Service has virtually no statutory

service or price obligations in the international sphere that would limit its ability to compete aggressively. Finally, even the limited political check exercised on the Postal Service domestically is hard to bring to bear in international matters. The minority of citizens engaged in international business, and the small international departments of large, domestically oriented companies, will always have difficulty mustering political support comparable to the vast influence which Postal Service draws from its huge domestic operations and labor force.

The exceedingly questionable wisdom and doubtful legislative basis of the suspension power, the extraordinary absence of legal controls over the Postal Service's international operations, and the Due Process problems of industry regulation by one of the competitors—all point in the same direction, and each concern reinforces the others. The ever increasing importance of the international flow of information to U.S. commerce lends enormous practical substance to these basic, constitutional issues. Surely, there is something fundamentally amiss in the prospect of an international postal monopolist—beyond the reach of the antitrust laws, the Rate Commission, and the President's Executive Orders—deciding for itself the scope of its monopoly and the commercial roles of its competitors.

We submit that, at very least, the scope and shape of the U.S. postal monopoly over the transmission of international documents, if any, must be determined by an impartial, disinterested administrator, and *not* by the United States Postal Service. No other procedure is likely to serve the economic best interests of the United States. More importantly, no other procedure will satisfy the principle of Due Process.

17

IECC Remail Case Complaint (1988)

Dear Sirs,

This letter is a formal application under Article 3 of Regulation no. 17 of the Council dated 6 February 1962 by which we respectfully request the Commission to initiate proceedings in view of finding that certain actions of European PTT have infringed and are infringing articles 85-86 of the EEC Treaty.

I. General Information Relating to the Interested Parties and to the Object of the Complaint

1.1 The plaintiff is the International Express Carriers Conference (hereafter the "IECC") whose registered office (under its previous name, the International Courier Conference) is located at Rue Amat 28, 1202 Geneva, Switzerland. The IECC is represented by its Chairman, Mr Gordon Barton. Communications in regard to this case should be directed to IECC legal counsel, Maître Eric Morgan de Rivery; Simeon Moquet Borde & Associés; Rue Brederode, 13; 1000 Brussels.

1.2 The IECC is an organization whose purpose is (i) to promote and protect the legitimate interests of the international express industry and (ii) to carry out legal, economic, and other studies to identify and develop the role of the express industry in international commerce. The current members and associate members, the latter indicated by an asterisk (*), of the IECC are:

- DHL, a company incorporated under the laws of Hong Kong and located at 20th Floor, Asian House, 1 Hennessey Road, Wanchai, Hong Kong.

International Express Carriers Conference, Complaint, Case IV/32.791-Remail (Jul 13, 1988) (submitted to the European Commission). Principal authors of this document were Eric Morgan de Rivery and James I. Campbell Jr. Exhibits omitted.

- Federal Express U.K, Ltd., a company incorporated under the laws of the United Kingdom and located at Hayes Road, Southall, Middlesex, U.K.
- IML Air Services Group, a company incorporated under the laws of the United Kingdom and located at Astronaut House, Hounslow Road, Feltham, Middlesex TW14 9AH, U.K.
- Independent, B.V.*, a company incorporated under the laws of the Netherlands and located at Aalsmeerderweg 483b, 1437 EL Rozenburg N.H., Postbus 307, 2130 AH Hoofddorp, The Netherlands.
- Oversea Courier Service, a company incorporated under the laws of Japan and located at 9, 2-Chome, Shibaura, Minato-Ku, Tokyo 108, Japan.
- Securicor Express International, a company incorporated under the laws of the United Kingdom and located at 24 Gillingham Street, London SW1V 1HZ, U.K.
- TNT Skypak Holdings, a company incorporated under the laws of the Netherlands and located at Haarlemmermeer, Schippol, Amsterdam, The Netherlands.
- United Parcel Service, a company incorporated under the laws of the United States and located at 51 Weaver Street, Greenwich Office Park 5, Greenwich, Connecticut 06830, United States.

1.3 This complaint is directed against two types of activities involving two sets of Post Offices:

a) The first part of the complaint (section IV, below) involves an agreement to increase collectively a certain postal charge called "terminal dues." This part of the complaint is directed against:

- the Post Office of Belgium,
- the Post Office of Finland,
- the Post Office of France,
- the Post Office of the Netherlands,
- the Post Office of Sweden,
- the Post Office of Switzerland, and
- the Post Office of the United Kingdom.

b) The second part of the complaint (section V, below) involves efforts by certain Post Offices to invoke a market allocation scheme set out in Article 23 of the Universal Postal Convention. This part of the complaint is directed against:

- the Post Office of the Federal Republic of Germany, and
- the Post Office of the United Kingdom.

1.4 Although the complaint involves two different types of activities, both arise from a common set of facts and involve a common object.

1.5 The IECC submits that although Finland, Sweden and Switzerland do not belong to the EEC, their Post Offices may be included in this complaint for violation of certain provisions of the Treaty of Rome. In doing so, the IECC

relies on what has been termed the "effects doctrine." This doctrine has been constantly applied by the Commission (see *Dyestuff*, Commission Decision of 24 July 1969, OJ (1969) L 195/11; *Aluminium*, Commission Decision of 19 December 1984, OJ (1985) L 92/1; *Polypropylene*, Commission Decision of 23 April 1986, OJ (1986) L 230/1) and was recently upheld by the Advocate-General of the European Court of Justice, M. Marco Darmon, in an opinion released on 26 May 1988 on the occasion of the appeal of the *Woodpulp* case.

1.6 The object of the complaint is to draw the attention of the Commission to certain actions and certain agreements by certain national Post Offices which have been taken with the view towards preventing totally or at least considerably hampering the providing of "remail" services to citizens within the European Community. Remail is a joint venture between certain private express companies and certain progressive Post Offices, as described more fully in the next section.

II. PRELIMINARY EXPLANATIONS

2.1 ON THE UNIVERSAL POSTAL UNION (UPU)

The Post Office emerged as a public service in the course of the eighteenth century. At this time, international postal relations were governed by bilateral agreements. By the end of the nineteenth century, it became clear that such bilateral agreements could no longer meet the requirements of growing international commerce. Thus, it was decided to set up a postal union of civilized countries which materialized in the Treaty of Berne in 1874.

This treaty founded the "General Postal Union," renamed three years later the "Universal Postal Union."

The supreme authority of the UPU is the *Congress*, a body that consists of representatives of member countries. The Congress meets every five years. The next Congress, the twentieth, will be held in November 1989 in Washington, D.C.

The major legal instrument of the UPU was initially the Universal Postal Convention, which until 1964 combined all institutional and operational provisions. At the Vienna Congress of 1964, the institutional provisions were placed into a separate Constitution. The *Constitution* is a permanent multilateral treaty subscribed to and ratified by member countries. It is implemented by the *General Regulations*, a second act, which is procedural in nature.

International letter postal service is provided in accordance with two further acts enacted by the Congress : the *Universal Postal Convention* and the *Detailed Regulations of the Convention*. Like the Constitution and the General Regulations, the Convention is agreed to by the member countries. The Detailed Regulations are agreed to by the postal administrations. According to past precedents, it is expected that the 1989 Convention will take effect on

1 January 1991 and determine the legal framework for postal and private delivery services until 31 December 1996.

In addition to these four basic acts, there are at least seven other UPU acts including, *inter alia*, the *Parcel Post Agreement*, *Money Orders Agreement*, *Subscriptions to Newspapers*, and *Periodicals Agreement*.

Between meetings of the Congresses, the affairs of the UPU are administered by an *Executive Council*. The Executive Council consists of forty UPU members which are elected by each Congress according to a geographical distribution formula. The Executive Council is, in turn, divided into ten *Committees*.[1]

The secretariat of the UPU, the *International Bureau*, is headed by a *Director General* who is elected at the occasion of each Congress.

In addition to the UPU, there are "restricted postal unions" representing each of the major continental regions of the world. The oldest is the *Postal Union of the Americas and Spain* (PUAS) founded in 1911. Of more recent origin is the *European Conference of Postal and Telecommunications Administrations* (CEPT) and the *Arab Postal Union*, both of which came into being in 1959. Others of importance include the Asian-Pacific Postal Union, the African Postal Union and the Nordic Postal Union. Restricted unions must be notified to the UPU in accordance with Article 116 of the General Regulations and they "may not introduce provisions less favourable to the public" than the Convention itself (Article 8 of the Constitution). Over the last decade the restricted unions seem to have played an increasingly important and influential role in the work of the UPU.

2.2 ON REMAIL

2.2.1 The remail activity

Historically, the international postal system offered two basic services. Airmail service was expensive but supposedly as fast as reasonably possible while surface mail using ship or rail was inexpensive but very slow. The high cost of airmail might be attributed in part to the fact that each national Post Office used direct flights to most destination countries rather than consolidating all traffic through a central hub airport.

As early as the 1930s, European publishers made use of a hybrid postal/freight service to overcome the inadequacies of these limited postal

[1]Of particular note is Committee 4 dealing with regulatory aspects of the international letter post. Another important committee of the UPU is the Consultative Council for Postal Studies (CCPS). Established in 1957, the thirty-five member CCPS is charged with "the study of the most important technical, operational, economic and technical cooperation problems." During the 1979-1984 period, the CCPS's work program included Study 522 on how the Post Offices could fashion a common defense against the private international express industry and generally enforce the postal monopoly. The CCPS is currently divided into seven subcommittees of which Committee 7 and its Study 671.1, dealing with international express mail, is particularly important to the express industry.

services. They air freighted bulk shipments of publications to the United States. These books and magazines were then distributed by the U.S. Postal Service.

Similarly, in the late 1950s, a large American publishing company (i.e. McGraw Hill) and KLM Royal Dutch Airlines began experimenting with air freighting bulk U.S. publications to Amsterdam; these publications were then "remailed" throughout Europe via the Dutch Post Office. By the late 1970s, the outbound remailing of printed matter was handled by a number of private remail companies in the U.K. and the U.S. Like the Dutch Post Office, the U.K. Post Office encouraged the remailing of foreign publications through its facilities. Its bulk services were called Accelerated Surface Post (ASP) and Bulk Air Mail (BAM).

As international commerce expanded in the 1960s and the 1970s, more and more different types of businesses began to demand an intermediate worldwide delivery service that was faster than surface mail, cheaper than air mail, and better value for money than either. This commercial demand was not wholly satisfied by the early discount on bulk postal services, which were designed primarily for publications rather than bulk letter mailings.[2] Indeed, large companies often resorted to privately sending bulk shipments of letters to foreign affiliates for posting abroad. Gradually, certain express companies and progressive Post Offices saw a way to respond to this unmet need.

Two crucial economic factors encouraged remail of letters. One was that airmail rates for letters were unreasonably high compared to the cost of handling an international bulk letter mailing. The second was that national Post Offices generally give a low priority to international mail, both outbound and inbound.

The basic effect of the collaboration of progressive Post Offices and private express companies was to introduce competition into the worldwide postal system. Today, as the advent of remail demonstrates, there is no economic or operational reason why post offices cannot compete with one another at the international level for the processing and distribution of large international mailings. In response to this increased state of competition (see section 5.2.3(c)), the Post Offices have in turn labored hard to improve their own services.

With the advent of remail, instead of relying upon the local Post Office, a large mailer could have his bulk mailing picked up by the express company and forwarded by air to a foreign Post Office, operating in joint venture[3] with

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[2]Modern business today produces a distinct type of postal shipment, periodic "bulk" mailings of similar identical documents, such as statements of account, solicitations, registration information, securities' prospectuses, newsletters, brochures, catalogues, order forms, operating instructions, corporate reports, etc. Bulk mailings are operationally different from individual letters. They are shipped in large quantities, weighing up to a metric tonne or more (see section 5.2.3(c)).

[3]The term "joint venture" as used here should be understood as a business venture (remail) (i) in which two of the parties (post office and express) provide a service that depends upon the contribution of both parties, and (ii) in which the two parties intend to continue to provide such service for some time. Remail relations are thus established by contract (the French Post Office

the express company. The bulk shipment of letters or printed papers would then be handled by the remail Post Office as mail and either delivered within the country or forwarded via the international postal system to destination Post Offices in third countries, to be delivered through normal postal services. Because of the heterogeneity in prices and efficiency, both the express company and the Post Office would, of course, shop around, so that in the end remail business naturally flowed to those joint ventures between express companies and Post Offices that provided the most service for the lowest price.

Operationally, remail was a logical extension of service for both the express company and the national Post Office. For the express company, the service required of bulk international mailings is similar to the service already offered. In both cases, a time-sensitive shipment is picked up on demand and rushed out of the country that night. In both cases, the shipment is consolidated with similar shipments. In both cases, the shipment is delivered immediately to the door of the consignee; in the case of an international bulk mailing, to a foreign Post Office (see section 5.2.3(c), below).

From the standpoint of the Post Office, the attraction of remail was that it allowed more efficient use of certain fixed costs. Typically, a Post Office contracts with the national airline for expensive, reserved cargo space. By using the express system to collect mail from beyond its borders, the Post Office can increase its purchase of international air transportation and lower its unit costs. It can also increase its utilization of airport warehousing and administrative personnel, while forcing the express company to do the labor intensive sorting. All in all, remail allows a Post Office to gain a substantial amount of new business and improve the economies of scale available to its old business.

From the large users' perspective, it became possible to shift bulk mailings from country to country, placing the Post Offices in competition with each other. Acting through the express companies, the customers collectively pushed for better services and lower prices. As a result, remail has forced down the price and pushed up the level of service available to international businessmen.

Confronted by this practice of remail, the national Post Offices have failed to make a detailed analysis of the costs associated with the distribution of international mail. Such an analysis would facilitate the computation charges among Post Offices based on specific costs. Instead, as explained in the next section, they have continued to use an official system of compensation for the distribution of international mail which ignores totally the differences in costs and efficiency prevailing among the various national Post Offices.

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refers to "*accords entre Postes et sociétés concurrentes*" see excerpt from Bulletin de l'I.R.E.P.P, *Exhibit 1(b)*, p. 54). The duration of such a contract is generally about one year. It should be noted that such an arrangement is less permanent than that implied by, for example, the creation of a separate corporate entity.

2.2.2 The barter of postal services and terminal dues

When a national Post Office receives mail to be delivered to a foreign consignee, it claims from the sender an amount of money which is deemed to represent the total cost of delivering such mail. The origin Post Office does not, however, assume responsibility for transporting or processing mail beyond its border. Rather, it is the destination Post Office, located in the country of the consignee, that will process and physically deliver the mail. Logically, a system of compensation must exist among Post Offices that takes into consideration this sharing of the tasks in international postal service. Strangely enough, prior to 1969, the sole compensation which Post Office B would receive for delivering the mail tendered by Post Office A was an undertaking by Post Office A to deliver the mail tendered to it by Post Office B.

This principle of non-sharing of charges was justified by the assumption "that a letter will in general entail a reply and that therefore the total of letters sent from one country to another will approximate to that of letters sent in the opposite direction" (see note 1 to Article 61 of the Universal Postal Convention, contained in Volume 2 of the Acts of the Universal Postal Union, Revised at Hamburg in 1984 and Annotated by the International Bureau (1985), hereafter, "Annotated UPU Convention"). The note thus infers the following conclusion:"Assuming this to be the case, it was clearly superfluous to divide the charges between the country of origin and the country of destination."

In this respect the IECC notes that such assumption of an equilibrium in traffic flows may have reflected more or less the reality at a certain stage of development of the worldwide trade, but this is not the case any longer.

More fundamentally, the bartering postal services is clearly economically invalid if the value of the postal services differs markedly in the two countries. In this regard, it may be noted that in 1987 the UPU asked Post Offices to estimate the costs of delivering inbound foreign origin letters. The survey concluded:

> *The range of replies was enormous* . . .Even if one omits consideration of [the very highest] estimate . . . the high figure is 34 times that of the low estimate [*Exhibit 1(a)*, para. 26, emphasis added].

In particular, this UPU study revealed that, among the EEC Post Offices, the estimated cost to provide inward delivery of foreign letters varied from 0.08 SDR[4] (Greece) to 0.29 SDR (West Germany). That is, the actual cost of postal delivery of the same letter is more that two and one half greater in some parts of the EEC than in others. This wide variation in the economic value of inward postal delivery service within the EEC is also shown by a very recent study of domestic letter tariffs within the EEC by a French postal official appearing in the June 1988 issue of Bulletin de l'I.R.E.P.P. (*Institut de Recherche d'Etudes et de Prospective Postales)*. According to this French study, the domestic

[4]Special Drawing Rights (SDR), see penultimate paragraph of this section, below.

postage for delivery of 20 grams letters in January 1988 varied from FFR 0.33 (Spanish intercity letters) to FFR 2.65 (West Germany), a variation of more than 700 percent from the lowest to the highest (*Exhibit 1(b)*, pp. 64-70). Thus, whether one measures economic value by cost or by price, it is clear that economic value of postal service varies enormously within the EEC.

In modern times, this barter arrangement for postal services led the Post Offices (i) to ignore the heterogeneity in the cost and efficiency of postal services and (ii) to institutionalize a system whereby the less industrialized countries were unfairly required to deliver far more mail than they sent to the industrialized countries.

Following a decision by the 1964 Vienna Congress to study the imbalance in reciprocal services between countries, the 1969 Tokyo Congress decided to introduce a "terminal dues" charge. The barter system was retained for so long as no imbalance (measured in terms of weight) existed between two countries. However, if any imbalance should arise (*i.e.* A sent a greater tonnage of mail to B than the reverse), then the Post Office which received more mail could charge its correspondent Post Office a certain payment, "terminal dues," applicable to the extra weight that such Post Office had to distribute (Annotated UPU Convention, Article 64, note 1).

While eliminating the most blatant injustices vis-à-vis the developing countries, the new terminal dues system did not have as its foundation sound economic analysis. As opposed to a cost-based pricing of services, the barter scheme, even as supplemented by the terminal dues payments, presented two major inconveniences:

- as long as there was no imbalance, the barter system favored low cost Post Offices which would thus secure the services of high cost Post Offices (which delivered their mail abroad) for their own low cost of inward delivery;
- when there were imbalances, the terminal dues paid represented arbitrary amounts bearing no relation with the costs actually incurred by the Post Office having a negative imbalance.

In the current 1984 UPU Convention, the terminal dues provision is found in Article 64 :

> 1. Subject to article 65 [*i.e.*, items exempt from postage], each administration which, in its exchanges by air and surface means with another administration, receives a larger quantity of letter mail items than it sends shall have the right to collect from the dispatching administration, as compensation, a payment for the costs it incurs for the excess international mail received.
>
> 2. The payment provided in paragraph 1, per kilogram of mail received in excess, shall be :
>
> a. 8 gold francs (2.614 SDR) for LC and AO items (excluding the printed papers sent by special bags referred to in article 19, paragraph 8);
>
> b. 2 gold francs (0.653 SDR) for the printed papers sent by special bags

(M bags) referred to in Article 19, paragraph 8.

3. Any administration may waive wholly or in part the payment provided for in paragraph 1.

A Special Drawing Right (SDR) is an accounting unit of the International Monetary Fund (IMF) used by the UPU (Article 8 of the Convention). As of 16 June 1988, 1 SDR equaled 1.1365 ECU. Hence, the terminal dues charge was 2.970 ECU per kilogram.

Ever since terminal dues were first introduced, there have been calls for major revisions in the rate structure.[5] In particular, it was early noted that terminal dues should be based on both weight and number of shipments since this would better reflect costs (Annotated UPU Convention, Article 64, note 1).

2.2.3. The policy guidelines set forth in Article 23 of the UPU Convention

In addition to raising terminal dues, several Post Offices have purportedly invoked the market reservation principles of Article 23 of the UPU Convention. The terms of this article are as follows:

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 that 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.

The text of Article 23, agreed upon by the member governments of UPU, including those named in section 1.3(b) of this complaint, authorizes a "member country" to intervene in the flow of international mail if the mail has

[5]The system of terminal dues charges is rigidly fixed by the UPU Convention for a five-year period until superseded by the subsequent Convention. The Convention prohibits Post Offices from agreeing upon higher postal charges outside the framework of the Convention. In this respect, it is useful to mention Article 7.2 of the Convention which states that "no postal charge of any kind may be collected other than those provided in the Convention and Agreements." The only leeway is granted by the concept of a "restricted union," explained in 2.1 above. Within a restricted postal union, Post Offices may, as stated in Article 8 of the Constitution, vary charges from the Convention standards "provided always that they do not introduce provisions less favourable to the public."

been posted in a country other than the country of origin. One should note that the decision to intervene or not to intervene rests with the "member country" and not with the postal administration of such "member country."

Article 23 is, in fact, two provisions. Paragraphs 1 to 3, adopted as one long paragraph in 1924, are concerned with "reimport remail," that is, mail that is sent out of the country of origin and posted abroad back into the origin country. Paragraph 4 was adopted in 1979 to restrain remail to a country of destination other than the country of origin.

Paragraph 4 was quite controversial. The vote in the UPU was 66 in favor, 30 against, and 20 abstentions. The measure was sponsored by Japan, which argued that it was needed to combat "private postal services that took the most profitable mail and left postal administrations with only the marginal mail." Germany supported the proposal arguing:

> The Universal Postal Convention was based on the principle that the sender of a letter to a foreign country paid the charge to the administration of the country of origin. The latter kept his on the basis of the principle of reciprocity. *The Convention did not deal with competition between administrations.* Each administration had its own costs structure, even with regard to international traffic. This structure enabled the charges to be set. The traffic under attack, however, contributed to distorting the normal costs and charges structure of administrations. It was therefore a question of safeguarding the principle of reciprocity and such was the spirit of [proposed paragraph 23.4] [emphasis added].

Canada opposed the proposal as interfering with each country's right to permit or prohibit such activities by national legislation. The United Kingdom agreed with Canada and noted further that the proposal was full of imprecisions (*Exhibit 2*).

III. DESCRIPTION OF SPECIFIC ACTIVITIES WHICH ARE THE SUBJECT OF THIS COMPLAINT

3.1. REVISION OF TERMINAL DUES

3.1.1 Agreement to organize bilateral agreements (October 1987)

On April 22, 1987, certain European and North American Post Offices convened an emergency meeting in London with the acknowledged purpose to respond to the "threat" of remail. The U.K. Post Office's letter calling the meeting noted:

> 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.

Following this first meeting, the group, referred to hereafter as the "Re-

mail Conference," appointed a "Working Party" consisting of the Post Offices from Sweden, the U.K., France, and the Netherlands. Later, the Post Offices of Belgium, Finland, and Switzerland were added to the Working Party.

The Remail Conference met again in London on 22 May 1987 and in Copenhagen on 4 September 1987. Thereafter, the Remail Conference members took advantage of other previously scheduled meetings to pursue their negotiations. Over the course of these meetings, the Post Offices concluded that the most feasible defensive strategy against remail was an increase in terminal dues. On the occasion of a UPU CCPS meeting in Berne, (on CCPS, see footnote to 2.1. above) on 27 October 1987, the Working Party with observers from the U.S. Postal Service and other Post Offices, finalized plans for a new terminal dues schedule. Under the proposed new system, the terminal dues charge for a quantity of mail would be changed from 2.614 SDR per kilogram to a charge based upon the number of pieces and the total weight of the shipment, i.e., 1.225 SDR per kilogram plus 0.121 SDR per piece.

The effect of the new terminal dues formula is shown in the following table,[6] with ECU equivalents at the date of 16 June 1988 (1 SDR = 1.1365 ECU). As this table makes clear, the new terminal dues system would substantially raise the terminal dues on letters, the average weight of which is about 20 grams. Terminal dues on printed matter, averaging about 200 grams, would actually decline.

	Current		New		
Wt/pc	SDR	ECU	SDR	ECU	Change
10 gr	0.026	0.030	0.133	0.151	+412%
20 gr	0.052	0.059	0.145	0.165	+179%
30 gr	0.078	0.089	0.158	0.180	+103%
50 gr	0.131	0.149	0.182	0.207	+ 39%
100 gr	0.261	0.297	0.243	0.276	- 7%
200 gr	0.523	0.594	0.366	0.416	- 30%
300 gr	0.784	0.891	0.488	0.555	- 38%

At this point, it should be noted that the proposed revisions in the terminal dues rates are apparently inconsistent with Article 7.2 of the UPU Convention, which clearly states: "No postal charge of any kind may be collected other than those provided for in the Convention and Agreements."

[6]A sample calculation follows: under the current terminal charge, a single 10-gram piece is charged 2.614 SDR/kg x 0.010 kg = *0.026 SDR or 0.0295 ECU* (0.026 SDR/1.1365 ECU/SDR). Under the new terminal dues system, a single 10-gram piece would be charged according a weight component of 1.225 SDR per kilogram x 0.010 kg = 0.0123 SDR plus a per piece component of 0.121 SDR, for a total charge of *0.133 SDR or 0.151 ECU* (0.133 SDR/1.1365 ECU/SDR).

3.1.2 Bilateral Agreements on new terminal dues

It is IECC's understanding that the bilateral agreements have in fact been agreed between at least the members of the Remail Conference's Working Party that concluded the October 1987 "agreement to agree." Mr. René Limat, Director of the Mail Division within the French Ministry of Post and Telecommunications, has publicly admitted that the European and other postal services have joined together to "cooperate" in taking measures to block competition from private couriers services which profit from tariff and regulatory differences between State postal services to reduce their competitive costs, a strategy which Mr. Limat qualifies as "unfair competition" (See *Exhibit 1(b)*, p. 58). There has not, however, been any public notice of the changes in postage rates that are certainly implied by the drastically different terminal dues schedule.

3.1.3 Actions to induce agreement among Post Offices

It is obvious that the new terminal dues agreements will benefit some Post Offices at the expense of others. In every pair of Post Offices, the implementation of a new terminal dues agreement must logically leave one Post Office richer and one poorer. More generally, it is clear that a general raising of terminal dues is contrary to the economic best interests of the progressive Post Offices that have entered into joint ventures with private companies for the provision of remail service.

One may ask, then, why a Post Office would sign the new terminal dues agreement if it would cause itself economic injury? The only logical answer is "pressure." Post Offices appear to have been induced to subscribe to an agreement contrary to their own best interests by threats of retaliation: non-cooperation in the exchange of mails, withdrawal of support in respect to mutual associations, etc. While such actions were necessarily veiled and hidden from the view of the IECC, it is easy to deduce their existence by the known results.

3.2. INVOCATION OF ARTICLE 23 OF THE UPU CONVENTION

3.2.1 Invocation of Article 23 by the UK Post Office

On 12 February 1987, the U.K. Post Office wrote to a number of Post Offices in and out of Europe in the following terms (*Exhibit 3*):

> 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* [emphasis added].

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

In addition, in January 1988, the Japanese Post Office, perhaps in response to similar requests from European Post Offices, has recently notified the Hong Kong Post Office that it will not accept international mail remailed through Hong Kong (*Exhibit 4*).

3.2.2 Invocation of Article 23 by the Post Office of the Federal Republic of Germany against inbound and outbound mail

The Post Office of the Federal Republic of Germany, the "Bundespost," has invoked Article 23 of the UPU Convention in two distinctly different ways with the effect of restraining competition in trade among Member States.

First, the Bundespost has cited Article 23 to mailers in Germany to discourage them from using remail for outbound international mail. In a letter dated 19 May 1988, the Dresdner Bank of Mannheim declined to make use of an intra-EEC remail service for its outbound mail because of legal objections raised by the Bundespost. One of these objections rested squarely upon Article 23 of the UPU Convention. According to the Dresdner Bank, the Bundespost wrote (in pertinent part, see *Exhibit 5*):

> *The transportation of first-class mail abroad with a view to mailing it there infringes . . . the provisions of the UPU Convention* . . . The provision of Article 23 of the UPU Convention is affected. This protective provision becomes effective, *inter alia*, if the mail does not remain in the country of mailing but is addressed to receivers in other countries [emphasis added].

Second, the Bundespost has also intercepted and returned inbound international mail posted by EEC mailers and destined for German addressees. Exhibit 6 shows that on 16 March, 18 March, 28 April, and 13 May 1988, the Bundespost returned a quantity of mail to the Rotterdam office of the Dutch Post Office. The transmittal forms completed by Bundespost explicitly cite Article 23 as its grounds for refusing to deliver this mail (*Exhibit 6*).

The instances cited of Bundespost interference in the free flow of inbound and outbound international mail appear by their terms to be examples of a general policy. Certainly, the Bundespost must have given similar advice to other prospective users of outbound remail services. Likewise, a careful examination of the transmittal forms contained in Exhibit 6 reveals that the handwritten references to Article 23 are identical even though the dates on the forms extend over a two month period. Plainly, the Bundespost made many identical copies of this Article 23 notice, leaving the specific dates blank, and then found occasion to use the forms at least during the period from 16 March

to 13 May 1988.

IV. THE AGREEMENTS PERTAINING TO TERMINAL DUES CONTRAVENE ARTICLE 85

4.1 THE NATIONAL POST OFFICES ARE COMMERCIAL UNDERTAKINGS

As recalled by the Commission "Green Paper on the development of the common market for telecommunications services and equipment" (p. 129 of the English version) the Commission, in the context of the International Air Couriers' case, has pointed out:

> that it regards the Member States' *postal* and telecommunications authorities as commercial undertakings since they supply goods and services for payments [emphasis added].

The logical implication of this statement, namely that these administrations are subject to the rules of the Treaty of Rome on competition, namely Articles 85 and 86 of said Treaty, has been confirmed by the Court of Justice in *Italian Republic v Commission*, case 41/83, (1983) ECR 873.

The correctness of this approach is underscored by the aggressively commercial manner in which the Post Offices have approached the international market. For example, SFMI (Société Française de Messagerie Internationale) is a private company including the French Post Office and a private transport courier formed to provide express service in competition with private express companies. It is interesting to note that SFMI has publicly announced that it will seek the best possible delivery partners in foreign countries and not automatically work with the foreign Post Office. Similarly, in November 1987, the Post Offices of several developed countries (including most European countries) formed a joint venture based in Brussels to transport international express mail. In May 1988, it was announced that this new express mail company, a large private express company and Sabena had agreed jointly to operate a daily express cargo flight across the Atlantic. In short, the Post Offices have become entrepreneurs. Indeed, the Post Offices are boasting of their new entrepreneurial and commercial attitude as evidenced by the above mentioned Bulletin de l'I.R.E.P.P. *Exhibit 1(b)*, back cover summary) as well as the terms of a speech delivered by the Managing Director of the Royal Mail Parcels division of the U.K. Post Office (*Exhibit 7*).

The non-governmental nature of the agreements pertaining *to terminal dues is* confirmed by the fact that the proposed revision of terminal dues is contrary to the UPU Convention. As noted above, Article 7 of the Convention does not admit of the possibility of charges "other than those provided for in the Convention." It appears that an increase of the terminal dues such as contemplated would constitute a charge other than those foreseen by the Convention. Indeed, the prevailing terminal dues charge may not vary from the figure set forth in Article 64 of the Convention until the current Convention is

replaced by an act of the 1989 UPU Congress (see Article 92 of the Convention).

The concept of "restricted unions and special agreements" allowed for in Article 8 of the UPU Constitution in no way diminishes the firmness of this conclusion. If one reads Article 8 and the official annotation provided by the UPU's secretariat as a whole, it is plain that the concept of a "restricted union" was meant to allow low rates of postage among countries sharing a cultural affinity, and this is how the concept has invariably been applied. Even the somewhat more flexible concept of a "special agreement" is explicitly limited to agreements that are not "less favourable to the public," a condition that cannot be fulfilled by a sharp increase in terminal dues. More fundamentally, interpreting Article 8 of the Constitution to allow rewriting a key provision of the Convention renders superfluous the amendment process explicitly provided for (Article 91 of the Convention). Recourse to Article 8 of the Constitution is, indeed, not even a theoretical possibility unless the notice and approval procedures provided in the General Regulations have been followed.

Hence, in concluding the October 1987 "agreement to agree," the Post Offices of the Working Party of the Remail Conference were acting in a manner inconsistent with the policies and procedures approved by their governments in the Convention. Similarly, any Post Office actually agreeing to a bilateral agreement raising terminal dues, as well as any Post Office using threats in order to extract a bilateral agreement from a "sister" Post Office, must be deemed to acting in a wholly non-go vernmental manner.

Finally, the strictly non-governmental nature of postal efforts to rewrite the terminal dues provision of the governmentally approved UPU Convention is manifest from a recent statement by the U.K. Parliamentary Under-Secretary for Industry, Mr. John Butcher. In response to a parliamentary question, Mr. Butcher stated that "Details of negotiations and implementation of terminal dues agreements between Post Offices and other postal administrations *are an operational matter for the Post Office* (emphasis added) (*Exhibit 8*) Mr. Butcher's statement plainly disclaims any participation or control of the terminal dues negotiations by the U.K. government.

4.2. THE AGREEMENTS HAVE AN EFFECT ON TRADE BETWEEN MEMBER STATES

As first expressed by the Court of Justice in 1966 (*Société Technique Minière v Maschinenbau Ulm*, Case 56/65, (1966) ECR 235) and regularly repeated ever since by the Commission and the Court (*FEDETAB*, Commission Decision of July 20, 1978, OJ (1978) L 224/29, ground 91; *Van Landewijk and Others v Commission*, joined cases 209-215 and 218/78R, (1980) ECR 3125, ground 170), it is settled law that an agreement or decision by undertakings or by an association of undertakings is capable of affecting trade between Member States provided that:

> it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement, decision or concerted practice in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. The influence thus foreseeable must give rise to a fear that the realization of a single market between Member States might be impeded.

This approach to the concept of an effect on trade between Member States has been generally construed as requiring a negative influence on trade between Member States. Relevant case law further suggests that such negative influence must be substantial, but this is a requirement to be judged on a case-by-case basis with a view towards determining in each case if the respondent had the power to modify the supply or the demand between Member States for the relevant product.

It should be finally recalled that both the Commission and the Court of Justice have said that the effect on the trade between Member States must be considered in light of Articles 2 and 3(f) of the Treaty (*Instituto Chemioterapico Italiano SPA and Commercial Solvents Corporation v Commission*, joined cases 6 and 7/73, (1974) ECR 223, ground 32).

Based on the above, it is the IECC's contention that both the October 1987 "agreement to agree" and the subsequent bilateral agreements implementing the October agreement affect trade between Member States.

Indeed, it is obvious that an increase in terminal dues and the resulting discouragement of remail will affect not only the traffic in documents but also the trade in goods and services to which the documents refer. Hence, the measures adopted by the Post Offices will not only render more difficult, or impossible, the specific remail trade between Member States, but also affect trade between Member States in a general sense.

Most fundamentally, if allowed to be carried out, these agreements would distort competition in the Common Market by restraining the competitive initiative of the private express companies and progressive Post Offices who are the inventors, developers and most dynamic actors in this specific industry, frustrating the policies of Article 3(f) of the Treaty of Rome. Through competition, remail fosters a greater degree of harmonization in the pricing policies of the Post Offices. Conversely, the elimination of remail would preserve differences in the economic policies of Member States, in particular with regard to the structure and costs of their postal services.

4.3. THE AGREEMENTS HAVE AS THEIR "OBJECT OR EFFECT" THE DISTORTION OF COMPETITION

4.3.1 The object of the agreement is to suppress remail competition.

In the invitation to the meeting held in London on 22 April 1987, the only item for discussion was "whether there is a common policy we can adopt to counter the activity of these companies" (*i.e.* private express companies acting

in joint venture with progressive Post Offices). Hence, for all the Post Offices which accepted this invitation, the meeting constituted, in and of itself, a conspiracy having as its object "the prevention, restriction or distortion of competition within the common market."

The agreements pertaining to terminal dues were the direct result of this meeting and can only be deemed to have as their object, the expressed purpose of the 22 April meeting.

4.3.2 The terminal dues agreements will distort competition between Post Offices and remail joint ventures.

Implementation of the new terminal dues agreements will distort competition between Post Offices as a group and the remail joint ventures (combinations of private express companies and progressive Post Offices). The remail joint ventures will be forced to include in their prices an increased amount of terminal dues payments. Hence, the other elements of their costs (i.e. collecting, sorting, handling of the mailings, air transport, and profit) will become relatively less important and price competition will diminish between remail services and the traditional international services of the national Post Offices. Of course, such an effect would be acceptable if the new terminal dues charges were in fact cost based, but it is obvious that they are not.

More particularly, implementation of the scheme would also create distortions of the type referred to in Article 85 (1)(d), because, in effect, a given destination Post Office will discriminate between remail joint ventures and individual origin Post Offices. As explained above, remail services will have to pay the destination Post Office the increased level of terminal dues for the very first kilogram tendered. On the other hand, an origin Post Office will continue to obtain postal delivery by the destination Post Office by bartering its own inward delivery service, at least so long as it remains within the limits of the barter system. A low cost origin Post Office will obtain delivery by the destination Post Office for an economic cost significantly below the standard terminal dues cost imposed on remail joint ventures. In short, mail originating in a given country will be delivered for significantly different economic costs depending upon whether the destination Post Office receives the mail from the origin country Post Office directly or from a remail joint venture. This difference in effective delivery charges bears no relationship to actual cost differences.

This problem of price discrimination by the destination Post Office is exacerbated further by the fact that not all Post Offices are expected to sign the new terminal dues agreements. A Post Office that does not sign the new terminal dues agreements will continue to pay (or be paid) for the delivery of imbalance mail according to the current UPU terminal dues rate. Therefore, remail transported via such a Post Office will be charged only the current terminal dues rate.

An example may be helpful to illustrate both sources of economic distortion described above. Assume that a British mailer wants to send

statements of account to 1000 customers in France, and the statements weigh 50 grams each. If the British mailer posts his letters with the U.K. Post Office, the U.K. Post Office's cost of delivery in France is approximately the cost to delivering the same quantity of French letters to English addressees (more or less, depending upon the proportion of imbalance in the U.K. - France postal exchange). Domestic U.K. postage is 18 pence or about 0.27 ECU. If we guess that the cost of delivering a letter is about half the cost of domestic postage (which covers marketing and collecting as well as delivery), then the cost of delivery in France via the U.K. Post Office is roughly 135 ECU. If a British mailer uses an express company to remail his letters via a Post Office that has signed the new terminal dues agreements, the cost of delivery in France will be determined by the new terminal dues charge, 207 ECU (see table in section 3.1.1, above). Finally, if the British mailer uses an express company to remail to France via a Post Office that holds to the current UPU terminal dues rate, the charge for delivery by the French Post Office will be 149 ECU.

These three charges—135 ECU, 207 ECU, and 149 ECU—would pertain to identical shipments of letters, which would in fact cost the French Post Office exactly the same to deliver. The differences in the French Post Office's charge (or effective charge, in the case of the U.K. Post Office) for the delivery of this mail derive strictly from distortions created by the terminal dues agreements, new and old. The single factor that determines the level of the French Post Office's charge (or effective charge) is the answer to the question: Which Post Office forwarded the mail to the French Post Office for delivery ?

4.3.3 The new terminal dues charges agreed in Berne in October 1987 constitute a price fixing agreement among competitors as mentioned in Article 85(1)(a).

While competition between remail and traditional postal service is merely distorted, competition among Post Offices is prohibited outright by the new terminal dues agreement. In terms often used by the Commission (see, in particular, *Association Belge des banques*, Commission Decision no. 87/13 of 11 December 1986, OJ no. L 7/27 of 9 January 1987, ground 45), the terminal dues agreements have the "effect of appreciably restricting the freedom of action of (those) that are party to it."

In a normally competitive market, it may be imagined that Post Offices would compete with each other for the delivery of international mail. Each Post Office would try to obtain the best possible delivery price from its foreign "agents," the other Post Offices, based no doubt upon volume, degree of mail preparation, delivery times, and so forth. Based in part upon these negotiated criteria, progressive Post Offices would then deal with express companies as collection and mail handling contractors. The whole concept of the terminal dues agreements, however, is to replace such individual negotiations among Post Offices with a standard price for the inward delivery for international mail. This standard price is the antithesis of a free market.

As noted above, the cost of postal service in the EEC varies substantially from Post Office to Post Office, probably by a factor of three or more. In contrast, the October 1987 terminal dues agreement establishes one price for the delivery of international mail by all subscribing Post Offices. It is obvious, therefore, that the agreement will distort trade from the patterns that would develop in a competitive market. While preoccupied with the prices charged by their competitors, the Post Offices have ignored the costs they actually incur.[7]

4.3.4 The new terminal dues agreements distort competition between users of international delivery services.

Not only will the new terminal dues agreements distort competition (i) between Post Offices and remail joint ventures and (ii) among Post Offices, they will also (iii) distort trade among major users of international delivery services. Of course, some such effect is automatic. The IECC would emphasize, however, that the distortions at the user level can be very significant.

Today, the quality and cost of international delivery services can determine, or substantially affect, the location of information processing and distribution activities, such as data processing (e.g., creation of credit card statements of account), mail processing, mail order activities, libraries, and printing of all sorts. These are substantial commercial activities in themselves. Even more fundamentally, they also form—together with their electronic equivalents—the "raw material which is essential at all levels of economic activity." COM(87) 360 (24 July 1987) (The establishment at community level of a policy and plan of priority actions for development of an information services market).

4.4 THE NEW TERMINAL DUES AGREEMENTS CANNOT BE EXEMPTED UNDER ARTICLE 85(3)

To the best of our knowledge, neither the October 1987 agreement to agree nor the resultant bilateral terminal dues agreements have been notified to the Commission as foreseen by Article 4 §1 of Regulation no. 17 of the Council of 6 February 1962. Therefore, they cannot benefit from the exemption set forth in Article 85(3).

Moreover, the IECC contends that even if the agreements had been notified, none of the four conditions required for an exemption under

[7]The current terminal dues and barter system sanctioned by the 1984 UPU Convention suffers from many of the defects of the October 1987 agreement to revise the terminal dues charges. However, the IECC believes that it is unnecessary to attack these provisions of the UPU Convention directly. Unlike the agreement to revise the terminal dues agreement, the Convention was agreed by the member governments, and there is no evidence that the terminal dues provisions were aimed specifically at remail competition. Moreover, the IECC is confident that Commission rejection of the proposed revisions in terminal dues charges will induce the EC Member States to support a cost based inward delivery charge in the upcoming UPU Congress of November 1989, especially in light of the imminence of 1992.

Article 85(3) could be deemed to have been met in the case at issue, for the reasons stated below.

4.4.1 The new terminal dues agreements will not improve the production or distribution of international mail.

The introduction of remail service has led to several improvements in the distribution of international mail. It has induced the various Post Offices to compete among themselves, forcing them to abandon their monopolistic airmail prices, at least for bulk mailings. Indeed, remail developed precisely because of the failure of traditional postal services to meet the needs of modern international bulk mailings (see section 2.2.1). At least for some European Post Offices, remail service has brought business which they would not otherwise have obtained, e.g., bulk mailings imported from the U.S.

Moreover, the improved service and lower cost of remail service has apparently expanded the total market. This, at least, is the preliminary lesson that can be inferred from the United States, which officially recognized the legality of remail in September 1986. Since that date, international remail traffic from the U.S. has grown tremendously, apparently without causing a significant reduction in the international mail handled by the U.S. Postal Service (judging from historical trends).

In light of the demonstrable improvements in the distribution of international mail fostered by remail service, it is difficult to conceive what improvements might now be introduced by hindering remail through the new terminal dues charges.

4.4.2 The new terminal dues agreements will not promote technical or economic progress.

It cannot be challenged that private remailers have introduced technical progress in the distribution of international mailings (see excerpts from Bulletin de l'I.R.E.P.P., *Exhibit 1(b)*, pp. 13, 104) through the use of new techniques such as, *inter alia*, the collection of mailings at the sender's location, use of a central hub airport, chartered flights allowing the mail to be rushed out of the country of origin the very same night as it was mailed, etc (see section 5.2.3(c), below). It is not disputed that these techniques that did not exist before the arrival of private remailers have now, at least some of them, been adopted by Post Offices.

Both agreements on terminal dues have as their purpose at the very least a considerable restraint on remail service and such restraint will bring to an end this technical progress. Indeed, it is submitted that a restraining of remail service will stop the continuous trend of technical improvements and efficiency generated by private initiative and competition. Moreover, the suppression of remail will impede technical progress since the services offered by the Post Offices for international bulk mailings are limited and (in the words often used by the Commission) "will not be the best available to meet the requirements

of a significant proportion of users." Such opinion is shared by the PTT themselves (see excerpts from Bulletin de l'I.R.E.P.P. *Exhibit 1(b)*, p. 20).

4.4.3 The new terminal dues agreements will not allow consumers a fair share of the resulting benefit.

Among the signatory Post Offices, the overall effect of the terminal dues agreements will be the establishment of a uniform rate for delivery of imbalances in international mail. The uniform rate, however, will be applicable to all items transported by the remail joint ventures. As compared to prevailing rates, the new terminal dues rates will represent a dramatic increase in the cost of delivering light weight letters and, to some degree, a decrease in the cost of delivering heavy international publications (see section 3.1.1). Depending upon their traffic characteristics, some Post Offices will gain and some will lose.

The result might be advantageous for some low cost Post Offices which are net importers of letters since they will be paid more (*i.e.* by way of higher terminal dues) than the costs they incur for the internal delivery of foreign origin mail. But because of the principle of non-sharing of charges (see section 2.2.2), the consumers from other Member States that send letters to such low cost Post Offices will not benefit from the windfall which will accrue to such low cost Post Offices. On the contrary, one may reasonably assume that Post Offices which are net exporters of letters will have to bear increased costs and will likely have to increase their postal charges in order to make up for the losses incurred as a result of the new terminal dues rates.

In conclusion, in certain Member States, consumers may not only be barred from enjoying the technical advantages of remail, they may also be stuck with higher postage rates to underwrite higher terminal dues payments.

4.4.4 The new scheme on terminal dues will (a) impose restrictions which are not indispensable to a better operation of international mail and (b) eliminate competition in substantial aspects of international delivery service.

It has just been shown that the two denounced agreements do not contribute to improving the distribution of international bulk mailings and do not promote technical of economic progress and therefore the study of this first part of the fourth condition for the exemption under Article 85(3) appears superfluous.

The only plausible argument that can be raised in defense of the terminal dues agreements is, in the opinion of the IECC, that they are more closely aligned to actual costs than the current terminal dues scheme. This may be true, but this argument does not meet the test of indispensability. On the contrary, it is obvious that aligning charges to costs can be achieved quite simply by basing charges on the costs of individual Post Offices. Such a system would avoid virtually all of the competitive restrictions and distortions threatened by the new agreements.

Regarding the second part of the fourth condition for the exemption under Article 85(3), it has been shown that the new terminal dues agreements will likely (i) eliminate competition between the Post Offices and the remail joint ventures in countries where postal costs are less than the new terminal dues level (see section 4.3.2) and (ii) eliminate competition among Post Offices in the procurement of inward postal delivery services (see section 4.3.3). There appears to be no need to elaborate on these points.

4.5 THE TERMINAL DUES AGREEMENTS ARE NOT COVERED BY THE EXEMPTION OF ARTICLE 234 OF THE TREATY OF ROME

As recalled by the Court of Justice at ground 36 of the British Telecommunications case (*Italian Republic v Commission*, case 41/83 (1985) ECR 873), Article 234 resolves any conflict between Community law and the pre-existing rules of international law, by giving the latter precedence over the former. Such provision does not apply here. All the agreements denounced in this complaint, namely those concerning the terminal dues charges as well as those examined hereafter under V, are regulated by the UPU Convention (respectively Article 64 and 23 thereof). Article 92 of that Convention specifically states that it came into force on 1 January 1986 and shall remain in force until the entry into force of the Acts of the next UPU Congress. It is true, of course, that some of the provisions of the current UPU Convention are similar to provisions in prior UPU Conventions in existence before the Treaty of Rome became applicable. This is irrelevant, however. On this, the IECC would refer the Commission to its position as quoted by the Court of Justice at ground 38 of the above-mentioned *British Telecommunications* case. There it is stated that the Commission itself found similarity with prior treaties to be irrelevant "because members of the (ITU) recover their freedom of action and enter into a fresh commitment whenever a reunion occurs"; in other terms the Commission concluded that there had been a novation. It is, therefore, clear that the rules being used as a basis for the agreements denounced in this complaint cannot be regarded as having any anteriority whatsoever on the Treaty of Rome.

V. INVOCATION OF ARTICLE 23 OF THE UPU CONVENTION CONTRAVENES ARTICLE 86 AND ARTICLE 85

5.1 THE NATIONAL POST OFFICES ARE COMMERCIAL UNDERTAKINGS

In general, the Commission and the European Court have regarded the national Post Offices as commercial undertakings (see section 4.1).

In addition, in respect to the invocation of Article 23 of the UPU Convention, certain additional points should be noted.

First, Article 23 of the UPU Convention is not mandatory. Appeal to its restrictions is discretionary.

Second, the power to implement Article 23 is, by its terms, vested in the

"member country" not the "postal administration." As far as the IECC is aware, no government of a UPU member country directed or approved any of the Article 23 interventions described above (section 3.2). In each case, the national Post Office invoked Article 23 as though it were the government. It does not appear in any case, however, that the Post Office requested or obtained authorization for the specific actions taken. Hence, in each case, the national Post Office "invoked" Article 23 for purely commercial purposes but it did not and could not "implement" Article 23 by itself.

In the U.K., the Parliamentary Under-Secretary for Industry, Mr. John Butcher, has emphasized the British government's distance from, and perhaps disagreement with, any postal efforts to invoke Article 23 (*Exhibit 8*):

> It is, of course, a matter for individual postal administrations to decide whether to take action under article 23. *My legal advice is that a collective decision by postal administrations to implement article 23 could be contrary to the Treaty of Rome. This is also a matter for the Post Office* [emphasis added].

5.2 VIOLATION OF ARTICLE 86

5.2.1 The relevant market

Definition of the relevant market is a prerequisite for establishing "dominance." As recalled recently by the Commission (ECS AKZO, Commission Decision of 14 December 1985, OJ (1985) L 374/1, ground 62):

> This [the relevant market] constitutes the area of business in which the economic power of the undertaking in question vis a vis its competitors is to be judged.

The IECC contends that the relevant market is the market for outbound international document delivery services in the countries concerned. These are the markets which the Post Offices are seeking to protect since it is from outbound postal services that Post Offices derive their primary revenues.

Thus, in the first abuse alleged (involving the U.K. Post Office) the relevant market is the market for outbound international delivery service of documents originating in the U.K. This is the market that the U.K. is seeking to protect by calling upon foreign post offices to intercept U.K. origin mail exported by a remail joint venture.

Similarly, in the second abuse alleged (involving the Bundespost) the relevant market is the market for outbound international documents originating in West Germany. The Bundespost is seeking to protect this market both directly, by citing Article 23 to potential German users of remail, and indirectly, by discouraging the development of foreign remail services operating into West Germany.

5.2.2 Each national Post Office is "dominant" in its market for outbound international document delivery services.

A dominant position under Article 86 has been defined by the Court of Justice in the Hoffmann-La Roche case (Hoffmann-La Roche & Co. AG v Commission, case 85/76 (1979) ECR 461, grounds 38 and 39) as

> a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such a position does not preclude some competition . . . but enables the undertaking which profits by it, *if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop*, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment. [emphasis added]

The IECC contends that the structure and the network deriving from postal legislation and postal traditions give national Post Offices in their respective countries a *de facto* dominant position for the transportation and distribution of outbound international documents, including international bulk mailings. As the Court of Justice has noted (*Telemarketing v CLT*, Case 311/84 of 3 October 1985, ECR 3270, paragraph (1) of the Ruling):

> Article 86 of the EEC Treaty must be interpreted as applying to an undertaking holding a dominant position on a particular market, even where that position is due not to the activity of the undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on that market.

Moreover, even if a Post Office would chose to challenge such contention, it could not deny that a scheme aiming at implementing Article 23 of the UPU Convention confirms that it has the power not only to influence but also to *determine* the conditions of competition in the relevant market. The purpose (and effect, if ever implemented) of Article 23 is the total elimination of remail services as competitors for the handling and transportation of outbound international documents. The mere fact that national Post Offices feel entitled to request implementation of Article 23 by "sister" Post Offices further confirms their dominance. In this respect, the IECC wishes to recall the terms used by the Commission at ground 67 in the AKZO case: "The power to exclude competition . . . may also involve the ability to eliminate or seriously weaken existing competitors or to prevent potential competitors from entering the market."

In summary, the IECC infers the dominant position of the UK Post Office and the Bundespost from their power to invoke a scheme that could eliminate all competition among the actors in the market. As stated by the Commission in the Michelin case (*Bandengroothandel Friedschebrug v Michelin*, Commission Decision of October 7, 1981, OJ (1981) L 353/33, ground 35) and later

adopted by Advocate-General Verloren Van Themaat at the occasion of the appeal of the case before the Court of Justice: "As is often the case in situations such as that being examined here, the finding of a dominant position is supported, *inter alia*, by the evidence relating to the abuse of that position."

Under this test of dominance, it is clear without extensive discussion that both the U.K. Post Office and the Bundespost are dominant in the outbound delivery services from their respective countries.

5.2.3 As the cited activities demonstrate, Article 23 lends itself to a variety of anticompetitive uses.

a) The activities brought to attention of the Commission (section 3.2) illustrate the several ways in which Article 23 can be used to discourage competition.

Section 3.2.1 describes a request by the British Post Office to intercept U.K. origin mail that has been remailed. This is a blatant attempt to reinforce the U.K. Post Office's dominant position in the outbound delivery market. At least one foreign Post Office, the Singapore Post Office, responded positively to this appeal.

Section 3.2.2 describes how the Bundespost has cited Article 23 to outbound mailers. This is a marketing strategy that appeals to the superior character and unquestioned authority of "international law" in order to reinforce a commercial position.

Section 3.2.2 also describes the Bundespost's interception and return of foreign origin remail entering West Germany. In so doing, the IECC submits, the Bundespost is seeking to persuade other Post Offices to enforce Article 23 against German origin mail as a matter of reciprocity. This may be deemed to constitute a conspiracy under Article 85 (see section 5.3, below). Moreover, in this indirect manner, the Bundespost is again protecting its own outbound market.

b) Invocation of Article 23 limits the market and results in the application of dissimilar conditions to equivalent transactions, in contravention of Article 86(b) and (c).

The applicability of Article 86 to this case is shown clearly by a consideration of the 1982 *British Telecommunications* case (*British Telecommunications*, Commission Decision of 10 December 1982; OJ (1982) L 360/36) (hereafter, "BT case").

At issue in the BT case were two tariffs of British Telecommunications for receiving and retransmitting telex messages sent from a non-U.K. point for forwarding to another non-U.K. point for a charge less than the charge applicable in the country of origin. That is, for example, a telex forwarding company in the U.K. was not supposed to receive a telex from a sender in Germany and resend the telex to a U.S. addressee for a fee less than the

German telecommunication administration would have charged for transmitting the same message directly to the U.S. (BT case, ground 11). Telex forwarding was commercially feasible because some administrations' telex rates were very high compared to U.K. rates.

Despite the British Telecommunications tariff, private reforwarding of telexes via the U.K. increased, and the international union of telecommunications administrations responded by adopting a regulation prohibiting outright retelexing "with a view to evading the full charges due for a complete route" (BT case, ground 15). British Telecommunications then issued a revised tariff flatly prohibiting forwarding of any telex originating from and bound for points outside the U.K.

The Commission found both tariffs incompatible with the Treaty. The original price maintenance tariff was held to violate Article 86 on two grounds especially pertinent here:

- it "limited (retelexing) to the prejudice of customers in other EEC Member States." (*BT* case, ground 30(i)); and
- it "applied dissimilar conditions to equivalent transactions" (BT case, ground 30(ii)).

The Commission noted that of all telex messages tendered to British Telecommunications a dissimilar condition was applied to international telexes, that is, they must either originate in the U.K. or the U.K. telex forwarding company must charge the foreign sender a minimum price. The Commission also noted that requiring telex forwarding companies to charge a minimum price placed them "at a competitive disadvantage vis-à-vis the national telecommunications authorities and agencies in other Member States not subject to such restrictions" (*BT* case, ground 30(ii)).

The second tariff, banning retelexing entirely, was also found to violate Article 86 since it limited the market. Specifically, the Commission noted:

> [The BT tariff] both limits the development of a new market and the use of new technology to the prejudice of relay operators and their customers who are thus prevented from making *more efficient use of existing telecommunication systems. The fact that in so doing the message forwarding agencies are simply exploiting the tariff differentials existing between telex and telephone services provided by the telecommunication authorities is irrelevant* [*BT* case, ground 34, emphasis added].

The conclusions of the Commission in this case squarely apply to the invocation of Article 23 by the Post Offices.

In the first instance described (see section 3.2.1), the British Post Office requested foreign Post Offices to apply precisely the same type of discrimination condemned in the BT case. In so doing, the British Post Office specifically sought to invoke its "sisterly" relationship with the foreign Post Office. The British Post Office's letter also contains a not so subtle hint that failure to accede to its request may result in a deterioration of the "previous excellent relations" between the Post Offices. Plainly, the British Post Office's

letter is an exercise of commercial and political dominance in the field of international mail. Since the intervention sought would violate Article 86 if done directly by the British Post Office, it must likewise be deemed a violation of Article 86 if the British Post Office accomplishes the same end by inducing others to make the intervention.

In the second instance (i.e. the Dresdner Bank letter, see section 3.2.2), the Bundespost has invoked Article 23 with a view to limiting the commercial choices of German mailers. The Bundespost has discouraged the German mailer from using, for example, the Belgian Post Office to distribute his international mailing rather than the Bundespost itself. In exactly the same way, the British Telecommunications tariff attempted to discourage a foreign telex subscriber from using a foreign telecommunications administration (i.e., British Telecommunications) rather than his local telecommunications administration.

In the third instance cited (see section 3.2.2), the Bundespost invoked Article 23 to intercept and return foreign origin mail based *solely* on whether or not the mail was tendered to the Bundespost by the Postal administration located in the country where the mailer resided. This constitutes a clear cut example of applying dissimilar conditions to transactions (the delivery of inbound mail) that are in every respect equivalent. In very much the same manner, in the BT case, the Commission proscribed treating telex messages in a different manner based solely upon in which country the telex sender resided.

c) The invocation of Article 23 also seeks to extend the dominant position of the national Post Offices by prohibiting the use of international express services for provision of a new service, the transmission of bulk international mailings.

Bulk mailings, i.e. letters or other documents shipped in large quantities, are operationally distinguishable from individual mailings. Although a bulk mailing may require sorting and consolidation with other bulk mailings, the origin Post Office does not incur the costs of collection and aggregation associated with individual letters. Indeed, a presorted international bulk mailing is, in essence, handled in the origin country as an express shipment. The object, and the practical effect, of invoking Article 23 is to extirpate the express industry from a submarket which the express industry has admittedly pioneered and for which it is well suited.

The operational distinctness of bulk mailings is manifest in a recent article in the *Financial Times* (8 June 1987):

> The [U.K.] Post Office is setting up a separate national delivery system to handle its thriving bulk mail business, which now accounts for 20 per cent of 46m letters and packets posted every day . . . It will operate separately from the existing Royal Mail delivery system . . . . The discrete nature of the new service is also in line with the strategy of splitting up the letters business into manageable parts . . . The bulk mail service is used largely by

> banks, building societies, credit card companies, the mail order business and others sending out large numbers of identical of similar documents [emphasis added].

The express companies recognized the distinct characteristics of bulk mailings and, in conjunction with progressive Post Offices, developed a service that met the needs of bulk international mailers. As described above, section 2.2.1, this "remail" service was provided first for bulk mailings of printed matter and later for bulk mailings of similar letters, such as statements of account.

The competitive interplay between the development of remail and the response by the international postal system was lucidly explained in a revealing exposition of the status of international mail by senior U.S. Postal Service officials in September 1985.[8] Although the U.S. Postal Service is not a subject of this complaint, given the large role of the U.S. in the international postal system, the international services of the U.S. Postal Service reflect generally the state of development of the international postal system.

On 22 April 1987, the Swedish Post Office reported to the Remail Conference in terms similar to those used by the U.S. Postal Service two years earlier:

> The only real possibility open to Postal Administrations if they want to meet the competition from the remail product offered by the competitors is *to immediately develop a similar postal letter product*. Such a product is outlined [in an annex]:
>
> 1. The sender pre-sorts items for countries covered by the service.
> 2. Free choice of calculating postage on a traditional basis or a kg

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[8]The occasion for the exposition was a presentation by Mr. W. Duka, Assistant Senior Postmaster General of the U.S. Postal Service, to the U.S. Postal Service Board of Governors (U.S. Postal Service, Transcript of Board of Governors meeting, Friday, September 6, 1985):

> ASSISTANT PMG DUKA. Let me turn now to the quality of international mail service . . . we freely acknowledge that international service can and certainly should be better . . .
>
> As part of our *marketing* development strategy, we're examining a number of *new possibilities*. These include the possible development of *new airlift services that would fill the gap between current surface and air delivery times and current surface and air international rates* . . . .
>
> Two programs are underway right now that demonstrate our desire to get international mail back on a healthy track. *The first is an international presort airmail program*, a test program, *that began last week* in four cities. *Our purpose is to match the delivery claims made by the so-called remailing companies*. . . .
>
> *A second current initiative involves our international surface airlift service* which we call ISAL.
>
> GOVERNOR VOSS . . . . "*[W]e should have done this 5 years ago when remailing began* and we have to recognize . . . as every corporation in the country recognizes, to really be competitive, you have to be innovative . . . .
>
> ASSISTANT PMG DUKA. . . . *I quite agree with you that we are coming too late, I think, to try to apply some imagination and creativity and try to be more competitive with these private firms* and I certainly agree with you that we should have been out ahead of them in providing a better service *before they in effect have forced us to do this* [transcript at 44-52 (emphasis added)].

basis.

3. The mail is picked up by the Postal Services in the afternoon.

4. It is taken in a special stream through the outward offices of exchanges.

5. Special dispatches. Special marking of bag labels.

6. Fastest possible transports (departures in the evening of J [first day]).

7. Special stream through the inward office of exchange.

8. Fast transfer to the domestic mailstream.

9. The same quality of handling as for domestic priority mail."

The Swedish report of April 1987 makes very clear two crucial points. First, the traditional offerings of the Post Offices did not include a "postal letter product" comparable to remail. Second, the characteristics of remail listed by the Swedish Post Office—pick up, daily dispatch, separate priority handling, payment on a kilogram basis, etc .—*are the characteristics of express service*, up to the point of insertion into the "domestic priority mail" service. These insights of the Swedish Post Office are especially significant since, as result of this report, the Swedish Post Office was elected as chairman of the Working Party of the Remail Conference.

To summarize, the evidence indicates that:

- the remail joint ventures, not the traditional postal system, developed new services appropriately adapted to international bulk commercial mailings;
- these services are, in significant respects, distinguishable from traditional postal services; and
- these services are essentially express-type services, in the territory of the origin country; these services use the domestic Post Office for the distribution of mail in the country of destination.

It is therefore clear that, by means of Article 23, the Post Offices are attempting to extend their dominant position to include a new international service (which might be termed "international bulk business letter service"). This service is, in the country of origin, more "express" in nature than it is "postal" in nature. These efforts represent an extension of "dominant position" for the simple reason that the remail joint ventures, not the Post Offices, developed the service in the first place, as clearly acknowledged by said Post Offices.

In this context the IECC wishes to recall the terms used by the Court of Justice first in the Continental Can case of 21 February 1973 where it stated that in general the strengthening of a dominant position (*Europemballage Corporation and Continental Can Company Inc. v Commission*, case 6/72, (1973) ECR 215, ground 26) held in a particular product market may constitute an abuse of that dominant position. The IECC would also note, in particular, paragraph (2) of the Commission's ruling in the above mentioned *Telemarketing* case:

> An abuse within the meaning of Article 86 is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to one undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighboring but separate market, with the possibility of eliminating all competition from such undertaking.

5.2.4 The Abuse has an Effect upon Trade Between Member States

As the Court of Justice pointed out (*United Brands Company and United Brands Continental B.V. v Commission of the European Communities*, Case 27/76, (1978) ECR 207, ground 201):

> if the occupier of a dominant position, established in the Common Market, aims at eliminating a competitor who is also established in the Common Market, it is immaterial whether this behaviour relates to trade between Member States once it has been shown that such elimination will have repercussions on the patterns of competition in the Common Market.

Without doubt, the specific activities complained of, and summarized in section 5.2.3, "have repercussions on the patterns competition in the Common Market" (see also section 4.4, above).

5.3 VIOLATION OF ARTICLE 85

5.3.1 The violations of Article 85

Article 23 (quoted in section 2.2.3, above) has as its explicit purpose the partitioning of, *inter alia*, the territory of the EEC into its component Member States. Implementation of Article 23 by EEC Post Offices, giving to one another explicit or implicit reciprocal commitments, can therefore be regarded as a market allocation agreement *per se*, contrary to the spirit of the Treaty of Rome and the letter of Article 85 (1)(c).

The purpose of the market allocation scheme set forth in Article 23 appears in the very first paragraph. In the EEC, Article 23 would prohibit a resident of one Member State from profiting by a more favourable price prevailing in another Member State. Such acknowledged purpose is, however, directly contrary to the purpose of the Treaty of Rome. In its effort to realize a single internal market, the Commission has particularly supported the right of the EEC consumer to purchase goods and services in which Member State offers the best price (for example, as a result of parallel imports).

In this respect, the IECC recalls that as early as in 1972, the Directorate of Competition in its First Report stated (see page 25 §2 of 1st Report on Competition Policy):

> Market-sharing agreements are particularly restrictive of competition and contrary to the achievement of a single market . . .
>
> The protection of their home market allows producers to pursue a commercial policy—*particularly a pricing policy*—in that market which is

> insulated from the competition of other parties to the agreement in other Member States, and which can sometimes only be maintained because they have no fear of competition from that direction . . . [emphasis added].

Both the Commission and the Court of Justice have continued to this day to adhere to such premise and the IECC believes that no exception should be made for the scheme devised by Article 23 of the UPU Convention.

Moreover the implementation of Article 23 would also create a distortion of the type referred to in Article 85(1)(d). It would lead to a discrimination among citizens of the same Member State desirous to send international bulk mailings abroad. In implementing Article 23, Post Office A will accept mailings from Country B only if they are tendered by Post Office B but will refuse them if tendered by Post Office C. Post Office A will thereby apply dissimilar conditions to equivalent transactions of citizens of Member State B.

5.3.2 Other conditions of Article 85

The first of these conditions concerns the fact that the national Post Offices are "commercial undertakings." This is fulfilled for reasons explained in sections 4.1 and 5.1, above.

The second condition concerns the effect on trade between Member States. This condition is fulfilled for the reasons explained in section 4.2, above.

5.3.3 The violations described in 5.2.1 cannot be exempted under 85 (3)

To the best of its knowledge, the IECC contends that the implementation of Article 23 was never notified to the Commission as foreseen in Article 4 §1 of Regulation no. 17 of the Council of 6 February 1962. Therefore, any explicit or implicit agreement to implement Article 23 cannot benefit from the exemption set forth in Article 85(3). The IECC contends further that, for the same reasons as those explained in section 4.4, above, even if the agreement had been notified, none of the four conditions required for an exemption could be met.

VI. THE EXISTENCE OF A LEGITIMATE INTEREST

This requirement which is mentioned in Article 3, subparagraph 2(b), of Regulation no. 17 has always been interpreted to mean that it is sufficient that the claimant be directly or indirectly affected by the anticompetitive behavior. Moreover, it has always been recognized that professional associations representing the interest of their members have standing as claimants.

In this context, it is clear that the above mentioned activities threaten to injure or restrict international remail service, in the provision of which the private express industry is a partner and joint venturer. As the only international trade association of the private international express industry, the IECC clearly has a legitimate interest in initiating an action under the Treaty of Rome.

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EEO Comment on REIMS (1996)

On 14 February 1996, the European Commission, in accordance with paragraph 19 of Council Regulation No. 17, published a summary of the notification of an agreement between 14 of the Community's 15 public postal operators. The "REIMS" agreement fixes rates that postal operators will charge each other for the delivery of cross-border mail. The Commission has invited interested parties to submit comments. In response, the European Express Organisation (EEO) is pleased to submit its comments as follows.

1. THE LEGAL CRITERIA WHICH THE REIMS AGREEMENT MUST MEET ARE SET OUT IN ARTICLE 85 OF THE EC TREATY.

Under Article 85(1), agreements between undertakings which may affect trade between Member States and have as their object or effect the prevention, restriction, or distortion of competition with the common market are prohibited. Under Article 85(3), however, even if the REIMS agreement is inconsistent with Article 85(1), the Commission may declare the inapplicability of Article 85(1) if four cumulative legal tests are satisfied:

- Does REIMS improve or promote (i) the production of goods or (ii) the distribution of goods, (iii) technical progress, or (iv) economic progress?
- Does REIMS allow "consumers a fair share of the resulting benefit"?
- Does REIMS avoid imposing on the undertakings concerned "restrictions which are not indispensable to the attainment of these objectives"?

European Express Organisation, "Comments on the Agreement on Terminal Dues (Reims) Between Postal Operators" (Mar 18, 1996) (submitted to the European Commission in Case No. IV/35.849 - Reims, OJ 96/C 42/06 (14.2.96). Appendix omitted.

- Does REIMS avoid affording the undertakings concerned "the possibility of eliminating competition in respect to a substantial part of the products in question"?

The burden of proof for demonstrating compliance with these conditions lies with those undertakings participating in the agreement in question. EEO submits that, based upon the very limited information available to the public, the REIMS agreement does not appear to satisfy these criteria.

2. THE EEO SUBMITS THAT THE REIMS AGREEMENT IS INCONSISTENT WITH ARTICLE 85(1).

In order to assess whether the REIMS agreement would restrict or distort trade between Member States, it is necessary to consider briefly the situation that would exist in the absence of any special inter-postal agreement on "terminal dues" (whether based on UPU, CEPT, REIMS or domestic postage[1]). Without an inter-postal agreement, each post office would pay domestic postage for delivery of mail by other Community post offices. In tendering cross-border mail to another Community post office, each post office would qualify for the same discounts for bulk, sorted mail as apply to large domestic mailers. As a large mailer, each post office would qualify for rebates for poor quality of service to the same extent, if any, that such rebates are made available to other domestic mailers. In short, each post office would distribute its intra-Community mail to other post offices in the same manner as other large Community undertakings. Such situation would be competitively neutral and undistorted. By eliminating the "frontier" effect in postal rates, it would promote the distribution of goods in the Single Market.

An open framework for mailings between post offices would increase customer pressure for good service since post offices would be like large customers who compete with one another, and each post office would demand the best possible service for the best possible price from the delivering post office. As the Commission found in its 1993 Statement of Objections relevant to the 1987 CEPT terminal dues agreement in case n° IV/32.791-Remail, post offices compete with one another "as potential forwarders of bulk international mail," a competition that has been fostered by remail:

> Through remail, postal administrations are placed in competition with each other as potential forwarders of bulk international mail. [¶ 17] . . . .
>
> The terminal dues agreement has the effect of appreciably restricting the freedom of those that are party to it. The possibility of individually negotiated commercial arrangements is reduced by the agreement on standard pricing arrangements for the inward delivery of international mail. In a freely competitive market, certain patterns of trading would develop to reflect the fact that the cost of providing postal services varies by a factor

[1]As used in this comment, the term "terminal dues" refers generically to any charge which a post office applies for the delivery of inward cross-border mail, whether that charge is based upon formulas derived from the UPU, CEPT, or REIMS agreements or from domestic postage.

> of about three within the EC. However, the agreement obstructs the development of such patterns and thus distorts trade in postal services. [¶ 68]

In the REIMS agreement, so far as EEO is able to discover, the post offices do not propose to treat the mail tendered by other post offices in the same manner as mail tendered by other mailers.[2] Instead, they propose to modify the ordinary market mechanisms by adopting a set of rules under which they give each other special treatment. In particular, main elements of the REIMS agreement include:

- an agreed postage rate system applicable only to mail tendered by post offices that features (by the end of a transitional period): (i) a mutually agreed discount (20%) from domestic postage available only to post offices, (ii) an agreement that this discount serves as a minimum rate floor for some post offices, and (iii) an agreement to ignore the actual number of postal items tendered in favor of a standard assumption about the average weight per piece.
- an agreed set of quality of service criteria applicable only to mail tendered by post offices;
- an agreed rebate system for poor quality service available only to mail tendered by post offices;
- an agreement to continue, for another six years, (i) some or all of the elements of the anticompetitive 1987 CEPT terminal dues scheme and (ii) enforcement of the market allocation provisions of the Universal Postal Convention and (iii) an agreement on a minimum rate rule of 1.491 SDR per kilogram and 0.147 SDR per item.

EEO submits that *each* of these elements will distort trade between Member States and *each* is inconsistent with Article 85(1) of the EC Treaty. Indeed, several elements of the REIMS agreement have already been found inconsistent with Article 85(1) by the Commission. The REIMS agreement extends the CEPT terminal dues agreement for one year (1996) without change and extends some aspects of this agreement for an additional five years, yet the Commission has already found the CEPT agreement in violation of the EC Treaty.[3] Inclusion of these provisions in the REIMS agreement is especially deplorable; these practices should have been long since condemned by the Commission.

3. THE COMMISSION'S SUMMARY FAILS TO REVEAL KEY DETAILS OF THE REIMS AGREEMENT AND THE EVIDENCE, IF ANY, TENDERED IN SUPPORT OF THE AGREEMENT; THESE OMISSIONS RENDER IT IMPOSSIBLE FOR

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[2]Although EEO has not seen a copy of the REIMS agreement notified to the Commission, it has seen earlier drafts of the REIMS agreement.

[3]Statement of Objections (5 April 1993), Case IV/32.791 - Remail; Decision SG(95) D/1790 (17 Feb 1995).

INTERESTED PARTIES TO PROVIDE APPROPRIATE COMMENTS AND, GIVEN THE IMPORTANCE OF THE AGREEMENT AND THE PUBLIC NATURE OF MOST OF THE COMMERCE AFFECTED, ARE INEXCUSABLE.

Although the Commission's summary of the notification offers a general description of the REIMS agreement, it does not provide sufficient details of the agreement to enable the public to offer meaningful comment. Similarly, the Commission's summary omits any reference to the factual evidence, if any, tendered by the parties in support of the agreement. Without such data, it is extremely difficult for the public to assess the public benefits, if any, that may flow from the REIMS agreement.[4]

The case for such transparency is more than merely logical. The REIMS agreement is one of the most important to be examined by the Commission. Its importance arises not merely from the large intrinsic volume of trade represented by the exchange of mail, but also from its effect on the much larger universe of commercial transactions affected by cross-border mail.

Moreover, it must be recalled that the subject matter of REIMS agreement is especially *public* in nature. The commerce directly affected by the REIMS agreement is derived almost entirely from special or exclusive rights granted to national post offices. Most parties to the REIMS agreement claim that they enjoy a legal monopoly over the items subject to the REIMS agreement (cross-border mail). Even if this claim is legally questionable,[5] it is obvious that all of the parties to the REIMS agreement hold a dominant position in the cross-border mail market by virtue of special or exclusive rights conferred in the domestic mail market.[6] At bottom, the REIMS agreement is thus agreement between public undertakings to make use of publicly conferred benefits in a manner that will distort trade between Member States.

The public nature of the REIMS agreement is also evident from its

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[4]If the parties have provided no evidence in support of the REIMS agreement, then the agreement must be condemned since the parties have failed to meet their burden of proof. If the parties to the REIMS agreement have provided supporting evidence, then it should be summarized in sufficient detail so that interested parties may comment upon it intelligently.

[5]EEO believes that, under the EC Treaty, a post office or a Member State may not restrict cross-border postal services unless such restrictions are demonstrably necessary to the maintenance of universal postal service and otherwise in conformance with the strict standards of Article 90(2). As Commissioner Van Miert has explicitly confirmed to the EEO, "*there [is] little quantitative evidence presented on how liberalization [of cross-border inward mail] would affect the universal service*" (see letter n° 0288 of February 3, 1994 to Mr. Van der Lande, Secretary General of the EEO). The Commission is also perfectly aware that a 1994-95 study commissioned by it (J. Dogson and S. Trotter, "*Study on the Impact of Liberalization of Inward Cross-border Mail on the Provision of Universal Service and the Options for Progressive Liberalization*") showed that liberalization of all cross-border mail would pose no significant threat to universal service in the Community.

[6]Although EEO applauds recent efforts in Sweden and Finland to eliminate special or exclusive rights for the public post offices, it must be conceded that the dominant positions currently enjoyed by these post offices are due primarily to the momentum of special or exclusive rights granted in the past.

indirect effects. It will indirectly affect the international remail industry which competes with normal international mail services and the printing and mail preparation activities which produce international mail. It is well known and clearly recognized by the Commission in the above-mentioned case IV/32.791-Remail, that the post offices have, contrary to public policy, used terminal dues agreements to hinder and distort the development of these sectors.

Under these circumstances, the EEO submits that the Commission should provide full details of the REIMS agreement and its effects on Community commerce and public policy.

4. THE REIMS AGREEMENT PROVIDES ZERO CONTRIBUTION TO THE PRODUCTION OR DISTRIBUTION OF GOODS AND/OR PROMOTION OF TECHNICAL OR ECONOMIC PROGRESS FOR THE COMMUNITY AS A WHOLE.

If there are any public benefits to be derived from the REIMS agreement, they must be benefits that would not exist in the absence of a REIMS agreement. The Commission's notice, however, suggests no public benefits that would not be available to an equal or greater extent without a REIMS agreement. In paragraph 5, the Commission identifies two "aims" of the REIMS agreement:

- fair compensation for the delivery of cross-border mail; and
- improvement in the quality of cross-border mail service.

However, it is clear that post offices would immediately receive fair compensation for the delivery of cross-border mail if they simply paid each other domestic postage rates. As for improvement in cross-border mail service, it is clear that—as the Commission found in the Postal Green Paper —nothing would improve cross-border mail more than liberalization, yet the post offices have vigorously opposed this approach. Instead of competition, the REIMS agreement proposes rebates for poor services. While EEO agrees that rebates for poor service may improve service quality, this possibility does not justify the REIMS agreement since such rebates are offered on a selective and anticompetitive basis. According to the REIMS agreement, rebates are limited to cross-border mail and to mail tendered by post offices. Do not the post offices want to improve domestic mail quality? Do they not want to improve the service quality of cross-border mail tendered by other mailers and operators? If a post office wishes to create incentives for itself to stimulate service quality it can (like any other undertaking) introduce a non-discriminatory rebate system applicable to all mailers, domestic and cross-border. There is no reason why such rebates need to be introduced by agreement between post offices.[7]

There is no reason to believe that any of the other provisions of the

[7]Moreover this discriminatory rebate system appears to be in violation of Article 86 of the EC Treaty since it amounts to a price discrimination that is not objectively justified.

REIMS agreement will improve upon normal market mechanisms. Consider the same proposals in a domestic mail context. Suppose a group of major mailers constituting 4 or 5 percent of the business of a Community post office notified to the Commission a six-year agreement under which the post office agreed to provide all parties with a standard discount for bulk mail. Suppose the agreement further provided that differences in the actual number of pieces per kilogram would be overlooked and the post office pledged not to negotiate a better deal with any of the mailers individually. Is there any reason to imagine that such an agreement would produce public benefits cognizable under Article 85(3)? Of course not.

Nor should it be imagined that the REIMS agreement can be justified as a means of insulating mailers from broadly disruptive, Community-wide economic shocks. In the Community as a whole, higher (or lower) terminal dues rates have *no effect whatsoever* on the cost of providing cross-border postal service, other than the effect of distorting trade between Member States where the rates deviate from domestic postage rates. Terminal dues are no more than accounting entries between post offices. Overall, regardless of what level of terminal dues rates are paid, the same post offices will deliver the same cross-border mail and incur the same costs in the form of employee wages and equipment costs. In other words, the Community postal system as a whole incurs exactly the same costs at any terminal dues level. Since real costs remain unchanged, there is no reason why changes in terminal dues charges should have any effect on the total postage paid by Community for cross-border mail.[8]

5. THE ONLY PUBLIC BENEFITS ASSOCIATED WITH A TRANSITION PERIOD FOR INTRODUCTION OF DOMESTIC POSTAGE BASED TERMINAL DUES CHARGES WILL ARISE FROM DISCRETE SITUATIONS IN A HANDFUL OF MEMBER STATES.

Because the overall effect of changing terminal dues schemes is neutral in the Community as a whole, economic disruptions, if any, are necessarily localized. A different terminal dues rule distributes the cost of cross-border mail service differently among the different Member State post offices. If post offices charged each other domestic postage for the delivery of cross-border mail, then each post office would bear its economically correct share of the

[8]For any given post office, the net cost of cross-border mail is the revenues earned from the distribution of inward cross-border mail less the charges paid to other post offices for delivery of its outward cross-border mail. As terminal dues levels change, some post offices will find that the net cost of cross-border mail increases and others will find that it decreases. Overall, the increases must necessarily equal the decreases for the same level of mail. The same would be true, for example, for the divisions of a single company. It makes no difference how much the divisions "charge" each other for intra-corporate services; the company's cost of production remains the same. The only charges that affect the cost of production are charges paid to outsiders.

total cost of cross-border mail. In addition, remail, printing, and mail preparation services for cross-border mail would proceed on a value-added basis without distortion. To the extent that terminal dues charges differ from domestic postage rates, they distort trade between Member States and misallocate the total costs of cross-border postal service, so that some post offices bear more than their share and others less than their share.

Thus, the only possible source of positive public benefits from a transition period for the introduction of a new terminal dues scheme will arise at Member State level. In a changeover from CEPT terminal dues to a terminal dues scheme aligned with domestic postage rates some post offices will be net gainers and some will be net losers. If the losers are affected to such a degree that public interests are adversely affected, then a reasonable period of transition may indeed be appropriate. Even in such cases, however, there is no justification for concluding the transition period with a discount structure and rebate scheme set by collective agreement, as the REIMS agreement proposes. Nor is there any reason to employ a long, six-year transition period unless quantitative analysis shows a very extreme economic disruption.

In short, the only aspect of the REIMS agreement that *may* produce truly public benefits is the transition period. The public benefits, if any, to be derived from a transition period will arise only in respect to particular Member States, not in respect to the Community as a whole. The need for a transition period (if any) is due to the shift from the CEPT terminal dues scheme to a system whereby terminal dues are aligned with domestic postage. Such public benefits have nothing to do with the collective price fixing and market allocation elements of REIMS, all of which have wholly negative and distortive effects on trade between Member States.[9]

The question of public benefits, then, comes to this: are there any Member States in which an abrupt increase in the net cost of cross-border mail distribution might be so substantial as to jeopardize the ability of the Member State, under current arrangements, to maintain universal postal service? Are there any Member States in which some members of the mailing public might be faced with unfairly and unreasonably rapid increases in some postage rates?

The only way to address these questions is to examine the pattern of mail distribution between Member State post offices. Such data is entirely in the hands of the post offices and has been omitted entirely from the Commission's notice. Nonetheless, by using publicly available data and making reasonable simplifications (see appendix 1, tables 1 to 8), EEO can offer a few preliminary

[9]The only interest that should be of concern is the interest of the public generally. The post offices themselves have been on notice since initiation of Case IV/32.791 - Remail in July 1988 that economically irrational terminal dues are incompatible with the EC Treaty. In June 1992, in the Postal Green Paper, the Commission clearly described the unacceptability of the traditional terminal dues arrangements. Eight years after these issues were raised, the post offices have no reason to expect a right to protection from undistorted trade between Member States in postal services.

observations. The data and assumptions used by the EEO may be summarized as follows:

- Universal Postal Union reports have been relied upon for the total inbound and outbound mail volumes for the post offices of most Member States. Missing data has been estimated by extrapolating from the latest available figures using general growth rates experienced in the Community.
- It has been assumed that for each Community post office, two thirds of outbound mail is destined for other Community post of fices.
- It has been assumed that, for each Community post office, the outbound intra-Community mail is distributed to other Community post offices based upon the relative amount of inbound mail received by that post office. For example, assume that the French post office receives twice as much mail as the Spanish post office; then one may estimate that twice as much of the outbound mail of the U.K. post office goes to the French post office than to the Spanish post office.[10]
- It has been assumed that all letters and cards qualify for the first postage rate category and weigh 14.8 grams each.[11]

With these data and assumptions, it is possible to derive a plausible model for the distribution of the commercially significant mail—letters and cards (LC)—sent between Community post offices. It should be noted, again, that these calculations cannot reflect actual mail flows since the necessary data has not been provided by the post offices or the Commission. Therefore, EEO's calculations offer only a rough guide to points requiring further investigation. Nonetheless, EEO maintains that these calculations illustrate that the type of economic analysis which is, as a matter of EC law, necessary to justify a transition period for the introduction of domestic postage based terminal dues.

Using a given pattern of mail distribution, one may calculate, for each Community post office, the (i) costs incurred for outward mail delivered by other Community post offices and (ii) the revenues earned from terminal dues charges applied to inward cross-border mail tendered by other Community post offices. Under the CEPT terminal dues scheme, costs and revenues for each Community post office will yield a certain net cost of cross-border mail. Under a domestic postage based system, the net cost for cross-border mail will be a different amount. The difference between the two figures will indicate the net gain or loss experienced by the post office in changing from the CEPT terminal dues scheme to a domestic postage based regime. EEO's calculations are based

[10]This assumption provides a plausible approximation of mail distribution, but it is only an approximation. There appears to be no mathematical approach that will allow an "automatic" distribution of outbound and inbound mail flows so that all outbound and inbound flows sum to predetermined totals. Further refinement of the model would require actual data—or educated guesses—as to how specific bilateral mail flows differ from the general rule set out in the text.

[11]Annex 2 of the REIMS agreement apparently presumes that the average weight per LC postal items is 14.83 grams.

on 1994 data, the latest year for which data is available from the UPU. It is assumed that a reasonable level of domestic postage based terminal dues is 80 percent of 1994 domestic postage rates, the percentage proposed in the REIMS agreement. While postal rates and volumes will be somewhat different in 1996, the basic insights resulting from this analysis should not be affected.

EEO's calculations suggest the most likely areas where the public interest may require a transition from the CEPT terminal dues scheme to the domestic-postage oriented scheme. Our calculations suggest that there are only six post offices that might suffer a significant net cost from the immediate implementation of domestic postage based terminal dues. These net losers, expressed as a percentage of estimated international mail and domestic mail revenues,[12] are as follows:

Table 1. Preliminary estimates of the effects of domestic postage based terminal dues in relation to mail revenues.

Post Office	Net loss as % international LC revenue	Net loss as % of domestic LC revenue
Greece	50%	33.8%
Spain	58%	3.1%
Luxembourg	10%	2.8%
United Kingdom	24%	2.0%
Portugal	42%	1.9%
Netherlands	8%	0.6%

Since the foregoing calculations include numerous simplifications, they should be interpreted to mean only that each of these situations requires further investigation. Some considerations that need to be taken into account include the following:

Greece. The possible threat to the ability of the Greek Post Office to provide universal service within its territory is probably highly overstated. Greece has an extraordinary large outward mail flow compared to its domestic mail volume. This mail consists largely of postcards sent by tourists from other Member States.[13] There is no public policy reason why postage rates for outward postcards sent by tourists from other Member States should not immediately conform to the domestic postage rates in their home states.

Spain. The possible threat to the ability of the Spanish Post Office is probably understated because the calculations assume that domestic mail revenue can be derived from the intercity postage rate. On the other hand, the higher intra-Community postage charged by the Spanish Post Office has been

[12]As in the estimates of terminal dues amounts, revenues for domestic and international LC mail are estimated by assuming that all LC mail is charged at the postage rate for the first weight step.

[13]In 1994, the Greek Post Office reported that outward cross-border mail was 67 percent of the domestic volume.

disregarded as well, an omission that works in the opposite direction.

Luxembourg. The effects of REIMS terminal dues on the finances of the Luxembourg Post Office seem manageable because the effect is not extraordinary on either the cross-border costs or the overall costs.

United Kingdom. Although the effect of REIMS on the overall financial position of the U.K. Post Office is small (2.0%), the impact on cross-border rates may be relatively large (23%). The reason is that the U.K. Post Office is a relatively low cost post office with a large outward imbalance. It should be also kept in mind that data for the U.K. Post Office is particularly dependent upon estimates (see appendix, table 1).

Portugal. Although the effect of REIMS on the overall financial position of the Portuguese Post Office is small (1.9%), the impact on cross-border rates may be very large (42%) because of the Portuguese Post Office is a low cost operator.

Netherlands. The negative effect on the Dutch Post Office is probably due to the large outward imbalance caused by remail; hence, there seems little public justification for relief.

Based upon these very preliminary considerations, it appears that the only areas where a transition period for introduction of domestic postage based terminal dues *might* be necessary to protect universal service are Greece and Spain. The situation in Greece requires careful investigation of the rates for cross-border postcards. The situation is Spain may be more difficult, which probably explains why the Spanish Post Office has so far declined to join the REIMS agreement. If the Spanish Post Office does join the REIMS agreement, some type of transitional relief may be justifiable.

In addition, although immediate introduction of domestic postage based terminal dues charges does not appear to threaten universal service in the United Kingdom and Portugal, it may be argued that a one or two year transition period would be appropriate to protect consumers' cross-border postage rates. It seems more difficult, however, to justify a transition period for the application of domestic postage based terminal dues to outward business mail. Businessmen located in the United Kingdom and Portugal compete with businessmen in other Member States. Why should they not pay the correct cost of distributing cross-border mail, just as their competitors must?

Although the foregoing calculations are necessarily crude, EEO submits that they are adequate to show the importance of a careful quantitative study of the alleged public benefits to be derived from a transition period for the introduction of domestic postage based terminal dues. At first sight, it appears that the public benefits are extremely limited in scope. Specifically, based upon the foregoing analysis, it appears the public benefits to be expected from such a transition period can be summarized as follows:

- Allowing a reasonable period for adjustment from the current mode of providing universal postal services in Greece and Spain to new financial conditions which might possibly threaten the universal postal

service as currently provided.

- Allowing a reasonable period for *non-commercial mailers* in the United Kingdom and Portugal to adjust to increases in outward cross-border postage rates that may appear to be so large as to threaten their ability to correspond with persons in other Member States.

In other sectors, such as telecommunications, the Commission has permitted transitional relief not on a general basis for every country but only in those limited circumstances where transitional relief was demonstrably necessary.[14] There is no reason to depart from this approach in reviewing the REIMS agreement. Transitional relief for all Community post offices is inappropriate when only a few post offices may (possibly) be able to demonstrate public benefits to be derived from further postponement of a non-discriminatory, domestic-postage based approach to "terminal dues."

6. THE REIMS AGREEMENT INCLUDES RESTRICTIONS WHICH ARE NOT INDISPENSABLE TO THE ATTAINMENT OF ANY PUBLIC BENEFITS WHICH MIGHT BE ACHIEVED.

The foregoing analysis suggests that a proper economic study might reveal the need, in certain discrete cases, for a transition period during which some Member State post offices would not be liable for the full amount of domestic postage based terminal dues. The Greek Post Office, for example, might not be able to pay the full cost of domestic postage based terminal dues because it cannot immediately raise domestic or international postage rates to the levels needed to cover costs. During a transition period, the Greek Post Office would not be required to pay the full costs of domestic postage based terminal dues. This does not imply that other Member State post offices must deliver Greek cross-border mail at a loss. It merely implies that the difference between what the Greek Post Office can pay and full domestic postage based terminal dues must be made up from a fund of money that is used to finance the transition period. If—as seems likely—economic analysis shows that the total amount of money needed to fund a transition period is relatively small compared to total mail revenues earned in the Community, then there would appear to be no reason why the Community post offices could not support a transition fund by direct payments.

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[14]See in particular Article 1.7 of the Commission Directive amending Commission Directive 90/388/EEC regarding the implementation of full competition in telecommunications market (provisional text of February 28, 1996 adopted by the Commission on February 29, 1996) inserting a new Article 4E in Directive 90/388/EEC which provides for possible transitional period as far as the liberalisation of voice telephony is concerned; in this Directive the Commission stipulates that Member States with less-developed networks shall be granted upon request an additional implementation period of up to 5 years (2 years for Member States with very small networks), provided that *this is needed to achieve the necessary structural adjustments*. The Commission adds that "*such a request must include detailed description for their implementation. The information provided shall be made available to any interested party on demand, having regard to the legitimate interest of undertakings in the protection of their business secrets*."

Such a possibility suggests that *none of the main elements* of the REIMS agreement listed at point 2 above are indispensable to attainment public benefits. What, for instance, does Germany's resort to Article 25 of the UPU Convention have to do with providing the financial support needed to allow the Greek Post Office a reasonable transition period to adjust to higher cross-border postage rates? How is the individual cross-border mailer in the U.K. or Portugal assisted by the fact that the French Post Office offers special discounts and rebates to other Community post offices but denies such services to other large cross-border mailers and operators? The answers are self evident. These restrictions have no relation to the attainment of the truly public benefits which might, possibly, be derived from a transition period for the introduction of certain selected terminal dues reforms.

7. THE REIMS AGREEMENT AFFORDS THE PARTIES TO THE AGREEMENT THE POSSIBILITY OF ELIMINATING COMPETITION IN A SUBSTANTIAL PART OF THE PRODUCTS IN QUESTION.

7.2 AS A PRICE-FIXING AGREEMENT, THE REIMS AGREEMENT MUST BE CONSIDERED, BY ITS NATURE, LIKELY TO ELIMINATE COMPETITION.

From the standpoint of the competition rules, the REIMS agreement must be considered as a price-fixing agreement between competitors on the horizontal level. Article 85(1)(a) expressly prohibits price-fixing agreements. Anticompetitive agreements, "*and in particular those which : (a) directly or indirectly fix purchase or selling prices or any other trading conditions*" are incompatible with the common market. It is settled case-law that those types of agreements, *by their nature*, constitute a restriction on competition. The Commission and the Court of Justice have consistently considered price-setting as highly anticompetitive. Indeed, the Commission has repeatedly confirmed in its Annual Reports on Competition Policy that price-fixing agreements are contrary to a fundamental principle of law and of competition policy, and therefore deserve heavy fines.[15] It has stated that agreements on price could not be envisaged even in order to respond to structural problems affecting certain sectors of industry.[16]As the Commission recalled in a 1985 decision "*price fixing arrangements (. . .) are fundamentally contrary to the basic objectives of the Treaty*."[17]

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[15]XVIth Report on Competition Policy, paragraph n° 45.

[16]XIIth Report on Competition Policy, paragraph n° 39.

[17]Commission Decision of November 23, 1984, *Peroxygen Products*, OJEC (1985) L 35/1, ground n° 53; see also Commission Decision *Flat Glass*, OJEC (1989) L 33/44; Commission Decision *Building and construction industry in the Netherlands*, OJEC (1992) L 92/1 (upheld by the Court of First Instance in case T-29/92); Commission Decision *Scottish Salmon Board*, OJEC (1992) L 246/37; Commission Decision *CNSD*, OJEC (1993) L 203/27. It should also be recalled that the Commission considers that a price-fixing agreement falls into "*the category of manifest infringements under Article 85(1) which it is almost always impossible to exempt under Article*

The Court of Justice and the Court of First Instance have always adopted the same position concerning the fundamental necessity of price competition [18] : for instance, it was stated in the *Metro I* case that "*price competition is so important that it can never be eliminated.*"[19] In the *SSI* case, the applicant claimed that it was unfair to impose fines systematically with respect to price agreements, when Article 85 makes no distinction between types of agreements. The Court answered that "*it must be emphasized that the fact that no distinction is made does not mean that all infringements are equally serious. Agreements which prevent the supply of goods to consumers at the most favourable prices are particularly serious, and the Commission is justified in strictly exercising its powers to impose penalties.*"[20]

7.2 THE THREAT OF CONTINUED POSTAL RESORT TO ARTICLE 25 OF THE UNIVERSAL POSTAL CONVENTION IS AN INTOLERABLE THREAT TO COMPETITION.

As the Commission has itself stated,

> 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 latter are infringed or not. If the exclusive rights of the latter are being 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. [21]

The REIMS agreement is an agreement between undertakings, not regulatory authorities. Yet the REIMS agreement declares, as EEO understands, that "Articles 25 and 49 §4 of the UPU Convention are an *integral part of this agreement* during the Transitional Period [emphasis added]." The agreement continues that the post offices will "abide by the *final* decisions of competent EU authorities [emphasis added]." These statements are tantamount to an agreement among the post offices that they, not the regulatory authorities, will continue to resort to UPU Article 25, as they interpret Article 25, until stopped by the European Court of Justice (since the Commission itself

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85(3) because of the total lack of benefit to the consumer" (Xth Report on Competition Policy, paragraph n° 115).

[18]See, in particular, joined cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82, *Stichting sigarettenindustrie e.a. v Commission*, [1985] ECR, 3860; case 243/83, *SA Binon & Cie v SA Agence et messageries de la presse*, [1985] ECR, 2015; case 27/87, *SPRL Louis Erauw-Jacquery v Société coopérative La Hesbignonne*, [1988] ECR, 1919; case 246/86, *SC Belasco e.a. v Commission*, [1989] ECR, 2117; joined cases T-68/89, T-77/89 et T-78/89, *Società Italiana Vetro SpA e.a. v Commission*, [1992] ECR, II-1403; case T-29/92, *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and Others v Commission*, [1995] ECR, II-289.

[19]Case 26/76, *Metro v Commission* (Metro I), [1977] ECR, 1987, point n° 21.

[20]Joined cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82, *Stichting sigarettenindustrie v Commission*, [1985] ECR, 3860, point n° 82.

[21]Statement of Objections (5 April 1993), Case IV/32.791 - Remail, paragraph 78. The Postal Green Paper, at 210, restated this conclusion in almost identical language.

does not stop them). As recent events have demonstrated, at least one Community post office interprets UPU Article 25 to permit it to prevent Community-wide credit card services.[22] In essence, the REIMS agreement includes an agreement that post offices will continue activities which the Commission has already found to constitute an abuse of dominant position. EEO submits that such an agreement, *by its nature*, constitutes a restriction on competition.

8. CONCLUSIONS

The European Express Organization accepts the theoretical proposition that the introduction of the domestic postage based terminal dues *may* require some form of a transitional financial relief for *some* Community post offices. Such financial relief, however, should be limited to that which, as shown by a quantitative economic study, is needed to secure genuinely *public* benefits in specifically identified Member States. So far, no such economic study has been produced. *A priori*, however, it is evident that transitional relief cannot be justified for all or even most Community post offices since, for the Community as a whole, terminal dues reform is financially neutral.

As currently drafted, the REIMS agreement casts no light whatsoever on these theoretical public interest considerations. On the contrary, the European Express Organization submits that the REIMS agreement is plainly inconsistent with Article 85(1) of the EC Treaty and that *none* of the four cumulative conditions of Article 85(3) are fulfilled by the REIMS agreement.

[22]See *Financial Times* of Monday March 4, 1996 and Thursday March 7, 1996.

Part 7

European Postal Reform

CHRONOLOGY

Fall 1988	European Commission begins *Postal Green Paper*.
12 Sep 1989	Commission adopts plan for *Postal Green Paper*.
Oct 1990	EEO submits *Community Delivery Services*.
5 Dec 1990	Discussion draft of Postal Green Paper (Document 35).
7 Apr 1991	EEO comment on Document 35.
11 June 1992	*Postal Green Paper* adopted by Commission; proposes liberalization of cross-border and direct mail.
2 Jun 1993	*Guidelines* published (Commission summary of comments on *Postal Green Paper*)
7 Feb 1994	Council instructs Commission to prepare directive.
26 Jul 1995	Draft Postal Directive adopted by Commission, postpones liberalization until 2001.
2 Dec 1995	Commission publishes draft Postal Directive and Notice seeking public comment.
9 May 1996	European Parliament votes to slow postal reform.
5 Feb 1996	France obtains German agreement to postpone all liberalization until July 1, 2003.
29 Apr 1997	Draft "common position" adopted by Commission.
15 Dec 1997	Postal Directive approved by Council and Parliament postponing liberalization until Jan 1, 2003 except for ceiling on national postal monopolies.
6 Feb 1998	Notice published on application of competition rules to postal sector.

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Overview: European Postal Reform

> *Whereas 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.*
>
> - Postal Directive (1997)

Postal reform in Europe, begun in 1988, remains incomplete in 2001, yet great progress has been made. The reform effort started as a comprehensive policy review conducted by the European Commission. Post offices encouraged this review to deflect scrutiny under the competition rules. Couriers and express companies also supported this review, urging, in particular, more freedom for cross-border delivery services. After four years of study, in the *Postal Green Paper* adopted in 1992, the Commission proposed numerous reforms including liberalization of cross-border markets. The *Postal Green Paper* provoked fierce opposition from most post offices and postal unions. The politics of reform proved too much for European governments and, in 1997, the final Postal Directive omitted most significant reform proposals. Nonetheless, the European postal policy review generated a broad intellectual, if not political, consensus in favor of market-oriented postal reform. Driven by the commercial imperatives of globalization and electronic substitution, governments in several European Member States have acted on the insights of the European policy review and adopted major postal reform laws. Over time, these precedents appear likely to induce similar reforms in other countries in and out of Europe.

Postal Green Paper Begun, 1988

Postal reform in Europe began as an effort to block reform. By the end of 1987, senior Commission officials were passing the word that there would be

no "green paper" or comprehensive policy review in the field of postal services. The possibility of such a review was implied by the Commission's program to end economic boundaries in Europe by the end of 1992 and by completion of a Telecommunications Green Paper in May 1987.[1] The idea of a postal green paper was revived abruptly after the International Express Carriers Conference, in July 1988, filed a competition law complaint against the post offices' plan to block remail. Faced with the prospect of post offices competing with one another for distribution of international mail, including intra-European mail, postal officials portrayed the consequences of remail in the darkest terms: "a suicide for the postal services."[2] They urged the Commission to delay resolution of the Remail Case until completion of a major review of European postal policy, including in particular the "universal service obligations" of post offices. By November 1988, the Commission had resolved to prepare a Postal Green Paper and the Remail Case was quietly placed in abeyance.

In September 1989, France, taking its six-month turn in the rotating presidency of the European Council, chaired a ministerial meeting in Antibes at which the Commission presented an outline of a European postal policy. The Antibes paper argued for harmonization of European postal monopoly la ws:

> A possible joint solution would be *to retain, within the framework of a regulation concerning the exclusive or special rights, a small number of central reserved services,* which are considered necessary and which should be available everywhere in the Community to the citizens and various enterprises and organizations.
>
> Full details of these reserved services should be given both as far as the nature of the items of mail . . . and their features . . . are concerned. The aim of the efforts should be a gradual approximation of the conditions, with a view to a high quality of service and an expansion of the postal infra-structure throughout the Community as requested by the European Parliament. Guided by the features of these services joint specifications could eventually be drawn up bit by bit for all member states.[3]

The Antibes paper also called for increased governmental assistance for post offices reflecting an interventionist economic philosophy.

> To facilitate the general alignment of the sector within the Community, to increase the competitive capacity of the postal administrations, and to improve the quality of the postal services throughout Europe, certain joint

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[1] *Towards a Dynamic European Economy: Green Paper on the Development of the Common Market for Telecommunications Services and Equipment*. COM(87) 290 (Jun 30, 1987). Indeed, this document cited the Commission's intervention to protect couriers from European postal monopoly laws as a key precedent supporting its proposal for a more liberalized regulatory regime for Community telecommunications services. Ibid, § 3.4.

[2] Minutes of a meeting between a prominent postal official and the head of the Directorate General III (industrial policy and the common market) in May 1988.

[3] European Commission, "The Debate on the Post," §§ IV.2-.3 (Sep 1989) (emphasis original) (submitted to the Council, Sep 12, 1989) (unofficial translation from French by EEO).

activities should be planned:

- Increase of joint efforts to introduce modern techniques improving the efficiency of the postal services and to improve the working conditions for the staff of the postal administrations.
- Taking a joint point of view in international questions of the postal system, particularly at meetings of the Universal Postal Union (UPU).
- In the medium term development of joint norms for the necessary facilities. . . .
- Occasional exchange of experience gathered in staff training. . . .[4]

In preparing the Postal Green Paper, the staff of the European Commission's Telecommunications Directorate (DG XIII) invited information and analyses from all sides. Concerned by the declarations from Antibes, the European Express Organisation (EEO), an association of regional express companies allied to the International Express Carriers Conference, realized that the express industry had to address the larger issues of European postal reform.

Chapter 20 reproduces "Community Delivery Services," an approach to European postal policy prepared by the European Express Organisation after extensive consultation with postal officials, economists, and lawyers. This 185-page (in original format) document was the most elaborate policy presentation prepared by the courier and express industry during the period covered by this book; it was also the most comprehensive submission to the Commission on postal policy. Although "Community Delivery Services" was not ready until October 1990, it had a substantial impact. Commission staff privately referred to the document as "the shadow green paper." One prominent ministerial official conceded the submission "rattled a lot of cages." The Conference of European Postal and Telecommunications Administrations, a union of European post offices, set up a special committee to answer the views expressed in "Community Delivery Services." EEO pressed its arguments for a more competitive European policy in a multitude of seminars, newspaper articles, and followup submissions to the Commission.

The Commission's first cut at the green paper was not very procompetitive, however. In September 1989, a Senior Officials Group on Posts was formed from representatives of the Member States to assist the Commission in its review of the postal sector. In December 1990, the Commission presented to this group a 52-page working document, "Document 35," which set out preliminary findings and policy proposals. The focus of Document 35, and the first of ten recommendations, was "Establish a set of reserved services."[5] The purported justification for this recommendation was economic:

> In order to ensure the viable continued provision of the universal service network protection is needed to ensure that these network "fixed" costs are spread over a sufficiently large number of units that the resulting unit prices

[4]Ibid., § IV.8.
[5]"SOGP Doc 90/035," Section 3, § 1 (Dec 5, 1990).

> are affordable to all. This protection will be given in the form of reserved services, granting special and exclusive rights to a service provider or providers.[6]

Yet there was no factual basis for the assertion that "viable continued provision of the universal service" depended on a postal monopoly. While Document 35 gave lip service to limiting the scope of the monopoly to the "least restrictive solution" necessary to protect universal service, no meaningful limits on the monopoly were proposed. Document 35 did, however, reject use of Article 23 of the Universal Postal Convention to intercept ABC remail within the Community, and it endorsed alignment of terminal dues with domestic postage.

In April 1991, the European Express Organisation submitted detailed point-by-point comments on Document 35. Because this 70-page analysis was explicit and in some cases strongly critical, EEO styled its comment as a nonpublic internal EEO document. On the justification for monopoly, EEO argued that the premises of Document 35 were simply incorrect as a matter of economics:

> The linchpin of the argument is that the provision of postal service over a given area generates "fixed" costs that "do not change with volume—particularly for collections and deliveries." An industry with fixed costs, Document 35 argues, cannot exist without a monopoly . . . As an economic proposition, this statement is certainly incorrect. Almost all businesses, including private delivery services, have some degree of "fixed" costs and yet survive without monopoly protection. Moreover, the factual premise of Document 35's analysis is mostly incorrect. About two thirds of postal costs vary with volume, including most collection costs. Of more economic significance, post offices have only a negligible proportion of "sunk costs."[7]

Despite this shaky beginning, the Commission's staff pursued its review of postal policy diligently and gradually came to accept many of the economic points offered by the EEO, user groups, consumers, and policy institutes like the Wissenschaftliches Institute für Kommunikationsdienste in Germany and the Adam Smith Institute in the United Kingdom.

POSTAL GREEN PAPER, 1992

In June 1992, after much delay and backroom protest, the European Commission published the Postal Green Paper.[8] Chapters 7, 8, and 9, setting out the policy analysis and recommendations, were derived from Document 35. While retaining much of the dubious economic rhetoric of Document 35, critical revisions and additions were introduced that transformed the *Postal Green Paper* into a plan for moderate but significant reform. In the *Postal*

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[6]Ibid, § 2.1.

[7]"Working Document K1315: Draft 7-Final" at 28 (Apr 3,1991).

[8]*Green Paper on the Development of the Single Market for Postal Services*, COM (91) 476 (final) (11 June 1992) (*Postal Green Paper*).

Green Paper, the first recommendation was "Establish a set of universal services" rather than a set of reserved services. In the *Postal Green Paper*, a Community-wide standard for reserved services was proposed as a *ceiling* for national postal monopoly laws and not a common standard. Most significantly, the *Postal Green Paper* proposed to liberalize three specific segments of the postal market: cross-border services (intra-Community and international), postal services for advertising mail, and upstream postal functions (collection, sorting, and transportation). Each liberalization was supported by EEO.

To police the boundary between reserved and competitive services, the *Postal Green Paper* called for each Member State to establish an independent impartial regulator:

> In order to ensure that the user's interests are best served through the impartial treatment of all operators, it is essential that regulatory and operational functions should be separated. The independence of the regulatory function will better enable it to achieve the best balance between public and private operators, and between reserved and non-reserved service providers. It will monitor the effectiveness of the reserved services, in terms of the service provider both maintaining a good universal service and meeting its other obligations.[9]

The *Postal Green Paper* also called for a broad, Community definition of "universal service," a set of postal services which European countries would guarantee to their citizens and presumably supply through national postal administrations. This "standard service" would include "both communications (letters, postcards and printed papers) and goods-bearing items (packets and parcels)."[10] Governments would be obliged to define and ensure achievement of quality of service standards for universal services.

At the same time, the *Postal Green Paper* was grounded in a narrow and sophisticated appreciation of the core mission of the post office: universal delivery of "letters," meaning, "individualized communications."

> Universal provision could be required of different types of service (or different uses made of services). These different types of service will naturally have an order of priority in terms of the importance of ensuring that they are safeguarded. In this regard, *the fundamental imperative is that universal service must be ensured for postal communication items of a personal or individualised nature*. . . .
>
> Since the criterion of the individuality of an item is so important from a regulatory point of view, it is necessary to define here what is meant by an "individualised communication." The essential point is that the text in the communication should relate to the business or personal affairs of the addressee (either an individual, an organisation or a position within an organisation) with sufficient individuality that it is clear that the text (excluding the address and any appellation) refers specifically to the

[9]Ibid, 247.
[10]Ibid, 188.

addressee.[11]

The concept of "individualized communication," in turn, formed the foundation for the *Postal Green Paper*'s view of the postal monopoly, i.e., that the outer limit of the postal monopoly should be the delivery of letters, invoices and other "individualized communications." Printed advertisements and other communications directed to a mass audience were considered by their nature (or *a priori*) outside the proper scope of the postal monopoly although inclusion within the postal monopoly could be justified if necessary to sustain universal service.[12]

The *Postal Green Paper* represented a great policy victory for the EEO, mailers, economists, and consumer groups. At the same time, it provoked dismay among many postal and postal union officials. A year of public comment followed publication of the *Postal Green Paper*.

Chapter 21 reproduces the EEO's extensive formal comment on the *Postal Green Paper*. EEO praised the *Postal Green Paper* while suggesting numerous corrections and refinements. Users and economists likewise supported the *Postal Green Paper*. Most post offices and postal unions urged retreat from the Commission's proposals to introduce more competition in the postal sector.

In June 1993, the Commission summarized public comment on the *Postal Green Paper* in a document called *Guidelines for the Development of Community Postal Services*.[13] Reflecting mounting political pressure, *Guidelines* implied that liberalization proposed in the *Postal Green Paper* had generated substantial opposition when in fact opposition was generally confined to post offices and postal unions, i.e., to those who directly benefitted from the existing restraints on competition.

Feeling it was important to counter this unduly negative characterization, the EEO, in December 1993, prepared a detailed critique of the *Guidelines* and offered its own assessment of the body of public comments submitted in the wake of the *Postal Green Paper*.

> *Guidelines* does not adequately convey a broad pattern of widespread public support for the main ideas of the Postal Green Paper and unsubstantiated opposition by most, but not all, public postal administrations and their employees. The main reforms proposed in the Postal Green Paper—including adoption of a flexibly defined universal service, liberalisation of cross border mail, liberalisation of direct mail, adjustment of terminal dues to domestic postage, restriction of UPU Article 25, establishment of truly independent and transparent regulation—were supported by the majority of

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[11]Ibid, 186, 201 (emphasis added).

[12]The sophisticated understanding of the historical origins of the postal monopoly law reflected in the Postal Green Paper's discussion of "individualized communications" is still largely unappreciated in European postal circles.

[13]COM (93) 247 final (Jun 2, 1993). The Commission published all comments on the *Postal Green Paper* in *Liste des contributions écrites transmises à la Commission lors de la période de consultation sur le livre vert postal* (1993).

> commercial mailers, private operators, and disinterested observers. Consumers' concerns, while somewhat different, appear to be largely reconcilable with the interests of these commercial users.[14]

In reply to the EEO, Karel van Miert, the member of the European Commission in charge competition policy, maintained that "great care has been taken to present accurately a balanced view" of the comments on the Postal Green Paper. In regard to liberalization of cross-border services, Commissioner van Miert noted that "all postal administrations, save one, opposed the liberalization of inward mail flows"while conceding "there is little quantitative evidence on how liberalization would affect the universal service."[15]

While the merits of the *Postal Green Paper* were being debated, its conclusion precipitated one concrete step towards reform in the cross-border market. In September 1992, the Conference of European Postal and Telecommunications Administrations became a council of regulators. Within CEPT, regulatory issues relating to postal services became the responsibility of a Committee of European Regulators-Posts (CERP). Public postal operators left CEPT and formed their own trade association, PostEurop.

DRAFT POSTAL DIRECTIVE, 1995

On February 7, 1994, the European Council approved the broad directions of postal reform described in the Postal Green Paper and Guidelines and instructed the Commission to prepare legislation for its consideration by July 1, 1994.[16] Again, political maneuvering attenuated the process. Two legal texts were envisioned by the Commission. The first would be a draft Postal Directive establishing legal norms for the scope of the postal monopoly and universal postal service. Member States would be responsible for adopting legislation consistent with this directive. The second document would be a directive issued under authority of the competition rules, setting out guidelines for compliance with European competition law. Due to political opposition, the second document was quickly scaled back to a non-binding "notice" that explained how the Commission would apply the competition rules of the EC Treaty to the postal sector. The Commission did not finish work on a draft directive until July 1995; it was not published for public comment until December of that year.[17] In the draft Postal Directive, the Commission proposed postponing liberalization of cross-border services and advertising mail until the beginning of 2001 and abandoning liberalization of upstream postal functions.

Chapter 22 reproduces the comments of the EEO on the draft directive.

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[14]European Express Organisation, "Comments of the European Express Organisation on 'Guidelines for the Development of Community Postal Services'" (Dec 1993).

[15]Letter from K. van Miert to A. van der Lande, Secretary General, European Express Organisation, dated Feb 8, 1994.

[16]OJ 1994 C 48/3 (Feb 16, 1994).

[17]OJ 1995 C 322/22 (Dec 2, 1995).

The brevity of this document reflects the fact that, by this time, postal policy in Europe was being shaped primarily by "political" considerations that bore little objective relationship to economics or law. The comments of the EEO were intended to assist civil servants, mailers, and scholars who supported present or future reform, either at European level or Member State level. In most cases, the "postal dossier" at the European level was no longer amenable to reasoned argumentation.

At the same time that the Commission published the draft Postal Directive, it solicited comment on a draft of its Notice on the application of the competition rules to the postal sector.[18] In comments on the draft Notice, EEO argued that the Notice should be strengthened, clarified, supplemented, and rendered more consistent with the similar Telecommunications Guidelines.

- EEO agreed that the concept of the "general letter service" usefully established limits on the presumptively reserved area, but EEO objected to the unexplained addition of direct mail to the concept of the "general letter service" in contradiction of the fundamental rationale of the Postal Green Paper and the public debate based on it.[19]
- EEO expressed concerned that the draft Notice's explanation of the possibility of postal services being exempt from the EC Treaty under Article 90(2)—particularly discussions relating to direct mail, inward cross-border mail, and upstream services—could be interpreted in a manner inconsistent with the actual requirements of Article 90(2).
- EEO urged the Commission to make the definition of "cross-subsidy" and the associated accounting standards for the postal sector more conducive to fair competition, in particular by following the approach used in the telecommunications sector.
- EEO argued that the Notice should address additional issues relevant to its purpose, especially: applicability of Article 30 to the postal sector; applicability of Article 85 to agreements between post offices; the need for separation of commercial and regulatory functions in Community representation at the Universal Postal Union; and applicability of Article 234 to the Universal Postal Convention.

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[18]OJ 1995 C 322/3 (Dec 2, 1995).

[19]In the draft Postal Directive agreed by the Commission on July 26, 1995, the "general letter service"—i.e., the outer limit of the area that could be presumed reserved to post offices—encompassed regular delivery of "items of correspondence" or "written" communications. These terms reflected the Postal Green Paper's concept of "individualised" or "personalized" communications. "Direct mail" was not considered "correspondence."Before publication on December 2, 1995, key definitions in the draft Postal Directive were mysteriously changed. Use of individualization as the defining characteristic of the general letter service was dropped. Items conveying information in wholly printed textual form—i.e., not individualised in any sense—were included as part of the general letter service and therefore part of the presumptive monopoly of the post office, unless specifically excluded as "books, catalogues, newspapers, and periodicals." Thus, the philosophical basis for defining the general letter service, previously rooted in historical and legal considerations identified by the Postal Green Paper, was abandoned and the nine-year public policymaking process abnegated.

FINAL POSTAL DIRECTIVE, 1997

Opponents of postal reform remained unsatisfied with liberalization of cross-border and advertising mail in 2001. On May 9, 1996, the European Parliament registered its opposition to liberalization of advertising mail and other reform elements in the draft directive. Within the Council, several countries, led by France, insisted on deleting provisions relating to cross-border and advertising mail. On November 5, 1996, France reportedly obtained German assent to postpone all liberalization until July 1, 2003, except for price and weight limits on national postal monopoly laws that would liberalize only a token 2 percent of postal services.[20] On April 29, 1997, the Council agreed to key elements of this "compromise" by adopting a draft "common position"on the Postal Directive and sending it to the Parliament.[21] On September 16, 1997, the European Parliament approved the draft common position with minor amendments. A final version of the Postal Directive was agreed on December 15,1997.[22]

The final version of the Postal Directive requires each Member State to maintain a universal postal service. "Universal service" is defined as "the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users."[23] The scope of "universal service" includes collection, transport, and delivery of "postal items" weighing up to two kilograms and postal packages weighing up to ten kilograms.[24] Express services are not included in the "universal service."[25] The Postal Directive places an upper limit on the postal monopoly law in all Member States. Member States are permitted, but not required, to reserve the collection, transport, and delivery of "items of domestic correspondence" provided (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. The reservation may be applied only if both conditions were met. In principle, a reservation may be adopted only "to the extent necessary to ensure the maintenance of universal service"; in practice, the ceiling excludes no more than 2 percent of letter mail from the postal monopoly. Meanwhile, the major innovations of the *Postal Green Paper*, liberalization of cross-border mail, direct (advertising) mail, and upstream

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[20]"Postal Services: Germans Join French in Bid to Delay Liberalization," *European Reports*, Nov 9-12 , 1996.

[21]OJ 1997 C 188/9.

[22]Directive 97/67/EC, OJ 1998 L15/14 (Jan 15, 1998) ("Postal Directive").

[23]Postal Directive § 3(1).

[24]Ibid, § 3(4). A Member State may, at its option, increase the universal service definition to include packages weighing up to 20 kg., but not more. § 3(5).

[25]Ibid, Recital 18 (". . . the essential difference between express mail and universal postal services lies in the value added (whatever form it takes) provided by express services and perceived by customers, the most effective way of determining the extra value perceived is to consider the extra price that customers are prepared to pay."

postal functions, were all abandoned. Failure to liberalize cross-border mail, the central proposal of EEO, was particularly unjustified since the Postal Directive explicitly found that cross-border postal service to be unsatisfactory.[26]

In the area of regulation, the Postal Directive is marginally more progressive. The Postal Directive requires each Member State to "designate one or more national regulatory authorities for the postal sector that are legally separate from and operationally independent of the postal operators."[27] The Postal Directive permits Member States to establish two levels of regulation depending on whether the regulated services are in the nature of "universal services" or not. For providers of universal services, a Member State may establish individual licenses and require license holders to contribute to a universal service fund and otherwise assist in the provision of universal service. For providers of non-universal services, such as express services, a Member State may establish a general registration procedure whose function is limited to purposes such as security and environmental protection. The Postal Directive further requires universal service providers to maintain reasonably detailed accounts that, in principle, will prevent cross-subsidization from monopoly services to competitive services, such as parcel services.

On February 6, 1998, the European Commission published the final version of the notice on application of the competition rules to the postal sector.[28] The Notice affirmed the continuing applicability of the competition rules to the postal sector. Nonetheless, like the Postal Directive, the Notice reflected a retreat from the moderate liberalization proposed in the *Postal Green Paper*.

Although post offices and postal unions were substantially successful in blocking the specific liberalization initiatives of the *Postal Green Paper*, the postal policy review in Europe served to educate many governmental officials, postal officials, and members of the public. This educational process, in turn, led to more definite movement towards reform, in both legal and commercial terms, in several northern European countries. Major postal liberalization laws were adopted in Germany (1997), the Netherlands (1998), and the United Kingdom (2000). Almost a decade after publication of the *Postal Green Paper*, it is widely believed that the postal monopoly in Europe has entered its final decade.

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[26]Ibid, Recital 6.

[27]Ibid, § 22.

[28]Notice from the Commission on the application of the competition rules to the postal sector and on assessment of certain state measures relating to postal services, OJ 1998 C 39/2 (Feb 6, 1998).

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EEO Submission for Postal Green Paper (1990)

Preliminary Note to Readers

This discussion paper on postal and delivery services in the European Community has been prepared by the European Express Organisation. After an short introduction defining terms (Chapter I), the paper reviews historical (Chapter II), foreign (Chapter III), economic (Chapter IV), and legal (Chapter V) considerations pertinent to the development of a Community policy in this sector. Chapter VI, which synthesizes these considerations into a possible policy outline, is extensively cross referenced to the earlier chapters. Readers already familiar with the subject matter may wish to begin with Chapter VI, using it as a guide to the previous material. Chapter VII is a short summary of the entire discussion paper. Those who require only the "short tour" or who would like a sense of the final view before starting the long climb may wish to turn to Chapter VII immediately.

I. Introduction

1. During the last year, the Commission of the European Communities has initiated a review of the nature and future of postal and private delivery services in the Community, leading to the preparation of a Green Paper. While much of the discussion to date has focused upon specific topics such as postal services, express services, parcel services, "remail," and the Universal Postal Union, all of these subjects are, in our view, interrelated parts of a larger whole, a Community "delivery services" market.

European Express Organisation, "Community Delivery Services: A Discussion Paper on the Proposed Green Paper on Postal and Private Delivery Services" (Oct 1990) (submitted to the European Commission).

2. This market is central to the *economic* future of the Community. Yet, it is still powerfully influenced by past *regulatory* policies which predate not only the Community, but many of its Member States.

3. This discussion paper has been prepared by the European Express Organisation, an association of private delivery services operating in the Community. Our document is designed to contribute to the present review by selecting and summarising fundamental historical, foreign, economic, and legal considerations that may assist in developing a modern regulatory approach to delivery services.

1. "DELIVERY SERVICES" DEFINED

4. The market for Community "delivery services" may be described most simply by starting from the viewpoint of those who receive deliveries and those who send things to be delivered. It is generated by the answers to two simple questions:

- Who makes regular deliveries to the home or place of business?
- If a business or private person wants an item delivered to a particular address, what are the choices in means of delivery?

5. In most areas of the Community, regular deliveries are made by some or all of the following:

- post office;
- newspaper delivery services;
- delivery services distributing advertising;
- express and parcel delivery companies;
- intra company messenger services;
- taxis; and
- local delivery services working for retailers selling food, milk, household goods, flowers, laundry service, etc.

6. The Community market in "delivery services" may be defined as *"the set of all carriers and systems of carriers that transmit physical objects to their final users, as well as the senders and addressees of such services."*

7. One essential distinction between the delivery services market and other transportation markets is its human scale. This particular market is generated by the need to transport things that can be picked up, carried, read, worn, eaten, or otherwise utilized by a human being, whether at home or in the office. What a producer sends to an individual—words, samples, or goods—almost invariably differs in scale from what is sent to a manufacturing concern, a warehouse, or a retail store.

8. "Delivery services" form the physical link between manufacturers, wholesalers and retailers, on one hand, and individuals, on the other, whether at home or at work. "Freight," in the traditional sense, is the bulk transport of goods among manufacturers, wholesalers, retailers, and large buyers. Typically, after freight transport, the goods will be broken down and sold or "delivered." A "delivery service" connotes an "*end to end*" service to the door

of the final user. While the two markets overlap, in practice this distinction has led to different types of carriers, with different customers and different business cultures.

9. The idea of a "delivery service" is also illuminated by noting the *service* provided before and after "transport": collection, sorting, consolidating, tracking and tracing, customs clearance, and final delivery. A "delivery service" is "service intensive," as opposed to a classic transport activity which is centred upon a particular transportation technology.

10. Traditionally, the dominant delivery services in the Community have been the Member State post offices. One could, in fact, also define the market for delivery services as roughly the market supplied by the twelve national post offices and their competitors.

11. Delivery services are well suited to the transmission of information in written or printed form. Hence, the market borders not only on freight but also on telecommunications (from telephone to television).

12. Since the delivery services market links individuals to the producers of consumable physical objects, the market is affected by, and more importantly *affects*, the location of facilities for printing, data processing, and distributive services for all types of consumer and office goods.

13. Setting an upper limit for this market is somewhat arbitrary. In a sense, anything that can be moved can be delivered, including the largest piece of machinery or the annual wheat harvest. In customary commercial terms, however, a "delivery service" refers to a service that collects, transports, and delivers relatively small items, and this appears to be consistent with the scope of the Commission's inquiry.

14. "Relatively small" is variously defined in practice. Airlines use 30 kilograms, roughly the limit for baggage and parcels that can be handled easily by one person. Postal services in Europe more generally use 20 kilograms. Some express companies use a weight limit higher than 30 kilograms, reflecting the use of hand trucks. Any one of these figures is defensible. The precise upper limit, it is suggested, is not critical to policy considerations. Regardless of what upper limit is used, the great majority of all items transported in the delivery services sector fall well short. Indeed, it is characteristic of the market that the most common index of traffic is number of items, not weight or some other attribute.

2. DELIVERY SERVICES AND THE SINGLE MARKET

15. Because the delivery services market focuses upon the needs of individual users, it has a special significance in the realization of the Single Market. Consider some of the types of items transmitted by delivery services between Member States as well as between the Community and the rest of the world:

- Personal and business correspondence of all types;
- Magazines, newspapers, and other periodicals;
- Financial, engineering, insurance, shipping, legal, and other business

records making possible the coordination of all types of office activities such as marketing, architecture, engineering, import/export, tourism, real estate, etc.;
- Time sensitive samples and spare parts, including original art work, computer boards, and machine parts;
- Direct marketing products of all types including clothes, household goods, sports equipment, specialized tools, personal computers and software, and many other specialized goods; and
- "Just in time" production parts of all types.

16. *In terms of personal impact, for most Community citizens, at home or at work, the ability to send and receive documents and parcels rapidly and reliably across the entire Community will be the most tangible everyday evidence of the reality of the Single Market.*

3. ECONOMIC ROLE OF DELIVERY SERVICES

17. The delivery services market is increasingly significant in the conduct of modern commerce because it straddles two economic trends that are inducing basic changes in the conduct of business and everyday life.

18. First, as carriers of information, delivery services are a key component in the rise of the service economy. Despite the ever increasing importance of telecommunications, it is probable that the great majority of information is still transmitted physically in the form of letters, documents, newspapers and periodicals, advertisements, checks and financial instruments, blueprints and specifications, books and manuals, etc. This flow of information is the lifeblood of the service industries. As the Commission has noted in the Telecommunications Green Paper of 1987, with the emergence of the modern service economy:

> The single most important factor of modern "production" [is] knowledge. *The organization of the [information] infrastructure will strongly influence, just like the nineteenth century railways, the economic, social and cultural space of tomorrow.*[1]

19. At the same time, the delivery services market also participates in the increasingly important "*just-in-time*" approach to production. Just-in-time is based upon the insight that inventory and delay are costly ingredients in modern production. A production component should not be delivered until the moment it is ready to be "consumed" by the production process. Timely and reliable production and transmission of small quantities of samples, parts, and goods offers dramatic savings over traditional methods of bulk transportation and warehousing.

20. These two trends have reinforced each other. Improvements in information exchanges have made it easier to coordinate the activities of

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[1] COM(87)290 Final, *Green Paper on the Development of the Common Market for Telecommunications Services and Equipment*, p 44 (emphasis added) (1987).

specialized subcontractors working over large geographical distances. In international commerce, the result has been not only dramatic growth, but a quantum increase in the integration of global commerce.

4. OVERVIEW OF PAPER

21. In this chapter, we have described briefly the market we are addressing, why it is important, and how our analysis is organized.

22. Chapter II outlines the historical development of delivery services in the Community, from their origins in the Middle Ages to the fruitful competitive interplay of the last decade. It highlights certain commercial and institutional developments of the last few years that hold major implications for future policy, including "bulk mail," "express service," and the recognition by public and private carriers of the necessity for "end to end" administrative control.

23. Chapter III describes the regulatory policies towards delivery systems in two countries that may be of interest to the Commission. The American system offers clues as to the future of a cohesive Single Market. In particular, the American system demonstrates the role that an impartial expert governmental agency can play in an industry that includes both public and private undertakings. Recent developments in New Zealand, on the other hand, explore the possibility of greater reliance upon competition to organize a delivery services market and call into question some of the tacit assumptions traditionally surrounding postal policy.

24. Chapter IV analyzes some of the economic concepts and data pertinent to the development of a Community delivery services policy. We consider the total Community market and its major submarkets. We also put some order to diverse concepts such as: natural monopoly, economies of scale, the concepts of "basic" versus "value added" service, outward and inward monopolies, and so on.

25. Chapter V examines the legal framework within which a Community policy on delivery services must be fashioned. This chapter also discusses three other subsidiary legal structures: the Universal Postal Union, the postal monopoly laws of the Member States, and the International Post Corporation.

26. Chapter VI outlines a policy approach to Community delivery services that fits consistently and comfortably within the historical, economic, and legal observations of the previous chapters.

27. Chapter VII provides a brief summary and final observations.

5. TERMINOLOGY

28. In discussing Community delivery services, it may be helpful to some readers to define a few frequently used terms at the outset:

- *Community* refers to the European Economic Community.
- *Member State* refers to one of the twelve Member States of the Community.

- *International* refers to commerce of all types (i.e., for personal and business purposes) between the Community and points outside the Community.
- *Intra EC* refers to commerce between different Member States of the Community.
- *Intra State* refers to commerce within a Member State other than "local" commerce.
- *Local* refers to commerce within an area easily accessible by truck in an hour or two (as defined in Chapter IV); roughly a city and neighbouring towns.
- *Delivery service* refers to any delivery service, public or private, including a Member State post office.
- *Private delivery service* refers to any privately owned delivery service including express, parcel, and other services.
- *Express service* refers to a service that provides delivery that is more or less as fast as physically possible (see Chapter IV).
- *Shipper* and *shipment* refer neutrally to the person who sends an item by a delivery service, public or private, and to the item sent, without any connotation of the size of the item.
- *Mailer* and *mail* refer to a "shipper" who uses a postal delivery service and to a "shipment" handled by a postal delivery service.

29. It also may be helpful to note that whenever we discuss the possibility of competition in a given market, we are referring to competition among all possible entrants, including the various Member State post offices. In our view, the rules of law and economic logic apply indifferently to public and private undertakings. In its home state, a post office may have special rights and responsibilities. It is presumed that outside its home state any Member State post office can participate in whatever markets it chooses and that *legal rights or commercial opportunities that are open to private delivery services will also be open to the post offices of the Member States.*

II. HISTORY

30. Just as the modern system of paved roads is made more intelligible by a knowledge of ancient fords and Roman highways, so the system of laws and institutions which today governs public and private delivery services becomes more comprehensible with an appreciation of its origins. Current policy discussions are too often bedeviled by historical arguments based upon misunderstanding or mistaken assumption. More subtly, the terms used in the discussion of delivery service policy often rest upon anachronistic assumptions about governmental policies and social needs.

1. EVOLUTION OF THE INTERNATIONAL POST

A. PRIVATE MESSENGERS TO A ROYAL POST OFFICE

31. Although Herodotus wrote admiringly of Persian messengers undaunted by "either snow, or rain, or heat, or darkness of night," in fact, neither the Persian empire, nor the Greek city states, nor the Senate and People of Rome developed what we would today call a "postal service." None provided a universal collection and delivery service for documents and parcels. The Persian messengers and their successors were governmental couriers, to whom the citizen has no access.

32. The concept of public delivery service developed gradually, with the rebirth of Europe after the Middle Ages.[2] In the twelfth century, inexpensive paper (as opposed to parchment) was introduced. Enterprising Venetian merchants of the fourteenth century organized private courier systems to deliver commercial documents, eventually extending their reach into the German hinterland. The Renaissance saw, after centuries of repression, the reemergence of scholarly exchanges of ideas. Monasteries and universities, notably the University of Paris, began to organize messenger systems. In the fifteenth century, the invention of a printing press with moveable type accelerated the dissemination of ideas.

33. At this time, the essence of a "postal" delivery system was a series of "posts," or relay stations, located at regular intervals along the road. At post stations horses were kept, and riders and other travelers lodged. For protection from the weather, documents were wrapped in a heavy cloth, or "mail," and tied in a bundle. To spread the cost of maintaining a system of post houses, messenger systems were gradually made available to the general public.

34. The fifteenth and sixteenth centuries saw the emergence of modern nation states in France and England. Nascent national governments soon sought control over private messenger services, especially international services, as part of the process of consolidating their authority.

35. In 1464, the French king Louis XI restricted the rights of the messengers of the University of Paris and proposed to take over their post stations. His intention was to reserve the system of posts for royal dispatches, but within twenty years correspondence between members of the aristocracy was being carried as well. All documents were opened and read to restrict the dissemination of unauthorized ideas.[3]

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[2] *See*, *e.g.*, UK General Post Office, "The Birth of the Postal Service" (Post Office Green Papers Number 15, undated); C.S. Holder, revised and abridged edition of A.D. Smith, *The Development of Rates of Postage (France)(1917)* (1980); A.F. Harlow, *Old Post Bags* (1928); C.H. Scheele, *A Short History of the Mail Service* (1970).

[3] The legal history of the French post office is described in detail in an unpublished paper: D. Borde and J. Duchemin, "Memorandum on the French Postal Monopoly - Rules and Regulations," (Paris, 1984), commissioned by the IECC.

36. Not until the seventeenth century did the French postal service become viewed as a possible source of net revenue. The French state's insistence on a monopoly increased correspondingly until the Sun King, Louis XIV, issued a decree on 18 June 1681, which gave the French postal monopoly its current form.
37. In England in 1482, King Edward IV established a series of post stations on certain roads for the purpose of transmitting state correspondence. In 1591, Queen Elizabeth I prohibited any one but a royal messenger from carrying international letters. The purpose of this proclamation was to assert a monopoly over the right to communicate with foreigners, not simply a monopoly over the business of carrying the letters.
38. As in France, however, this national security measure soon became no more than a monopoly over rights of carriage. The English postal monopoly was extended to internal correspondence by James I and Charles I in the first half of the seventeenth century. The English crown did not earn revenues from the early post; the purpose of the monopoly was to permit the monitoring of correspondence. The English postal monopoly assumed its current form by virtue of an act of Parliament of 1660, which confirmed the exclusive right of the government to carry all correspondence, to censor the correspondence, and to retain the revenues.
39. In Germany, towards the end of the fifteenth century, the Taxis family (later "Thurn und Taxis") transformed the remnants of the Venetians' messenger service into a regular system to serve the administration of the Habsburg Empire. The system expanded quickly from Vienna to Brussels and the Netherlands. As the Habsburg Empire expanded into France, Spain, and Italy, so did the Thurn und Taxis post. Although the Emperor later awarded Thurn und Taxis a monopoly, most states of the German federation established their own postal systems.
40. With the emergence of Prussia as the leading German state, the Thurn und Taxis system lost its preeminence, and was purchased by Prussia. As the German states were gradually unified, the Thurn und Taxis system became the uniform delivery service for Germany, with stations as far afield as the Middle and Far East. The Thurn und Taxis organization was not placed directly under the authority of a postal ministry until the end of the First World War.
41. In this manner, public "postal" service developed from private initiatives, born of the renaissance of commerce in goods and ideas and fed by improvements in the process of recording messages on paper. The postal monopoly was interposed by monarchs anxious to control the circulation of ideas and bolster the power of early nation states. *The "royal" post office was, simply, an instrument of state control.*
42. It should be noted that the post office was originally conceived as an *inter city* service only. The first *intra city* service in Europe was begun in London in 1680 by William Dockwra, a private merchant. Dockwra's local delivery service was not only outside the official post office, it was opposed by the Duke of York, who enjoyed the profits of the post. Unfortunately for Dockwra,

in 1685, the Duke of York became King James II, and Dockwra's service was immediately incorporated into the post.[4]

43. Similarly in France, although Louis XI organized and monopolized French postal services in 1464, the postal service took no notice of local delivery service until 1758. In that year, M. Claude Piarron de Chamousset was granted a non-exclusive concession to organize a local delivery service called the "*petite poste*." Twenty two years later, the local service was taken over by the French post office, but the *petite poste* and the *grand poste* (long distance postal service) were operated separately until well into the nineteenth century.[5]

44. A byproduct of the development of the royal post office was the conclusion of international postal treaties, precursors of today's Universal Postal Union.[6] Originally, private messenger services established post houses in foreign countries as required to serve weary couriers; permission of local authorities was unnecessary. Early governmental messenger systems followed the same practice. With the introduction of national postal monopolies, however, foreign post houses were first restricted and then banned entirely. One of the first international "postal" treaties was signed by France and the Netherlands in 1601. It recognized the French post office as the only carrier of mail across France.

45. After the seventeenth and eighteenth centuries, international postal service in Europe became possible only by the exchange of mail between national monopolists. In today's terminology, end to end administrative control over delivery services between national markets became impossible. In many respects, *the central task of a Community policy is to reform this organizational structure, one which the success of private delivery services and the establishment of the International Post Corporation has shown to be inadequate to the needs of modern European commerce.*

B. ROWLAND HILL AND A DEMOCRATIC POST OFFICE

46. Although basic concepts of the postal law are derived from efforts by royal monarchs to consolidate their power, what we think of today as traditional postal service is very much the product of the Industrial Revolution, with its emphasis on efficiency, and the emergence of democratic governments, with their concern for the rights and privileges of individual citizens. We may call this new, and distinctly different, concept of the post office, the "democratic post office."

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[4]A.F. Harlow, *Old Post Bags*, pp. 131-35 (1928).

[5]A.F. Harlow, *Old Post Bags*, pp. 89-90 (1928); Borde, D. and J. Duchemin, "Memorandum on the French Postal Monopoly Rules and Regulations," pp. 6-8 (unpublished, 1983). In Italy and Spain, the different origins of local and regional postal services are reflected in current practices to this day. The Italian postal monopoly permits private delivery of parcels up to 20 kilograms within a city but not between cities. § 58 of DPR. 156 (29 Mar 1973). The Spanish post retains different tariffs for local and intercity postal services.

[6]The best history of the Universal Postal Union and its origins is G.A. Codding Jr., *The Universal Postal Union* (1964).

47. Remarkably, the birth of the democratic post office can be traced to a single date, 1840. In that year, Parliament enacted a fundamental reform of the British post office, based largely upon the suggestions of a crusading Englishman from outside the postal establishment, Rowland Hill.[7]

48. Hill's analysis was economic in nature. He argued that postal service was lagging behind other sectors, such as stagecoach services, because postage rates were unreasonably high, unreflective of costs, and unnecessarily complicated. One of Hill's major conclusions, startling at the time, was that transportation costs between major towns were insignificant compared to collection and delivery costs. Hence, the postage rates should be uniform in the "primary distribution" area (i.e., between major towns) and not vary with distance.

49. Because of frequent misstatement of Hill's principles today, it is worth emphasizing that for Hill *uniformity of price was a consequence of conforming prices to costs*, not a goal in itself. Hill did not advocate uniform postage rates to "secondary" towns, for he concluded that such an approach was economically incorrect. Hill believed firmly that "every branch of the Post Office ought to defray its own expenses."[8]

50. The concept of modern postal service, at least as envisioned by its originator, in no way depended upon monopoly or cross subsidy. On the contrary, as clearly follows from his views on primary and secondary distribution, Hill believed cross subsidization should be kept to an absolute minimum. Regarding the monopoly, Hill wrote:

> There cannot be a doubt that if the law did not interpose its prohibition, the transmission of letters would be gladly undertaken by capitalists, *and conducted on the ordinary commercial principles, with all that economy, attention to the wants of their customers, and skilful adaptation of means to the desired end, which is usually practised* by those whose interests are involved in their success. But the law constitutes the Post Office a monopoly. Its conductors are, therefore, uninfluenced by the ordinary motives to enterprise and good management; and however injudiciously the

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[7]Rowland Hill, *Post Office Reform: its Importance and Practicability* (private pamphlet, 1837); M.J. Daunton, *Royal Mail: The Post Office since 1840* (1985); R.H. Coase, "Rowland Hill and the Penny Post," *Economica* pp. 423, 432 (Nov 1939); M. Crew and P. Kleindorfer, "Rowland Hill as an Economist," in *Competition and Innovation in Postal Services* (M. Crew and P. Kleindorfer, eds.,to be published late 1990).

[8]Rowland Hill, *Post Office Reform: its Importance and Practicability*, p. 46 (private pamphlet, 1837). At the governmental inquiry into Hill's proposals, Hill himself was followed by two witnesses from the Post Office. The first said he did not understand the distinction between primary and secondary distribution, and the second testified that he understood it and saw no advantages. Finding the concept too technical to explain in the face of postal opposition, Hill withdrew this portion of his proposal. R.H. Coase, "Rowland Hill and the Penny Post," *Economica* 423, 432 (Nov 1939). Writing a century later (1939), Professor Coase commented:

> There is indeed good reason to deplore the abandonment of the distinction between primary and secondary distribution. *It . . . might have led to a rational discussion of price policy and its relation to costs. As it is, the magic word "uniformity" has been substituted for thought*. [p. 435 (emphasis added)]

> institution may be conducted, however inadequate it may be to the growing wants of the nation, the people must submit to the inconvenience; they cannot set up a Post Office for themselves.[9]

51. Hill's ideas were opposed by British post officials, who branded them as naive and unworkable. Sir Francis Freeling, Secretary of the Post Office, reportedly exclaimed, "Cheap postage! What is this men are talking about? Can it be that all my life I have been in error?"[10] The Postmaster General thundered to the House of Lords, "*Of all the wild and visionary schemes which I have ever heard of, this is the most extraordinary!*"[11]

52. In 1840, the British Parliament, responding to public pressure, enacted most of Hill's reforms over postal objections. Postal traffic doubled in the first year, and despite some early losses and miscalculations, Hill's ideas soon proved correct. The English reforms were quickly followed by all the other major national post offices.

53. Today it is difficult to appreciate the social impact of Rowland Hill's reforms. In a world without telecommunications, when the only connection to the outside world was by the physical delivery of messages and newspapers, the development of a cheap, universal national delivery service was as significant in its way as later, more technologically spectacular inventions such as the telephone and television.

54. *A review of Rowland Hill's work is worthwhile not only because of his singular importance in the history of postal policy, but also because the task of devising a Community policy on delivery services is not unlike the task Hill set himself. Although post offices have drifted away from Hill's underlying principles, especially in relations between national postal systems, his comments and insights remain so powerful that a valid Community policy must respond to them.*

C. BIRTH OF THE UPU

55. The development of the democratic post office in the 1840's stimulated international as well as national postal traffic. Countries responded with detailed bilateral postal treaties in the manner of the early French-Dutch agreement. By 1873, Germany had 17 such treaties, France 16, and England 12.[12]

56. In 1862, Montgomery Blair, the Postmaster General of the United States, initiated an international meeting for the purpose of reaching a common postal agreement. This Conference, which met in Paris on 11 May 1863, was attended by fifteen nations. It resulted in agreement on a number of principles representing what the majority considered to be a summary of actual inter-

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[9]Rowland Hill, *Post Office Reform: its Importance and Practicability*, p. 7 (private pamphlet, 1837).

[10]A.F. Harlow, *Old Post Bags*, p. 190 (New York, 1928).

[11]M.J. Daunton, *Royal Mail: The Post Office since 1840*, p. 17 (1985).

[12]G.A. Codding, Jr., *The Universal Postal Union*, p. 16 (1964).

national usage as embodied in the bilateral treaties. Despite the limited scope of the decisions taken at Paris, and the numerous escape clauses, the principles laid down were incorporated in many subsequent bilateral treaties and did bring improvements.

57. Uniformity of principles embodied in separate bilateral agreements, however, proved inadequate in the face of rapidly developing international relations. In 1868, Henrich von Stephan, a senior official in the postal administration of the Northern German Confederation, drew up a plan for a postal union of civilized countries. In 1874, in Berne, Switzerland, representatives of twenty two nations signed the first multilateral postal treaty and founded the "General Postal Union." The Convention took effect on 1 July, 1875. Other nations quickly joined and, three years later, the General Postal Union became the "Universal Postal Union."

58. The essential principles introduced at the Berne Convention of 1874 are still at the heart of the UPU Convention. Today, these principles are summarized by the UPU's secretariat in the following seven points:[13]

- Formation of a single postal territory
- "Freedom of transit"[14]
- Standardization of the postage rates (not strictly applied since each administration also has the option to vary their basic charges)
- No sharing of charges between the origin and destination post offices.[15]
- Institution of arbitration procedures
- Creation of a secretariat (International Bureau)
- Periodic meetings of a Congress of plenipotentiaries of the member countries with a view to revising the Acts of the Union and discussing questions of common concern.

59. These principles are inconsistent with Rowland Hill's axioms of administrative simplicity and cost based charges, yet they shaped the development of the UPU for more than a century. In the last decade, private delivery services have (albeit unconsciously) played the role of Rowland Hill's successor, forcing the UPU into more economic reasonably practices. [16]

60. Nonetheless, these UPU principles remain important to any consideration of Community delivery services policy because *they have established a*

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[13]UPU, *Acts of the Universal Postal Union*, vol. 1, pp. xi-xii (1985) (Historical outline). The version reproduced in the text is simplified and shortened.

[14]As noted above, the development of postal monopolies stopped a post office's ability to establish post stations across another country. "Freedom of transit" therefore really means only "guaranteed transshipment" of one post office's mail by another.

[15]As explained by the UPU, "Each administration retains the whole amount of the charges which it collects, subject to an adjustment for intermediate administrative transit charges and, since 1969, a charge to correct for imbalances in traffic flows (known as "terminal dues")." In plain words, post offices do not pay each other postage for delivering international mail, although they pay each other various charges unrelated to the cost of delivering the mail.

[16]See J.I. Campbell Jr, "International Postal Reform: An Application of the Principles of Rowland Hill to the International Postal System," in *Competition and Innovation in Postal Services* (M. Crew and P. Kleindorfer, eds., to be published late 1990).

framework for thinking about relations between national systems that is fundamentally at odds with the Treaty of Rome. A detailed legal analysis of this contention is presented in Chapter V, below.

D. TOWARDS A COMMERCIAL POST OFFICE

61. In 1969, a third major period of postal development was initiated, again in England. In that year, the United Kingdom converted the post office from a department of state into a commercial undertaking owned by the state. U.K. Postmaster General Stonehouse explained:

> The Government have decided to set up this new corporation *so that in the communications explosion we shall be experiencing during the next ten years there will be a public authority fully able to take advantage of the commercial opportunities* available to it to serve the public and to provide new ways of improving communications within the United Kingdom.[17]

62. In 1980, the U.K. took a further step in the same direction by separating the telecommunications functions from the British Post Office. In 1986, the British Post Office subdivided into four separate businesses: letters, counters, parcels, and banking. Each business is run by a managing director and services exchanged between the businesses are provided on a contract basis.[18]

63. The U.K. reforms have resulted in a more efficient and businesslike postal organization. The British Post Office reports that it is the only Member State post office to have survived without subsidy during the twelve year period ending 1988. During the decade ending in 1988, the U.K. Post Office's letter business grew by a healthy 42 percent.[19]

64. Other countries have studied and adopted similar "commercial" reforms of posts, including the United States (1970), Canada (1981), Ireland (1983), the Netherlands (1989), Germany (1989), and France (1990).

65. If the democratic post office was the product of the Industrial Revolution and the emergence of the idea of citizen's rights, the commercial post office was the product of the vast increase in the *diversity of commercial demands* that improved technology and economic freedom have made possible. Concomitantly, the concept of citizens' rights has been extended to include not merely the right to a standard state service, but the right to efficiency and responsiveness in all services, public and private.

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[17]Quoted in M. Corby, *The Postal Business*, p. 1 (London, 1979) (emphasis added).

[18]U.K. Post Office, *The Post Office Report and Accounts, 1985-86*, pp. 7-8; Post Office Users National Council, *Customer Audit and Review of the Post Office 1987*, p. 12 (1987).

[19]U.K. Post Office, *The Post Office Report and Accounts 1987-1988*, pp. 4, 10. The new competitive spirit at the U.K. Post Office was nicely stated by its Managing Director for Parcels, Mr. Nick Nelson, in a speech to the June 1988 World Express conference in London:

> I want to remove any misconception you may have that we are tarnished with the remnants of a monopolistic approach . . . Competitive superiority . . . lies at the root of our business. *Our mission is simple—to beat the competition to death*—by providing unbeatable products, and unbeatable standards of customer service at unbeatable value for money. [emphasis added]

Figure 1. International infrastructure, 1977-1986

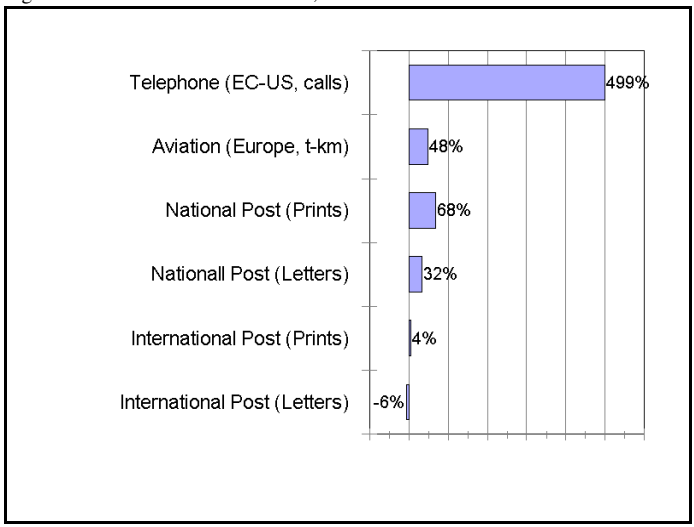
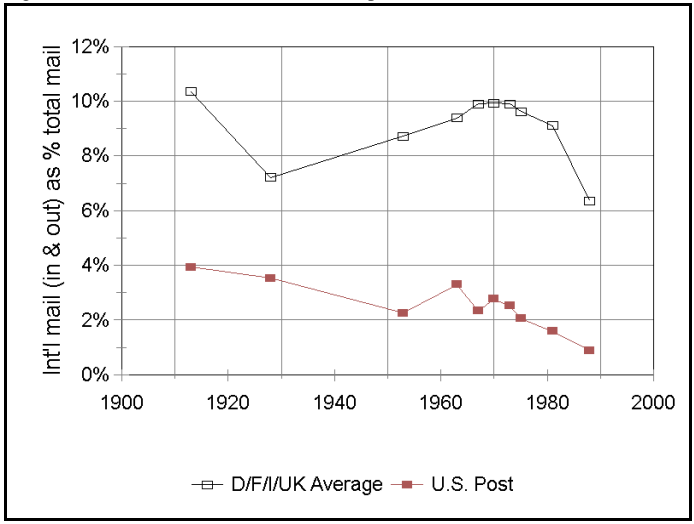


Figure 2. International mail (in and out) as percent of total mail



E. DECLINE OF THE INTERNATIONAL POST

66. During the last 10 to 15 years, the international postal system has fallen behind the pace of change in modern international commerce, despite relatively strong performance in the domestic market. Figure 1 compares the international post in the developed countries to other international services and

to the domestic post in the same countries.[20]

67. Between 1981 and 1988, national postal traffic for the Community post offices grew about 24 percent, but intra EC and international traffic remained almost unchanged. As a result intra EC and international mail *declined* as a percentage of total mail.

68. By updating a 1979 study by Professor Deutsch of Harvard University,[21] it is possible to view this trend in a long term perspective. The decline in the proportion of international postal traffic in the Community in the last decade appears rather unusual, while data for the U.S. Postal Service seems to suggest a long term trend. In the U.S., international mail is a lower percentage of total mail because mail between "member states" is considered national mail. U.S. postal data may document a "natural" decline in the relative share of international mail in which the Community is participating more heavily due to the fact that a higher percentage of its traffic is regulated by the rigidities of international postal rules.[22]

69. The most basic explanation for the decline in the international post appears to be the difficulty of coordinating the activities of two postal services, each of whom is focused upon its main business, the national market. A Swedish post office report to a special conference of major European post offices in April 1987 complained of the unsatisfactory status of the international postal service in the following terms:[23]

> The *domestic* priority letter mail service provided by many Postal Administrations is presently characterised by a relatively high service level at reasonable prices. The corresponding *international* services, on the other hand, are characterized by the following weaknesses:
> - Slow mail processing at the office of exchange of the country of origin;
> - Slow mail processing at the office of exchange of the country of destination, in some cases combined with the fact that domestic mail is given priority over foreign origin mail;
> - Unprofessional purchases of air transportation.

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[20]Sources: UPU, *Five-yearly Report on the Development of the Postal Services, 1977-1981*, Tables XIV, XV, XVIII, XIX (1984); UPU, *Five-yearly Report on the Development of the Postal Services, 1982-1986*, Graphs T1, T4, T13, T16 (1989); International Civil Aviation Organization, *Civil Aviation Statistics of the World*, Table 1-13 (1986 ed, 1988 ed); US Federal Communications Commission, *Statistics of Common Carriers* Table 15 (1977 ed), Table 13 (1986 ed).

[21]K.W. Deutsch and R.L. Merrit, "Transnational Communications and the International System," *Annals of AAPSS* vol. 442, pp. 84-97 (1979) (based on UPU Stat); updated for 1981-1988 period by EEO, based upon UPU Statistics for relevant year. Professor Deutsch was at that time a professor of international affairs at Harvard University. For the Spanish Post Office, 1987 data is used for 1988. For the U.S. Post Office, inbound traffic is assumed equal to outbound traffic for 1975-1988, an assumption that will somewhat overstate international mail as a percentage of total mail for U.S.

[22]Some explanations for the decline in the international post are discussed in Chapter IV.

[23]Swedish Post Office, paper submitted to the "Remail Conference" held in London, 22 April 1987, p. 2 (emphasis by Swedish Post Office). Remail competition between post offices is discussed in section 4, below. Remail highlighted, although it certainly did not create, the problems noted by the Swedish post office.

70. Other analyses also made clear the international post was hindered by (i) post offices' traditional unwillingness to charge each other for delivery services according to actual economic costs[24] and (ii) post offices' refusal to give large customers postage rates that reflected cost savings associated with large tenders of mail.

71. By the holding of the twentieth congress of the Universal Postal Union in Washington in December 1989, postal officials evinced a nearly unanimous recognition that the international postal system is in need of reform. Increasingly, diagnoses of the international system by post officials have focused upon an additional, structural element:

> Our competitors hold a major advantage over us in the fact that they have *unified management and control their business process from end to end*. In contrast, management of the world's postal system is divided into 170 parts.[25]

2. INTERNATIONAL EXPRESS INDUSTRY

A. ORIGINS OF THE EXPRESS CARRIERS

72. In the late 1960's, in North America and Western Europe, "air couriers" began to offer fast and reliable delivery service between cities by carrying items from city to city as the baggage of an airline passenger.[26] The couriers organized rapid collection, forwarding (at intermediate airports), and delivery services that took innovative advantage of the possibilities of the underlying air transportation.

73. Air couriers primarily transmitted urgent documents, such as financial, shipping, and engineering papers. Delivering these documents worldwide, they invented two terms which are illuminating and are now commonplace in the industry: "time-sensitive" and "door-to-door."

74. Some of the early air couriers evolved from the armoured car companies, which provided banks with secure transportation of money and financial instruments.[27] The most important and successful air couriers, however, were

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[24]The EEO and the International Express Carriers Conference have supported a rationalisation to these charges so that they are reasonably based upon the costs incurred by the destination post office. Unfortunately, "reforms" in the terminal dues system advocated by some post offices are not reasonably based upon the costs of the destination post office and, as postal documents made clear, have been inspired primarily by a desire to suppress remail competition between post offices.

[25]E.E. Horgan, speech of 16 November 1989, in UPU, 1989 Washington Congress, Congress - PV 6, p. 5. Mr. Horgan was the Chairman of the UPU 1989 Washington Congress and the speech was one of the opening speeches of the congress.

[26]*Courier* is an old English word meaning a "running messenger, one sent in haste." Interestingly, although *air* courier services were new in the 1960's, *railway* couriers carried urgent commercial documents as baggage aboard trains in much the same manner in the United States in the mid-nineteenth century.

[27]Examples include Purolator (bought by Emery) and Loomis (bought by Gelco, in turn bought by Federal Express).

developed from the ground up by young entrepreneurs in their twenties. [28]

75. The growth of air courier companies was the product of an expanding international market, including:

- Worldwide expansion of large scale banking operations implied a need for the rapid transfer of financial instruments to avoid large losses in interest.
- Rapid industrialization of the Middle East in the 1970's generated a flow of urgent, complex engineering and petroleum documentation to and from the developed countries.
- Containerization of sea cargo increased the amount of cargo documentation per ship and decreased sailing and port times; documents had to be flown to the port of destination to avoid unloading delays.

76. International air couriers were the pioneers of cross border express services. In these early days, *a key to success proved to be unity of control over administrative operations*. A courier company that worked with agents never achieved the same degree of success as the courier companies that could manage their offices directly.

77. While the air couriers thrived on the long international routes, a different type of rapid delivery company developed in certain large regional markets. Like the major air couriers, they were usually started by young men and did not develop from other types of transportation companies. [29]

78. The "air express"[30] companies organized carefully coordinated collection and delivery operations in each city. Unlike the couriers, air express companies operated a fleet of dedicated aircraft, which flew at night to a central "hub" airport. At the hub, urgent packages were sorted quickly, and the aircraft were loaded and dispatched to destination cities before daybreak.

79. Because they operated their own aircraft through a central hub, air express companies obtained a still greater degree of end to end administrative control than did air couriers. Advanced "tracking and tracing" was pioneered by these companies. Air express companies were also better suited to handle packages, as compared to documents. As international delivery services have grown in size, these capabilities have proved increasingly important.

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[28]DHL, founded by a young American law student, Larry Hillblom, began operations in 1969 to provide rapid delivery of shipping and banking documents between the West Coast of the United States and Hawaii. Skypak (now TNT/Skypak) began as a European courier led by an Australian, Gordon Barton, who had previously pioneered express trucking operations in Australia and Europe (IPEC). Andrew Walters, an Englishman, started IML in the early 1970's as a courier specializing in service between London and Africa. Roy Harry, and American, and Mike David, and Englishman, organized Airsystems to specialize in London-New York service. Airport Couriers (later Securicor Air Courier) was begun by an English ex-Pan American employee, Bertie Coxall, to serve the London-Europe market. A pioneer in the Pacific Ocean area was Callan Air Courier, begun by a DHL veteran, John Callan.

[29]For example, Federal Express in the United States, organized by Fred Smith in 1972 and XP in the Netherlands, led by Jaap Mulders.

[30]In early English, an "express" messenger was one sent for the particular (or "express") purpose of delivering a given message, hence a quick and reliable means of delivery.

80. Other important entrants in the international delivery services market include the parcel delivery services. Unlike the air courier and air express companies, international parcel delivery services have usually been extensions of existing national delivery businesses.[31]

81. Since about 1972, the international postal system has also offered a rapid service called Express Mail Service or "EMS."[32] Although an early entrant into the express market, EMS's development has been slow and almost entirely in response to the competitive pressure of the private express companies.

82. Meanwhile, in early 1986, the French Postal Administration invented a new type of postal undertaking to compete in the express field. Société française de messagerie internationale, SFMI, is a joint venture established under private law and owned two thirds by the French post office and one third by a private airline TAT (Transport Aérien Transrégional). Capitalized with FFR 10 million, its mission is to capture business from the private express industry. In effect, the French post office freed itself from the problems of governmental control but retained the legal advantages of the public post.[33]

B. REGIONAL OPERATIONS AND REGULATORY REFORMS

83. Although the United States has never had internal customs controls, two other regulatory regimes posed substantial obstacles to the development of an express industry that could take full advantage of the size of the American market.

84. In 1977, the United States deregulated federal controls on all cargo aircraft operations, allowing Federal Express and other express companies to introduce the efficiencies of large aircraft. In 1979, after a three year public debate, the U.S. Postal Service bowed to congressional pressure and adopted an exemption from the postal monopoly for all items for which the shipper paid the carrier more than $3 or twice the otherwise applicable postage, whichever is more. Soon thereafter express companies were able to develop "overnight letter" services to supplement their express package services.

85. In Europe, as well, reform of regulatory controls has been central to the development of a regional express industry. Although the U.K. permitted the private carriage of time sensitive letters in 1981, a regional exception to postal monopoly restrictions has developed only in respect to express operations between Member States and only as a result of a series of skillful Commission interventions with individual Member States post offices between 1984 and

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[31]In the northwestern corner of the United States, United Parcel Service (UPS) began operations in 1907 delivering written versions of telephone calls to houses that did not have a telephone. In Japan, as well, large "takyubin" (door to door parcel) companies have developed and are venturing into international delivery services. The leading example is also the most specialized: Overseas Courier Services (OCS) began as a rapid delivery service for Japanese newspapers.

[32]EMS was originally called different names in different countries such as "Datapost" (U.K. and Germany), "Chronopost" (France), and "International Business Mail" (Japan).

[33]Universal Postal Union, *Union Postale* (January/February 1986).

1989. The use of large all cargo aircraft for regional express operations and the complete elimination internal customs formalities are still in process or under study.

86. By the end of 1979, U.S. private delivery services were thus free to develop express services on a larger scale than permitted by the regulatory regimes in Europe or other parts of the world. Inevitably, they became the largest building blocks for the global systems that are emerging today.

87. In 1986, the United States adopted a further important regulatory reform to the postal monopoly law. U.S. businesses were given clear regulatory authority to use private express services to tender their mail to foreign post offices, that is, outward "remail." Whether the U.S. Postal Service has lost business as a result of this policy remains unclear, but American mailers, and European post offices, have gained substantially.

C. EVOLUTION OF GLOBAL SYSTEMS

88. In 1985, as the international air courier business continued to grow, Federal Express began operating its own aircraft across the Atlantic. It soon became clear that the future market would require the building of *global* express systems.

89. Structurally, the industry changed dramatically, from specialists in one operation or another into general delivery service systems. All major participants in the industry now use both air couriers and dedicated aircraft. All handle both documents and parcels.

90. Most importantly, participants in the international delivery services market recognized the need to consolidate into global systems or assume the role of a local "feeder" into a global system. As in other regions, European companies have assumed both roles. Some have joined under the organizing umbrella of a large system (such as Deutscher Paket Dienst, DHL, Federal Express, United Parcel Service).[34] Others prefer a separate, local role that interconnects with the larger systems.

91. As they seek to provide service from anywhere to anywhere, the global systems are losing their original home market perspective and being forced to adopt a global perspective that depends primarily upon which markets provide

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[34]Some examples of this trend towards consolidation into global systems include:

- DPD is a consolidation of more than 15 local companies, primarily German in origin.
- DHL purchased Calico (USA) in 1983 and took over the business of Securicor (UK) in 1985. Majority interest in the original DHL (USA and HK) was purchased by Lufthansa (German) and Japan Air Lines (Japan) in 1990.
- TNT bought IPEC (Netherlands) in 1982, Skypak (Australian) in 1983, XP (Dutch) in 1988, Traco (Italian) in 1987, and UniSpain (Spain) in 1988.
- Federal Express purchased Gelco (USA) in 1982, Lex Wilkinson (UK) in 1986, Saimex (Italy) in 1988, and Flying Tigers (USA) in 1989.
- UPS purchased Alimondo (Italy) in 1988, Asian Courier (HK) in 1988, IML (UK) in 1989, and Arkstar (UK) in 1989.

the most business. Within these global systems, therefore, the role of European managers and European customers will depend upon the size of the European market.

92. The growth of the new generation of express companies has also stimulated traditional freight forwarding companies in Europe to form national and intra Community cooperatives and to seek improvements in service standards. Examples include ACE (Associated Couriers of Europe), Euro Express, System Gut, German Parcel, IDS, German Sky, and Unitrans.

93. So far, these cooperatives have found it difficult to sustain top quality delivery services among group members, due to an absence of close administrative coordination. Prognos, a Swiss transportation consulting firm, has just released a two year study of the delivery services industry in Europe that concludes:

> The freight forwarders . . . have neglected or even overlooked the fact that *transport customers have developed higher qualitative standards with regard to the services required, especially concerning speed, reliability and convenience* . . . Although freight forwarders have always been capable of organizing house-to-house transport, they have not been able to keep up with the integrators, especially in overseas services. *In contrast to the newcomers, who have consistently built up their own networks of branches and are, moreover, able to rely on their own fleet of vehicles and aircraft with the corresponding infrastructure (hubs, integrated data processing), freight forwarders always have to enlist the services of third parties,* whose services and prices vary enormously . . .[35]

94. *The problems identified by Prognos of integrating multiple private delivery companies into a modern delivery service mirror precisely the difficulties of integrating different postal systems into a modern international delivery service.*

3. INTERNATIONAL POST CORPORATION

95. Responding to the relative decline in international postal services, and following much the same path as the freight forwarders, in May 1985, the Conference of European Post and Telecommunications Administrations (CEPT) set out to tighten cooperative arrangements.[36]

96. On November 12, 1987, the "EMS International Post Corporation" (EMS) was incorporated as a Belgian "société coopérative" by major post offices in the Community and North America.[37] EMS organized an air

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[35]Prognos A.G., *Courier, Express and Parcel Service Markets in Europe*, vol. A, p. 86 (1990) (multi-client study) (emphasis added).

[36]The CEPT agreed to regular meetings of the DG's and initiated an outside study which, in early 1987, confirmed the inadequacies of the international postal service.

[37]The post offices of Belgium, Canada, Denmark, Finland, France, Ireland, Norway, Portugal, Sweden, the United Kingdom and the United States. Membership is limited to post offices of a member state of the UPU and their mail handling subsidiaries (art. 8 of the bylaws) and membership in the board of directors is limited to directors and employees of the member

transportation "hub" at Zaventem airport in Brussels and the night airmail network for "Express Mail Service." Today, 13 aircraft connect 22 major European cities. A trans Atlantic flight joins the hub to New York, Montreal, and Toronto.

97. On 4 September 1987, at a CEPT meeting in Copenhagen, former UK Postmaster General Sir Ronald Dearing was placed in charge of a working party to develop plans for a new institutional structure for the international post. Meeting in Ottawa in May 1988, the directors general of the major post offices approved the plan proposed by the Dearing group. [38]

98. On 5 January 1989, 21 major post offices (11 Member State) took a further step towards integration by forming a second private corporation, International Post Corporation (IPC), to take the lead in managing and marketing international postal services, including EMS's Brussels hub.[39] IPC's initial budget was UK£ 5 million in 1989, financed through contributions from the shareholders.

99. IPC's mission has been described by top executives[40] to include the following:

- coordination of business policies;
- harmonization and improvement of international postal services;
- monitoring of service quality;
- development of tracking and tracing systems;
- planning of competitive responses to remail; and
- advancement of EMS's market share.

100. IPC conducts or buys postal business research and recommends specific measures to postal administrations to improve competitiveness. By the end of 1989, IPC had arranged for studies on:

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companies (art. 16).

[38]During this period, and in particular at the Copenhagen meeting of the CEPT, the post offices were extremely concerned about remail competition. These concerns may have had an impact on the work of the Dearing group as well.

[39]More precisely, on 1 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 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 holds all but one of the 25 shares, the remaining share being held by EMS for reasons of Belgian corporate law. It is 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 the IPC Brussels was changed into "Uniposte" or Unipost in English.

[40]*See, e.g.,* G. Meynié, "L'agence internationale de coordination postale," in *Le courrier dans le marché de la communication*, pp. 114-15 (Bulletin de l'Institut de Recherche d'Etudes et de Prospectives Postales, Mar 1989). M. Meynié served as president of the board of EMS and IPC until early 1990. G. Harvey, "CEPT Agency: Report to Meeting of Directors General," p 3, (Washington, 23 Sep 1989). Mr. Harvey was the chairman and is now president of the board of IPC. Richard Wohlfart, "Nationale und internationale Tendenzen im Briefdienst," p 5, in *Zeitschrift für Post und Fernmeldewesen* (Feb 1989). Mr. Wohlfart is a member of the IPC board.

- purchased transportation;
- demand and competitor research; and
- monitoring the quality of postal services.

101. IPC also seeks "partnership agreements" with member posts. Under these agreements, a post office assumes responsibility for quality of service, product range, promotion, and the introduction of a tracking and tracing system. IPC undertakes to assist in the post's commercial activities, to develop new products, to contract with private companies to enhance service reliability, and in the event of malfunction, to assure continuity for premium services like EMS. IPC has concluded "partnership agreements" with the British, French and Irish post offices.

102. Thus, two decades after the concept of the commercial post office was introduced at the national level, it appeared in outline form at the international level with the creation of IPC, a private international postal undertaking established jointly by 20 major post offices.

4. POSTAL-PRIVATE COOPERATION

103. As establishment of the French SFMI foreshadowed, the restructuring of the express delivery market not only changed relations within the private and public sectors, but also relations between them. For example:

- In 1988, EMS and DHL agreed to operate jointly an express flight between Brussels and New York.
- A Member State post office retained an express company to deliver "electronic mail" documents from the U.S.
- Member State post offices discussed openly the use of American express companies to deliver express mail to the U.S.

104. The most important form of postal-private cooperation came about because of the development of *international bulk mail, a phenomenon that carries profound implications for future Community postal policy*.

105. As early as the 1930's, European publishers used air freight to transport bulk shipments of publications to the United States which were delivered by the U.S. Post Office. In the late 1950's, a large American publishing company and KLM Royal Dutch Airlines began air freighting bulk U.S. publications to the Netherlands where they were posted throughout Europe. Since most post offices break even or lose money on publications, this practice did not raise many eyebrows.

106. However, in the late 1970's, large businesses began producing a distinctly different type of shipment, periodic "bulk" mailings of similar or identical documents, such as statements of account, solicitations, registration information, securities' prospectuses, newsletters, brochures, catalogues, order forms, operating instructions, corporate reports, etc.

107. In many respects, bulk mail is an extension of printed matter. Bulk letter mailings are produced in large quantities (as much as a tonne or more), but unlike printed matter, they require the priority treatment of first class letters.

With computers, all large mailings, letters and printed matter, can be produced completely presorted so that they do not require individual handling.

108. The operational distinctness of bulk mail was well described in the *Financial Times* (8 June 1987):

> The [U.K.] Post Office is setting up *a separate national delivery system to handle its thriving bulk mail business*, which now accounts for 20 per cent of the 46m letters and packets posted every day . . . . *It will operate separately from the existing Royal Mail delivery system . . . . The discrete nature of the new service is also in line with the strategy of splitting up the letters business into manageable parts* . . . . The bulk mail service is used largely by banks, building societies, credit card companies, the mail order business and others sending out large numbers of identical or similar documents. [Emphasis added.]

109. *Bulk mail differs from ordinary mail in that it is, in effect, already "collected" by the mailer*, saving the post office the costs of collection from multiple points, facing, and initial sorting. This amounts to perhaps a quarter or more of total end to end costs for regular first class mail.

110. Despite the distinct and favourable characteristics of bulk mail, post offices were slow to develop rates and services appropriate to it, especially at the international level.[41] Large international mailers reacted by using the express system to tender bulk mail to whichever post office offered the most attractive prices. Certain post offices began competing with one another to become hubs for the handling and forwarding of international bulk mail. "Remail" competition *between post offices* developed.

111. Inter postal competition has spurred improvements in international postal services.[42] A March 1988 UPU survey on remail reported:

> As a competitive response to the remail practice, fifteen of the responding administrations indicated that they had established new rates or new services. The new services included SAL, EMS, business letter service, consignment service, and special collection services for large customers. In addition, some administrations had reduced their rates to barely cover their costs in an effort to compete with remail companies.[43]

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[41]See UPU Consultative Council for Postal Studies, "Bulk Posting of, and Prepayment of Postage on, Ordinary and Registered Mail," Study 430 (1979). This interesting study shows the prevalence of bulk mail in the national mail stream at this early date, and yet it discusses bulk mail primarily in terms of appropriate restrictions to be placed upon it. Of 41 countries giving special treatment to bulk LC mail, only 16 allowed rate reductions, and these were small.

[42]Several post offices introduced new international "business letter services," that is, discounts and service enhancements for bulk mail. For example, the UK Post Office's "Airstream" charge for a 1000 kilogram shipment of letters to Europe averaging 10 grams each is £ 11,600, compared with £ 18,000 if sent under the regular airmail letter post rate, a 36 percent discount.

[43]UPU, Executive Council, CE 1988/C 4 - Doc 9 ("Study on remailing"), *reproduced in*, "Terminal Dues Round Table, 6-7 April 1989," Annex 3, at paragraph 13. Despite these salutary effects of postal-private cooperation, many post offices urge "solidarity" among post offices and a general ban on postal-private relationships. This approach is being pursued vigorously by the Secretariat of the Universal Postal Union. (See Chapter V, below.)

5. INTERNATIONAL DIRECT MARKETING

112. While public and private carriers organize and reorganize, the market itself is also changing dramatically. Widespread use of credit cards, improvements in direct mail techniques, and cheap worldwide telecommunications (telephone and fax) have allowed producers and large distributors to market goods and services directly to final users (at home and in the office), bypassing traditional retail stores. Both postal and private delivery services expect the rise of international "direct marketing" as a major source of growth in the international traffic of documents and goods. A report adopted by the Universal Postal Union considers direct marketing "one of the biggest areas of potential traffic growth for letter mail."[44]

113. The UPU report notes that:

- over 10 percent of the U.K. Post Office's domestic traffic is direct mail;
- in major European countries, direct mail has been growing by 6 percent per year for five years;
- in the U.S., direct mail per capita is *five times* the European figure.

114. International direct marketing includes both the sale of services and the sale of goods. International service companies—such as banks, insurance companies, securities firms, real estate agencies, tourist agencies, etc.—cannot operate across national borders unless customer service items (such as statements of account, invoices, forms, etc.) can be delivered as promptly and reliably as those of the local competitor.[45] Increasingly, international direct marketing is also used to sell speciality goods directly to the buyer. Examples include records and tapes, computer equipment, clothes, shoes, toys, athletic equipment, novelty foods, books and publications, and office equipment.

115. Until recently, a major impediment to international direct marketing was the absence of a practical business reply service. That is, a service whereby a shipper could send to an addressee preaddressed, and usually prepaid, reply "cards" (including envelopes).[46] Business reply services are necessary to facilitate market surveys, customer orders, and return of payments.

116. In domestic postal services, business reply cards alone account for a significant amount of traffic (e.g., about 3 percent in the U.K.). The true importance of business reply services, however, lies in their ability to stimulate an increase in the exchange of both documents and goods.

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[44]UPU, 1989 Washington Congress, Decision C 90 ("International business reply service"), sec. 3.3 (Doc 78.2).

[45]For this reason, U.S. banks and financial institutions were major proponents of the 1986 U.S. postal regulation permitting international "remail" out of the U.S.

[46]Until recently, an international shipper could only:

- affix return international postage on *all* items (regardless of whether they were returned), denominated in the local postage of each addressee's country; or
- enclose "international reply coupons" that the addressee would have to take to his local post office for redemption in stamps.

117. In 1986, certain European post offices began an experiment with an international business reply service. Under this system, a shipper may prepay reply cards for return via the international postal system. By the end of 1989, 16 post offices had joined this system.

118. In 1989, a private delivery service, TNT, initiated an alternative business reply service designed to take advantage of the strengths of both postal and private delivery systems. With TNT's service, the addressee's reply card can be sent by domestic postal service to a post office box in the addressee's country. The replies are collected daily and returned to the original shipper by international express. Currently, TNT's service is available in 33 countries.

119. Two major European airlines, operating in conjunction with their post offices, have also begun international business reply services.

120. In December 1989, the UPU congress, "*noting the demand for this service has also prompted competitors, including at least one international courier, to introduce a similar service*," endorsed the European postal business reply system and urged all UPU member countries to join it.[47]

6. SUMMARY

121. From this historical survey, it may be helpful to list in summary fashion a few key points:

- The postal monopoly was originally enacted to control the circulation of ideas in the sixteenth century.
- Low cost, universal postal service for the public was conceived by Rowland Hill and introduced by the U.K. in 1840.
- Uniformity of postal rates within a primary distribution was introduced by Hill because they were cost-based; he did not support uniform postage rates for service to high cost "secondary" areas.
- Hill did not think the postal monopoly was necessary to permit uniform rates and in fact generally opposed the postal monopoly.
- The UPU was established in 1874 and is based upon governmental principles of that period.
- In 1969, the U.K. initiated a second major reform of the concept of the post office by separating the post office from the government and making it a commercial undertaking.
- In the last 15 years, the international postal system has lagged behind the national postal systems and the other elements of the international infrastructure.
- Today's global private delivery services have evolved, by growth and acquisition, from U.S. and European international air couriers, national and regional air express services, and national and regional parcel delivery services.
- A key ingredient in the commercial success of these private delivery

[47]UPU, 1989 Washington Congress, Decision 90.

services has been their ability to exercise unified administrative control over shipments from end to end.

- A fundamental difficulty faced by cooperatives of air freight forwarders and traditional international postal structures has proven to be their inability to exercise unified administrative control across their traditional markets.
- The establishment of IPC, as well as postal studies growing out of concern over remail, indicate a recognition by leading Community post offices of the need to establish end to end administrative control in order to meet the needs of modern commerce for delivery service across borders.
- In the last few years there has developed an increasing tendency for postal and private companies to work together in commercial relationships, although some post officials oppose this tendency.
- The increasing scale of international business and the introduction of the computer has resulted in the production of business mail as "bulk mail."
- Bulk mail is mail that has been aggregated in large quantities and prepared for final delivery by the post office, saving the post office the normal collection costs.
- Post offices, especially at the international level, were slow to respond to the special characteristics of bulk mail; this led large mailers to tender international mailings to whichever foreign post office would provide the best service at the best price.
- Competition between post offices for large international mailings is called "remail." Remail is made possible by mailers' use of express carriers to transport bulk mail to other post offices quickly and reliably.
- International direct marketing is expected to be an important source of growth for international delivery services for documents and goods; and both postal and private delivery services have introduced international business reply services to facilitate this market.
- To date, the overall effect of the competition posed by private delivery services at the international level and increasing postal-private cooperation has been to stimulate the market, spur post offices to improve their services materially, and introduce price and services options that would not have been introduced otherwise.

III. OTHER COUNTRIES

122. This chapter briefly surveys the policies of two jurisdictions outside the Community that, in different ways, raise policy issues that may be appropriate for further consideration in the evolution of a Community policy towards delivery services.

123. The first is the United States. Not only is the United States a developed

regional economy roughly similar in size to the Single Market, but the United States has established a unique regulatory framework towards delivery services that, while perhaps unsuitable for imitation, appears worthy of study.

124. The second jurisdiction examined is New Zealand. New Zealand has recently embarked upon a bold experiment in privatization and deregulation of postal services that has provoked a wide ranging debate within the international postal community. The Commission and the European public should at least be aware of the basic elements of this interesting experiment.

1. UNITED STATES

A. ORGANIZATION OF MARKET

125. The United States has approximately two thirds the population and the same level of economic activity as the Community, yet the United States employs delivery services far more intensively than the Community. The annual delivery service market in the U.S. appears to be, very roughly, about 170 billion items (excluding purely local companies) compared to about 75 billion items in the Community.

126. The U.S. Postal Service (USPS) delivers almost 40 percent of the world's mail (excluding the U.S.S.R.). In 1989, USPS transmitted 162 billion items—0.4 percent international—and collected revenues of $37 billion (28 billion ECU). Postage rates in the U.S. are substantially lower than in Europe. The one ounce (28 gram) letter rate is $ 0.25 (0.19 ECU).[48] USPS faces competition primarily in three fringe markets: express services, parcel services, and unaddressed advertising enclosed with newspapers.

127. Although there are no official figures for the U.S. private express services sector, the current market may be estimated at about 500 million pieces. The express market is extremely competitive, with several large, aggressive delivery services, including Federal Express (the market leader), UPS, TNT, DHL, Airborne, and Emery. USPS's share of the express market is about 12 percent.

128. The size of the parcel market depends upon the definition of the term "parcel," but it may be estimated to be of the order of a few billion items. Participants include UPS (the market leader), Roadway Express, USPS, and many smaller companies. USPS's market share may be estimated at 15 to 25 percent, depending upon which services are counted as "parcel" services.

129. In 1970, the United States separated the post office from the President's direct authority and established it as an independent undertaking[49] whose assets

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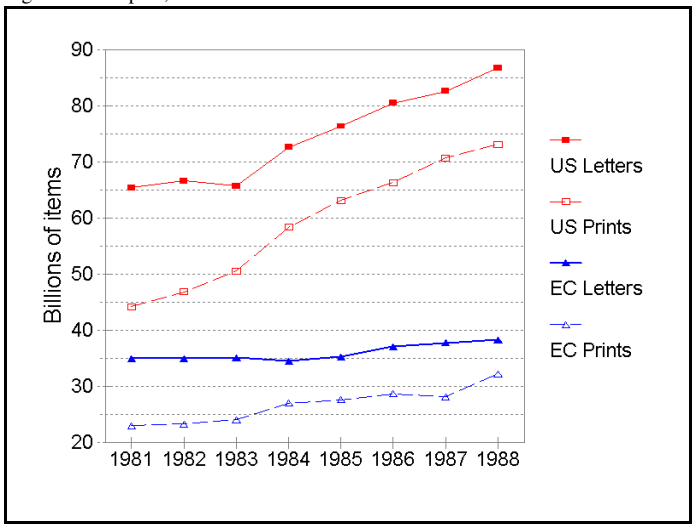
[48]The basic sources of information about the US Postal Service are: *United States Code*, Title 39; US Postal Service, *Annual Report of the Postmaster General* (annual); U.S. Postal Service, *Comprehensive Statement on Postal Operations* (annual); and U.S. Postal Rate Commission, *Postal Rate and Fee Changes, 1987: Opinion and Recommended Decision* (Mar 1988).

[49]Under the US Constitution, the President is generally vested with ultimate authority over the international policies of the United States, including international commercial policies. However, USPS has usually resisted application of presidential authority to international postal affairs.

Figure 3. U.S. post, 1981-1988



are owned by the federal government. A "Board of Governors" supervises postal management roughly like a corporate board of directors.[50] The U.S. Congress also maintains active oversight of USPS and functions, in a sense, as a superior board.[51]

130. USPS enjoys a legal monopoly over the carriage of "letters" and other legal privileges. U.S. postal monopoly law recognizes a number of exceptions including:

- letters upon which postage is paid;
- urgent letters for which the shipper pays the carrier more than $3 (2.30 ECU) or twice postage;
- letters that are posted with a foreign post office; and
- letters that are privately carried prior or subsequent to posting with the U.S. Postal Service (roughly the equivalent of internal "remail").

131. USPS is legally required to provide a uniformly priced delivery service[52] throughout the U.S. and to comply with other legislative dictates. Other postal rates, generally for larger packages, vary with distance. USPS is allowed, and required, to adjust postage rates so that it is financially self sufficient.

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[50]The Board consists of nine "Governors" appointed by the President for nine year terms. The Governors select a Postmaster General and Deputy Postmaster General, who also sit on the Board. The Board meets once per month, but it has no independent staff and is not equipped to perform detailed managerial supervision of USPS.

[51]Congressional authority over USPS is unlimited in theory. However, given its broad responsibilities, Congress's oversight is necessarily limited in most instances to major revisions of postal policy and to specific issues of political concern that either require legislation or that, for some reason, USPS itself has failed to address.

[52]No weight limit is provided in the statute. Currently, USPS provides a uniformly priced service only for items up to 313 grams (11 ounces).

Table 1. U.S. postal users[53]

	1977	1987
Business to Business	29%	31%
Business to Person	53%	57%
Person to Business	10%	7%
Person to Person	8%	5%

132. As shown in Table 1, 82 percent of mail in the U.S. originates from businesses, a percentage that has increased during the last decade.

B. POSTAL RATE COMMISSION

133. The most distinctive aspect of the American regulatory policy in the delivery services sector is the *Postal Rate Commission* (PRC). The PRC is composed of five full time commissioners, appointed by the President. It has a small expert staff of 35 to 40 economists, lawyers, and other professionals. As an expert and knowledgeable referee, the role of the PRC is to ensure that USPS's commercial efforts comply with certain "public interest" guidelines decreed by the legislator.

134. The "public interest" guidelines include standards for postal rates that are designed to preserve fairness between different mailers and between the Postal Service and its competitors. The PRC is also authorized to review USPS decisions to close or consolidate local post offices. The PRC can investigate any complaint by any mailer, and is required to investigate and issue an opinion on any general change in national postal service. In addition, Congress often requests the PRC to advise on technical issues bearing upon new legislation.

135. Whenever USPS proposes a change in postage rates, it must seek an opinion from the PRC. The PRC reviews postal costs and attributes them, as far as practicable, to the service or class of mail incurring the cost. In general, the PRC looks for costs that vary with volume (traffic) and attributes them to each class according to volume or other cost factors. In this manner, the PRC attributes about 67 percent of all postal costs.

136. The remaining 33 percent of costs are viewed as "institutional" costs that do not vary directly with volume and cannot otherwise be traced directly to any particular class of mail. The PRC allocates these institutional costs to each class of mail according to an assortment of factors set down by Congress:

- the establishment of a fair and equitable rate and classification system;
- the value of the mail service in terms of speed of delivery and other aspects of the service actually provided;
- the importance of providing classifications for both high and low degrees of reliability and speed of delivery;
- the effect of the rates upon the general public, users, and competitors

[53]U.S. Postal Service, *The Household Diary Study FY 1987*, Table 3-1 (1988).

of USPS;
- the available alternative means of sending and receiving mail at reasonable cost;
- the amount of mail preparation which the mailer performs;
- simplification of the fee structure and schedule;
- the educational, scientific, and cultural value of the mail to the recipient; and
- such other factors as the PRC may deem appropriate.

137. The PRC weighs these assorted factors according to its best judgement without reliance upon a specific theory. For example, in the most recent rate case (decided in March 1988), the PRC set first class letter rates set at 58 percent above attributable costs, while parcel post rates were set at only 12 percent above attributable cost. In deciding the rate for first class letters, the PRC was influenced by, among other things, "value of service" considerations, while in regard to parcel post rates, the Commission gave weight to the presence of capable and efficient private competitors.

138. The PRC's investigation into costs and public interest considerations is conducted through public hearings in which mail users and competitors of USPS present factual evidence as well as legal, economic, and policy arguments. The PRC is required to complete a rate proceeding in ten months. Despite limited exceptions, as a practical matter, USPS is generally obliged to accept the rates recommended by the PRC. However, USPS, and other participants in the case, can challenge the PRC's decision in court if they disagree with the PRC's interpretations of the law.

139. Similar, but usually simpler, procedures are followed when USPS desires to add new postal services, change classifications or conditions of service, alter the nature of service in a substantial part of the U.S., or close rural post offices over the objections of local inhabitants.

140. The Postal Rate Commission does *not* rule upon the level of postal wages. Nor does it have jurisdiction over international postal services.

C. EFFECTS OF REGULATION

141. In general, the effect of review by the Postal Rate Commission has been to:[54]
- decrease USPS's proposed postage rates for monopoly services;
- increase USPS's proposed rates for competitive services;
- encourage and increase USPS's proposed discounts for mailers that tender bulk sorted mail and/or transport their mail to postal facilities near the area of final delivery;

[54]Since 1970, the PRC has reviewed seven general rate cases; its eighth opinion will be issued in January 1991. After each general rate case, the findings and reasoning of the PRC are contained in a detailed and scholarly document called an "Opinion and Recommended Decision." The last was 811 pages with numerous appendices.

- require USPS to keep more detailed business data than it otherwise would in data categories that are more nearly cost based than traditional categories; and
- stimulate scholarly research and debate over economic questions relevant to postal policy.

142. In three of the seven general rates cases conducted by the PRC since 1970, the PRC has recommended lower rates in monopoly classes of mail than proposed by USPS. The PRC's treatment of parcel rates illustrates its approach to setting postal rates in competitive markets. In the 1988 rate case already mentioned, the PRC increased USPS's proposed 25 percent increase in parcel post rates to 35 percent. In 1975, the Commission endorsed a 16 percent increase in competitive parcel post rates, although USPS proposed only a 6.3 percent increase.

Table 2. U.S. bulk postal rates

Item	Discount	Bulk mail as percent of class
Letters	16 - 22 %	30 %
Printed Papers	33 - 59 %	99 %

143. The PRC has actively supported lower postage rates for bulk mail which the shipper, or his agent, has prepared for postal handling. The discounts vary according to the degree of sorting and coding performed by the mailer. Bulk discounts for shipments of at least 500 letters were first introduced in 1976. Bulk letter mail has grown rapidly and today accounts for about one third of all first class letters.

144. Although bulk discounts for printed matter, primarily advertising, have long been offered by USPS, further discounts for presorted bulk mail were introduced in 1982. Since then, printed matter mail has increased dramatically. Today extremely sophisticated bulk mail shippers presort more than half of such mail according to the postal carrier's final delivery route. In the 1988 rate case, the PRC indicated its willingness to consider favourably further discounts for third class mail shippers who tender the mail to the postal facility nearest the addressee, saving the post office transport costs.[55]

145. One of the most remarkable effects of the PRC regulatory process has been the degree to which it has stimulated scholarly debate about fundamental issues of regulatory policy. Leading academics often participate on the hearings. The most recent case featured inquiries into issues such as:

- Is it more fair to society, in terms of economic theory, to set prices of a regulated undertaking based upon allocated costs or marginal costs?

[55]The PRC did not approve specific discounts for such shipments because of inadequate data, but it approved the concept and indicated the data that would be needed for the next rate case (now in progress).

- How should common overtime costs be allocated between priority and non priority services?
- Should shippers receive a discount for transporting mail to the post office's distribution centre and, if so, how much?
- Does "bulk mail" have different demand characteristics from non bulk mail of the same type?

146. The overall result of PRC regulation has been to resist a marked tendency by USPS to use its position as the dominant carrier on one market to underwrite efforts to achieve greater commercial success in related, competitive markets.[56] In effect, USPS has been required to concentrate, in terms of better service and lower prices, upon markets for which its universal, final delivery network is best suited.

147. Inevitably, there are different opinions as to whether the PRC's activities have advanced the "public interest" or even USPS's own commercial interest. All observers, however, would agree upon certain basic facts:

- USPS's traffic grew very substantially from 1981 to 1988 (46 percent compared with 22 in the Community, see Figure 3, above); and
- U.S. mailers and shippers have excellent delivery services in express and parcel services and a low priced national postal service which is at least very good value for money.

148. As noted, the PRC also advises the U.S. government on technical aspects of delivery service policy. For example, in 1982, the PRC was requested by a Senate committee to identify differences in the cost of delivering rural mail as compared to non rural mail. The PRC estimated that rural delivery costs were approximately 12 percent higher than non rural deli very costs.[57]

149. The foregoing discussion of the U.S. market is *not* intended to suggest the suitability of a "European Postal Rate Commission." It is submitted, however, that the American experience is helpful in illuminating certain areas relevant to Community policy on delivery services, including:

- the types of issues that may be expected to arise from the mixed public - private nature of the delivery services sector and the possible merits and demerits of various alternative policy solutions;
- the extent to which these issues generate, and will continue to generate, intrinsically difficult factual and conceptual issues;
- the possibilities and limitations for improved data as a policy tool in the delivery services sector; and
- the potential tasks of a governmental institution serving as an impartial expert on delivery services policy and the advantages and disadvantages of intervention by such an institution.

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[56]USPS's proposed rates may contain an element of "gamesmanship," so the effect of Commission intervention may be less than it appears from simply comparing proposed and approved rates.

[57]The PRC's estimate pertained only to actual delivery costs. As the PRC pointed out, because of limitations in the appropriateness of data categories, this figure was only an estimate.

2. NEW ZEALAND

150. In area, New Zealand is about 10 percent larger than the U.K., and its population is approximately three million. The New Zealand post office handles about 820 million items per year, about one third the volume of the Belgian post office. During the last four years, the New Zealand government and its post office have undertaken a radical review of the concept of a "postal service."[58]

151. In 1987, the New Zealand PTT was divided into three state owned undertakings: Post, Telecoms, and Post Bank. New Zealand Post was established as a private company owned by the government. It is managed by a board of directors, pays taxes, and aims to return a profit to its owners.

152. *"Corporatising" precipitated a top to bottom reconsideration of the post office as a commercial business.* New Zealand Post reconsidered its business strategy and decided to focus more strongly upon its core business, first class mail service. Second class service, a lower priority, lower priced service, was discontinued. All mail was treated as first class mail, and all post offices were to operate on a "clean floor" policy. As postal officials put it, "*Mail is not aged in New Zealand Post*."

153. Traditional, weight based postal pricing policy was found to be poorly aligned with actual costs and market demand. New Zealand Post introduced a new three tier tariff for envelopes based on standard sizes: medium, large, and extra large. Size based prices were started for domestic services and later extended to international services as well.

154. New Zealand Post also introduced a new premium service, "Fast Post" to provide overnight service for most cities and towns.

155. To compete with the widely used private document exchanges, New Zealand Post introduced "BoxLink" service. For a single contract price, determined by a survey of historical mailing practices, New Zealand Post will transport mail overnight to post office boxes (but not provide final delivery) throughout New Zealand. BoxLink mail must be separated by the customer; it does not require stamping by the mailer or checking by the post.

156. The concept of BoxLink service has been expanded to include the possibility of a contract rate for all postal services. The savings to customers in mail processing costs are said to be significant.

157. New Zealand Post also decided to explore the demand for "upstream" document processing services. For a fee, New Zealand Post will manage mail processing facilities on the shipper's premises. New Zealand Post, through a

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[58]Sources of information on the New Zealand postal experiment include: New Zealand, "Officials Committee" Report to the Cabinet MCC/SOE Committee (31 Oct 1988); R. Prebble, "How to Privatise Postal Service: Lessons from New Zealand," speech to the Canada Post Privatization Conference, Toronto (23 Jun 1989); New Zealand Post Limited, *Annual Report 1990* (1990); and E. Toime, "Competitive Strategy for New Zealand Post," in M. Crew and P. Kleindorfer, eds., *Competition and Innovation in Postal Services* (to be published late 1990).

joint venture, can also convert a company's electronic billing file into printed invoices which are enveloped and delivered to the company's customers. Return payments are collected, processed at a central processing centre, and credited to the account of the original mailer.

158. To improve services for unaddressed advertising mail, New Zealand Post purchased a private circular delivery company, which operates independently under the name AdPost.

159. In the politically sensitive area of rural postal services and employment levels, New Zealand Post made some hard decisions.

160. New Zealand Post concluded that it had too many specialized retail offices for its business. In February 1988, New Zealand Post closed 432 post offices, about one third of the total, although collectively they accounted for only 5 percent of the traffic. These small post offices were replaced by private sector agents, postal delivery centres, and community mailboxes. This program has continued so that about 80 percent of New Zealand Post's 1400 postal outlets are now privately owned.

161. In addition to purely postal business, rural post offices of the former post office department conducted a number of services for the government, including:

- compilation of election rolls;
- registration of births, deaths, and marriages;
- motor vehicle registration;
- counter services for telephone service; and
- counter services for Post Bank.

162. A Parliamentary Select Committee concluded that the closure of post offices did not adversely affect postal or other services in rural communities, and indeed improved services in most communities. An exception, however, was the loss of Post Bank services in rural areas. The Committee recommended a direct subsidy program to banks to expand their rural services.

163. New Zealand Post also reduced staff levels by 20 percent, from 12,000 to 9,800. Other expenditures were also reduced, so that total costs declined 30 percent.

164. In commercial terms, New Zealand Post appears to be successful.

- on time delivery has increased from a 80 - 85 percent range to a 96 -97 percent range;
- a 24 percent return on equity was achieved in the year ended March 1990; and
- productivity (letters per employee) has increased substantially each year.

165. At the time it was established, New Zealand Post inherited the monopoly enjoyed by the previous post office department. The postal monopoly extended to the carriage of all letters weighing up to 500 grams, with two major exceptions:

- a letter could be carried by private express carrier if the shipper paid a

charge of more than NZ$ 1.75 (0.80 ECU) per shipment; and
- document exchanges were permitted and widespread.

166. In October 1988, a special government commission completed a two year study of the postal monopoly. In a detailed report, the commission carefully examined and rejected the traditional arguments for a postal monopoly and recommended its abolition. In particular, the commission concluded:
- universal service is likely to continue without a monopoly for sound commercial reasons; if necessary, however, rural service should be supported by a direct subsidy rather than by a postal monopoly;
- differential prices for rural and urban services are unlikely since marginal costs for rural delivery are not much higher than for non rural delivery; if differential prices develop, they will have a minimal impact upon rural residents.

167. Despite opposition from New Zealand Post and postal unions, in September 1990, the government decided to reduce sharply postal monopoly protection. The maximum weight of items protected by the monopoly was reduced to 200 grams, and all international letters were exempted from the monopoly. A transition period was also agreed during which the minimum price that private carriers must charge will be reduced, as follows:
- immediate reduction of minimum charge to NZ$ 1.25 (0.58 ECU);
- December 1990, reduction of minimum charge to NZ$ 1.00 (0.46 ECU);
- December 1991, reduction of minimum charge to NZ$ 0.80 (0.37 ECU).

168. New Zealand Post and many observers expect that, after 1992, the postal monopoly will be abolished entirely.

169. In return for continued monopoly protection until 1992, New Zealand Post is contractually required to abide by a "Deed of Understanding" with the government. It provides that:
- universal letter service is to be continued;
- postage rates are to be increased no more than the consumer price index, less 2 percent; and
- a minimum network of post offices and agency post outlets is to be maintained.

IV. ECONOMICS

1. BASIC CONCEPTS

A. MARKET PARAMETERS: TIME AND DISTANCE

170. All delivery services necessarily entail several operational components:
- collection (at collection boxes, shipper's offices, retail offices, or carrier's loading dock);

- "outward" sorting at a dispatch office (and perhaps one or more intermediate sorting offices);
- transport in bulk from dispatch office to receiving office (and to and from intermediate offices, if necessary);
- "inward" sorting at a receiving office (and perhaps one or more intermediate sorting offices);
- delivery to addressees.

171. At first glance, the diversity of delivery services appears so great that it is difficult to discover a framework for economic analysis. Any attempt at economic analysis of the delivery services industry quickly confronts questions such as: What types of delivery services should be included in a particular study? What are the major components of the market under study? Who are the major participants?

(1) Evolution of tariff classifications

172. The largest delivery service, the post office, has traditionally used tariff classifications that depend upon the *nature of the item* transported:

- "letters" (and postcards),
- "printed papers," and
- "small packets" containing other things such as commercial papers and samples.

173. This classification scheme was embodied in the first Universal Postal Convention of 1874. To this day the Universal Postal Union (UPU) keeps statistics according to such categories. Nonetheless, the rationale for this classification scheme is unclear, although it may be related to the post office's original purpose to control the circulation of ideas. [59]

174. In the freight industry, tariff categories were originally derived from the economic imperatives of the railways. Railways are characterized by great economies of scale. Once the tracks are laid, the cost of moving trains back and forth is minimal. Hence, the price of freight transportation by rail was based not upon "marginal" cost, which is very little, but upon what the traffic would bear. "Value of service" pricing was given a theoretical underpinning by relating the price to "demand elasticity." Traditional freight tariffs, both surface and air, were thus expressed in terms of types and quantities of specific commodities designed to reflect *categories of demand elasticity*.

175. Price discrimination based upon the nature of the good transported,

[59] Details of early postage rates are suggestive. Prior to the nineteenth century, the British and French post offices charged letters according to the number of sheets of paper, i.e, upon the amount of information transmitted. Such an approach is consistent with the origin of the postal monopoly as a means of controlling the circulation of ideas. Similarly, in France "printed papers" were distinguished from "letters" and accorded higher or lower rates according to whether the government of the day wanted to encourage or discourage the distribution of ideas. The French post also differentiated between Parisian and non-Parisian newspapers and between political and non-political newspapers. C.S. Holder, Revised and abridged edition of *A.D. Smith, The Development of Rates of Postage (France) (London, 1917)*, chapter 2 (1980).

whether embodied in tariffs of the post office or freight carriers, is a symptom of monopoly power. In a competitive environment, there is a strong tendency for prices to equal marginal cost.

176. In many international air transportation markets, increased competition during the last two decades has led to a conversion from "specific commodity" freight rates to more cost based categories. Today, air freight rates are based primarily upon weight, size, priority, and quantity (whether the freight fills a whole "container" which can be loaded directly into the aircraft).

177. Similarly, in the last few years, a trend has developed towards postage rates based upon priority of handling rather than content. This approach w as pioneered by the U.K. post office. In 1989, the UPU Convention recognized priority as a legitimate mail classification for the first time.

178. The private express industry has also based prices upon priority of service. Unlike most post offices, however, private express services have not employed fine distinctions in weight. The minimum weight category is customarily about 250 grams. As noted in Chapter III, the New Zealand post office has adopted a similar, size based tariff scheme as part of its reconsideration of its commercial practices.[60] It appears at least plausible that these per piece pricing schemes are, indeed, "natural" and related to costs.

179. In addition, the tariffs of delivery services often incorporate categories related to the *distance* that the item is transported. As discussed in Chapter 2, postal tariffs for letters within countries varied according to distance until Rowland Hill, in 1837, demonstrated that transport costs do not vary significantly between major cities. Today, however, many postal tariffs still vary with distance, especially at the international level.

(2) Time: priority and service level

180. Any delivery service must live within certain constraints imposed by the market. Most businesses prepare documents and parcels for shipment at the end of the business day. Most businesses expect deliveries at the beginning of the day so that work schedules can be organized.

181. A delivery system, postal or private, is inexorably constrained by such time frames. Collection from post boxes, sorting, and delivery must all be accomplished as efficiently as possible within fixed periods. Staffing levels and work routines are organized accordingly.

182. Higher priority handling implies higher costs because it requires:

- more specialized collection, sorting, transport, and delivery operations, with substantial "excess capacity" to allow for variation in demand;
- closer coordination between collection, sorting, transport, and delivery routines;

[60]The U.K. post office's minimum weight step of 60 grams is also considerably higher than the 20 gram level used by most other EC post offices. In the U.S., the minimum weight step for bulk printed matter is about 3.5 ounces (almost 100 grams).

- higher levels of administrative control over service quality.

183. For example, a sorting operation which must sort all items received within four hours is more expensive to operate than one that has eight hours to complete sortation, or 24 hours, or 48 hours. Similarly, a sortation that is committed to a particular "cut off" time (for example, due to an aircraft departure) is more expensive than one that has more flexibility. Similar observations apply to collection and delivery operations.

Table 3. Service level scale

Service Level	Characteristics
Express	As fast as possible with speed more important than small variations in rates for most shippers; very high degree of reliability; tracking and tracing capabilities necessary.
1st Class	As rapid as possible consistent with economical rates; high degree of reliability; some tracing capability necessary.
2d Class	Service which is slower than 1st class service, or more irregular, so that traffic can be used to supplement work schedules and facilities required by 1st class service.
3d Class	Slower than 2d class service, taking advantage of economical means of transportation and other savings. More suitable for shipments not requiring a response from the addressee (e.g., parcels and old files).

184. For these reasons, as priority increases, it becomes increasingly difficult to combine delivery services for different types of demand. Hence, they become more and more specialized. For example, at the local level, newspapers, milk, flowers, laundry, urgent documents all require delivery within a few hours of dispatch, yet in most places all are delivered by different sets of specialized delivery services.[61]

185. These considerations of time result divide the delivery services sector into several "service levels," which reflect differences in priority of handling as well as other aspects such as the availability of rapid tracking and tracing, consistency and regularity of delivery, etc. Table 3 provides an illustrative "service level" scale.[62]

(3) Distance: geographic scale

186. Because delivery service requires the physical conveyance of an item, distance is a second "natural" dimension to the delivery services market.

[61]In virtually all cities, post offices tolerate local messenger services because they recognize that they cannot combine traditional postal services with such high priority services.

[62]The terms "first class," "second class," and "third class" are borrowed from the British Post Office's priority based postage rates; they do not refer to the commercial or social significance of the different services.

187. Although distance is an important parameter, the role of distance is subtle. All delivery services rely upon local collection and delivery networks to achieve reasonable economies of scale. However, as the distance between the sender and the addressee increases:

- coordination between collection, sorting, and delivery routines is altered by longer and differently timed delays in transport;
- transport between collection and delivery routines is less frequent and more inflexible;[63] and
- administrative control becomes more difficult.

188. The effect of distance upon delivery service organization may be illustrated by considering the express industry. To provide express service between points in the Community, one logical organizational scheme is to bring all items by air or truck into one or more central "hubs," sort the items in a 2 to 4 hour period, and distribute them across the Community by air or truck. All collections, inward sortation, and transport schedules are determined by the requirements of the hub procedures. The same organizational logic would apply in the United States.

189. On the other hand, to provide express service *between* the United States and Europe, the most logical solution might be to ship all items on flights (commercial or dedicated) leaving from international gateway airports to international gateway airports. Sending items through one or more central hubs in the Community hubs and U.S. could delay the shipment by a day and perhaps two. Therefore, for an optimum trans Atlantic express system, collections and sortations might be determined by the schedule of flight departures from the international gate ways.

190. In other words, because of differences in geographic scale, two regional express systems do not automatically add up to an interregional express system.[64] In the same manner, two local urgent delivery services do not necessarily add up to a regional express service (in fact, companies tend to specialize in one market or the other). The effect of distance as a market parameter increases with priority, but *the difficulties of reconciling an efficient local operation and an efficient long distance operation are elemental for all delivery services.*

191. National, linguistic, and cultural divisions intensify the operational effects of distance. Sending a driver in a van across a national border is substantially

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[63]In general, as the separation between collection and delivery increases, the means of transport shifts from small van, to large truck, to small aircraft, to large aircraft. With each step up, frequency and flexibility of service decreases and loading and unloading time increases.

[64]The example in the text is intended to be illustrative only. In addition to the factors mentioned, an express company would weigh several other considerations such as the location and number of sortations, effect of time zones, aircraft positioning requirements, loading and unloading times, weather and congestion delays (which affect some hubs and gateways more than others), etc. These complexities, however, do not alter the basic point that there are operational and economic inconsistencies between *optimum* regional and inter regional operations. In actual operations, there is no "perfect" solution and compromises must be made. Furthermore, different express companies tend to specialize by emphasizing the advantages of one solution or another.

more costly and time consuming than sending him the same distance within a country; a bilingual driver is required and unforeseen problems always seem to take longer to resolve. Common nationality also tends to focus the pattern of exchanges and hence the availability of transportation facilities.[65] Intra EC operations between Member States also imply substantially different, and more difficult, issues of administrative control.[66] As the Inspector General of the French post office admitted in the 1989 Congress of the Universal Postal Union:

> *International operational strategies are hindered by the poor interconnection of national systems*: mail can be moved faster from Brest to Nice (1500 km) than from Paris to Brussels, in Belgium (300 km). This is because *each postal administration gives preference to its own system* and does not always give the same priority to international mail.[67]

192. Table 4 provides an illustrative "geographic scale" showing implications of distance for delivery services. At any given time, the concepts of "local," "regional," and "interregional" are defined primarily by the technology of transportation. A "local" area is an area in which items can be shuttled to, from, and between sorting centres quickly and cheaply without significantly altering the collection, sorting, and delivery routines. A "local area" can be traversed by a small truck in an hour or two. A "regional" area is, roughly, one which can be traversed overnight by normal transport means; for example, the area that can be served by aircraft operating to and from a central "hub" airport with supplementary ground vehicles within, say, an eight hour period (allowing time for sorting operations). As transport technology improves, the geographic scope of a given delivery system expands.

Table 4. Geographic Scale

Inter Regional	an area such that aircraft flights cannot return overnight.
Regional	an area such that it can easily be covered by normal aircraft flights, long distance trucks, or train, and return overnight.
Local	an area such that it can be easily covered by motor vehicle within a period of time that does not disturb collection, sorting, and inward delivery routines.

193. As noted in Chapter II, the role of distance as a natural economic parameter is nicely reflected in the historical development of the postal service. In both England and France, the city postal delivery services developed separately from the official post offices, in each case by private businessmen, and they were merged with the long distance post office only after being taken

[65] Air transportation, for example, tends to operate between national hub airports.

[66] In actual practice, some private delivery services use air transportation between Member States rather than surface transportation solely to overcome problems and delays caused by the sorts of difficulties mentioned in the text.

[67] UPU, 1989 Washington Congress, Minutes of sixth meeting of Congress, Congress - PV 6 (speech by J.-C. Rauch) (emphasis added).

over by the government.

(4) Submarkets

194. These two natural parameters of the delivery service sector, service level and geographic scale, divide the sector into natural submarkets, as shown in Table 5. (This table is illustrative, rather than scientific.)

Table 5. Natural submarkets

Service Level	Geographic Scope		
	Local	Regional	Inter Regional
Express	Few Hours	Overnight	1-2 Days
1st Class	1 Day	1-2 Days	2-4 Days
2d Class	2-3 Days	2-4 Days	3-6 Days
3d Class	3-4 Days	4-6 Days	6 + Days

195. The above description of the natural submarkets of the delivery service sector does not include all operationally important distinctions. For instance, as observed above, within the "local express" market there appear to be a host of operational factors which result in specialized delivery services for items such as milk, newspapers, etc.[68] Similarly, as discussed in Part II, the rise of "bulk mail" has led some post offices to separate bulk mail and regular mail flows to some degree.[69]

196. The implications of this simple analysis are fundamental and perhaps counter intuitive. *Delivery services providing similar service levels but operating at different geographic scales are not truly in the same business, or "submarket," any more than are delivery services operating at the same geographic scale but providing different service levels. In either case, it is economically inappropriate to vest a monopoly for distinctly different submarkets in the same organization.*

B. OPERATIONAL COMPONENTS

197. The great majority of all delivery items are sent by businesses, rather than individuals. For the Community letter post items, about 80 percent of the traffic originates with businesses, while about 50 percent of traffic is delivered to individuals. For parcels and express items, an even higher percentage originates with businesses.

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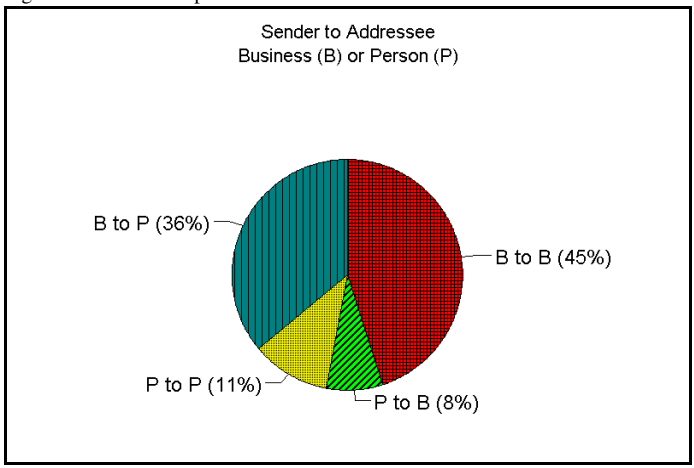
[68] *Regularity* of demand can be an important consideration in the development of delivery service. If the same number of items are delivered to the same points every day (as, for example, with newspapers or branch office/head office exchanges), important simplifications can be introduced in the design of a delivery service.

[69] Size of item becomes a more important characteristic as density of traffic increases. An occasional "parcel" will not interrupt an operational system for "envelopes," but many parcels will alter sorting operations, and may eventually imply different final delivery operations as well.

Figure 4. Users of EC post



198. As noted above, any delivery service consists of collection, outward sorting, transport, inward sorting, and delivery, as well as general administrative functions such as marketing and accounting.

199. Most of the revenues collected by delivery services are paid to employees, landlords, and common carriers. The employees, in particular, are necessarily local residents, and their salaries and benefits account for about three quarters of postal budgets, declining to about half of the budgets of some express services (because of higher utilization of transport equipment). In the Community, there are roughly 1.3 million postal employees[70] and an additional several hundred thousand private delivery service employees.

200. The collection and delivery components are not symmetrical. A delivery service generally controls the number of collection points it establishes, but it cannot easily control the number of delivery points, since these are ordained by the shippers. A post office, for example, may have four times as many delivery points as collection points. Hence, assuming collecting and delivery to be somewhat similar physical activities, the delivery function would be significantly more expensive than the collection function per item.

201. According to one major Member State post office, the breakdown of postal costs by operational function is as shown in Table 6.

202. Confirming the disproportionate role of final delivery in the overall postal business, as of 1 January 1990, the four Scandinavian post offices agreed to pay each other *60 percent* of domestic postage rates for the delivery of foreign mail. It is understood that other Member State post offices privately believe that in principle the "Nordic agreement" is an acceptable basis for delivery charges between post offices. Taking into account the British and Nordic approaches, it may be concluded that *collection and outward sorting account*

[70]UPU, *Statistique des services postaux* (1988) (excludes Irish post offices).

for about 30 percent of total postal costs and inward sorting and delivery account for the remaining 70 percent of costs.[71]

203. These considerations indicate clearly how much of "postal service" is final delivery, as opposed to the collection or transport functions.[72] Indeed, the timing and requirements of the final delivery operation determines the timing of all other steps in the operational chain. Moreover, most observers would agree that it is the delivery function and only the delivery function where great economies of scale, if any, are to be found.[73] *Final delivery is the dog that wags the tail of collection, sorting, and transport.*

Table 6. Components of postal service[74]

Component	Percent of of Total Cost	Economies of Scale
Collection	25 %	Moderate
Outward Sorting		Low
Transport		Low
Inward Sorting	75 %	Low
Delivery		High

204. The realization that a postal service, and to a lesser degree any delivery service, is primarily engaged in final delivery is reinforced by a consideration of the effect of geographic scope upon delivery services. The problems associated with expanding the geographic scope of local delivery services reflect mainly the difficulties of coordinating collection, sorting, and transport activities with the rhythm of both distant delivery cycles and local delivery cycles simultaneously.

205. Recent developments in postal tariffs are consistent with these observations. Increasingly post offices are ready to permit large mailers and contractors to collect and sort the mail, and even transport it to the post office of distribution. These tariffs suggest that post officials are (probably correctly from a commercial standpoint) concentrating their efforts on those activities that they do best and retain a clear cost advantage over competitors.[75]

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[71]It is believed that the Nordic post offices are considering raising the 60 percent figure.

[72]All other delivery services are oriented around the actual delivery function as well, although an express service invests relatively more resources in collection since it, unlike the post office, picks up from the shipper's premises.

[73]A recent estimate of scale economies, which the authors say "should be treated cautiously, would indicate that postal costs increase at 60 percent of the rate of volume (and hence revenue) at the margin. S. Estrin and D. de Meza, "Delivering Letters: Should it be Decriminalized?," in *Competition and Innovation in Postal Services* (M. Crew and P. Kleindorfer, eds., to be published late 1990)

[74]R. Tabor, "Comment," in *Competition and Innovation in Postal Services* (M. Crew and P. Kleindorfer, eds., to be published late 1990). Mr. Tabor is the head of corporate planning for the British Post Office. Data from the U.S. Postal Rate Commission yields results almost identical to the 25-75 breakdown estimated by Mr. Tabor.

[75]As described in Chapter III, the regulatory conclusions of the U.S. Postal Rate Commission appear to point in the same direction.

Table 7. U.K. mail users' proposal

Company	Function	Monopoly
Counters	Counter Services	No Monopoly
Royal Mail Letters	Collection and Primary Sort	No Monopoly
Mailsort	Bulk Mail	No Monopoly
Royal Mail Network	Transport	No Monopoly
Royal Mail International	International	No Monopoly
Royal Mail Delivery Services	Delivery	Monopoly, But Subcontracting Allowed
Parcelforce	Parcels	No Monopoly
Royal Mail Stamps	Stamps	Implied Monopoly

206. In the U.K., in June 1990, the Mail Users Association issued a thought provoking proposal for long term reform of the British Post Office.[76] MUA, a group of 100 business users, recommended dividing the post office into eight separate companies, with only the delivery function retaining a monopoly. MUA, in particular, called for the greater regional autonomy in the collection, sortation, and transport of mail. A summary of the MUA proposal is provided in Table 7.

207. At bottom, the MUA proposal appears to represent a reaction to the difficulties of combining local and distant delivery services. Greater regional autonomy and separation of collection, transport, and delivery functions—as well as for the separation of bulk mail and international mail activities—would allow large mailers, such as MUA members, to arrange for collection, sortation, and transport of their mail in a manner better suited to the pattern of local delivery in diverse cities and towns.[77]

208. *A consideration of the operational components of delivery services, especially postal services, is thus very important in illuminating recent trends in what the post offices are actually selling and what enlightened customers are demanding to buy. For postal services, the economic heart of the service being sold is the inward sorting and delivery service functions in the "local, first class" submarket.*

C. END TO END CONTROL

209. It is an obvious truism of the delivery business that no one gives an item to a delivery service for any reason other than to have it delivered to a final addressee. That is, while one can analyze the business of delivery services in terms of different operational components, the user is not buying a collection

[76]Mail Users Association, "Response to Post Office Tariff Proposals" (June 1990).

[77]Large American mailers are proposing similar transportation related discounts in the general case now pending before the U.S. Postal Rate Commission.

of operational components, but the achievement of final delivery—reliably and efficiently.

210. From the shippers' standpoint, unless the delivery service he deals with has end to end control, the shipper himself suffers a loss of control over his shipment, for he is unable to hold someone directly and personally responsible for final delivery of his shipment. While an interruption in accountability may be necessary for some types of international services, it is hardly the preferred arrangement for most commercial shippers.

211. From the carriers' standpoint, end to end managerial control is the only way that high quality end to end delivery service can be ensured. The recent commercial success of the international express companies, compared to the poorly coordinated national post offices and freight forwarding groups, provides a dramatic illustration of the need for unified administration.

212. Therefore, although what a delivery service does most and best may be the actual delivery function, it is necessary for management to be able to coordinate collection, sortation, and transport with the final delivery function from the point at which the shipper chooses to tender the shipment. At a bare minimum, management must be able to establish common operating procedures and choose who will perform the services.

213. Viewed in this light, the MUA proposal appears logical and reasonable insofar as it permits a large mailer to tailor various components of the entire transmission operation to his own needs and tender his shipment to the post office only at the point in the chain of operational components (up to actual delivery) where the post office is best placed to provide the service. This concept is especially valid where the shipper is ultimately seeking delivery by a distant delivery network rather than by a local network. The MUA proposal, however, appears to underestimate the need of the post office to coordinate its collection and delivery services closely for those mailers who wish to tender their mail earlier in the chain of operations.

214. Similarly, in principle, the International Post Corporation represents a recognition by Member State post offices that unified managerial control is the only way in which high quality delivery services can be provided between postal districts. Despite this philosophical advance, however, individual national post offices appear unwilling to grant IPC actual managerial control all the way from shipper to addressee.

215. More practically, the need for end to end managerial control would also suggest the desirability of allowing a national post office to establish collection and sortation activities in other Member States. For example, the British Post Office might consider establishing collection offices in a city in which it does a large amount of business, such as Amsterdam or Paris.[78] While such an untraditional idea may seem startling at first, it is no different from British

[78]The same operating principle would apply, of course, to the Dutch or French post office opening an office in London or a private delivery service opening offices in any of the cities.

Airways' opening offices to serve better its Dutch and French customers.

216. *In short, both practical considerations and recent commercial history make clear that the management of delivery services, postal and private, must exert, to the maximum practicable extent, unified administrative control over the services rendered, from the point of tender by the shipper to the point of delivery to the addressee.*

D. PUBLIC SERVICE CONCEPTS CLARIFIED

217. Discussion of delivery services policy frequently includes terms such as "basic service," "value added service," "public service," "universal service," "uniform rates," and "reserved service." These terms have often been employed so loosely that it is frequently difficult to discern their meanings, and especially their economic ramifications.

(1) "Basic service"

218. In the development of the Green Paper on Telecommunications, the Commission and others wrestled with the telecommunications terms "*basic service*" and "*value added service*,"[79] before finally abandoning any effort to use them in a technical, economic sense. A "basic service" came to mean an important service that is guaranteed to all persons by the government. However, there emerged no consensus on what type or level of telecommunications was "basic" in this sense. Similarly, "value added" service referred to something other than "basic service."

219. In public discussions of delivery services, the terms "basic" and "value added" have also been used. To do so however, compounds the air of confusion already surrounding these telecommunications terms. Worse, these terms, which originally carried certain implications about fixed costs and economies of scale, convey an impression that delivery services—especially postal services—share some of the same economic characteristics as telecommunications systems, a connotation that is factually incorrect. The economics of the delivery services sector can be understood only by fresh analysis, not by analogy to the telecommunications sector.[80]

220. Unquestionably, the concept of a "basic" delivery service which should be available to all citizens presents important and valid issues for a Community

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[79]These terms originated in an American competition law case filed in 1949 against AT&T, the American telephone monopolist, which both operated telephone services and owned the major manufacturer of telephone equipment. In 1956, a U.S. court limited AT&T to the provision of "common carrier" telephone service. In the 1970's, the U.S. Federal Communications Commission struggled to interpret the court's order in light of the blurring boundary line between telephone service and computer services. The result was the concept of "basic" and "value added" services, a distinction that proved extremely difficult to administer as soon as adopted.

[80]In the delivery service industry, there is no equivalent to the infrastructure of telecommunications wires. There is, indeed, no physical or technical barrier to new entry at all. Hence, there is no equivalent to "basic service" and "value added service" as those terms were originally used in the telecommunications field.

policy on delivery services. However, to avoid adding further to the foregoing terminological confusion, this paper will use the term "essential service" to be defined as follows:

> *"Essential service" is a minimum level of service which is deemed so essential to modern life that its availability is ensured (through an appropriate means) to all persons by relevant governmental authorities.*

221. A "basic" or an "essential" service can be ensured in several ways. It can be provided by a government entity, with or without the benefit of a legal monopoly. Or it can be provided by a public or private entity operating under a contract with the government. Or it can be ensured by means of legal standards which can be enforced against delivery services.

(2) "Universal service at uniform rates"

222. As discussed in Chapter II, since Rowland Hill's reforms of 1840, the essential service provided by the post office has often been viewed as providing "universal service at uniform postage rates." Even at the national level, however, the "universality" of postal service is not absolute, since the post office is not obliged to deliver items to "the peak of Mont Blanc if someone should decide to live there."[81]

223. An obligation to provide "universal service" does not, moreover, imply an obligation to provide *uniform* service. In fact, the quality of postal service (priority, speed, regularity, number of deliveries, etc.) varies from place to place depending upon the number of items to be delivered by the *local* delivery system. *As a matter of economics, there is no difference between varying levels of service at uniform rates and varying levels of rates for uniform service.*

224. The fact that uniformity of rates does not imply uniformity of service is, in reality, highly desirable, for it allows postal management to exercise some control over the *costs* (although not the revenues) of rural delivery. In this way, urban mailers are not unduly burdened. Different postal rates for different destinations would impose substantial administrative costs upon the post office, costs which are avoided by a sliding scale of tolerable variations in service levels.[82]

225. Even the concept of "uniform" rates requires clarification. In a modern society as much as half of the mail may be posted in bulk at substantially lower postage rates than those available to an individual. In principle, the lower rate reflects the collection and sorting costs that the large mailer has saved the post office. Hence, *the postage rate that is uniform is the final delivery rate not the normal stamp price.*

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[81]F. Braize, "Perspectives on the Evolution of the Legal Organisation of the Mail Service," *Bulletin de l'IREPP*, p. 164 (Mar 1989).

[82]Nonetheless, it should be noted that in most Member States, governments impose some limits on postal management's discretion to adjust the quality of delivery service precisely to local demand.

(3) "Reserved service" (postal monopoly)

226. In telecommunications policy discussions, "reserved services" came to refer to "services reserved for exclusive provision by the telecommunications administrations."[83] In the long tradition of the delivery services sector, however, such services have been referred to as postal "monopoly" services. The term "monopoly" appears clearer than "reserved," and this paper will use the more traditional term.

227. It should be noted that there is no economic reason why "essential services" must be ensured by a "postal monopoly." Essential service can also be guaranteed by regulation of private companies or by public contracts with postal or private delivery services. Hence, the terms "essential service" and "monopoly" service are not equivalent.

(4) "Obligatory service"

228. An "obligatory service" is a service the government legally requires an undertaking to perform. To offer an "obligatory service" may or may not be in the commercial interest of the undertaking.

229. For a public undertaking, such as a post office, an obligatory service requirement may be imposed as part of the public law chartering the undertaking. For example, the post office may be required to deliver all items weighing less than 10 kilograms to any address in the country. Such a law is much like a contract. It is an obligation which is imposed by the government in return for funds and other support.

230. An obligatory service requirement may also be created by a normal contract. A contract places an undertaking, public or private, under a legal obligation to perform a specified service. Indeed, in the delivery services sector, *obligation by contract is more obligatory than an obligation under the postal law* because a delivery service can be sued for breaching a contract, whereas a post office can rarely be sued for failing to perform a service required by public law.

231. In most countries, private as well as public carriers are also subject to other obligatory service requirements. These derive from legal standards concerning the conduct of essential services offered to the public. All delivery services, for example, are compelled to offer their services on a basis that is free from certain types of discrimination. Furthermore, under the competition rules of the Treaty of Rome, all undertakings in a dominant position are obliged to refrain from "applying dissimilar conditions to equivalent transactions."

232. "Obligatory service" thus appears similar to "essential service" since the government is ensuring the availability of a service by a legal requirement.

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[83]Commission, COM(87)290 Final, *Green Paper on the Development of the Common Market for Telecommunications Services and Equipment*, p. 96.

Like the concept of essential service, the scope of obligatory service is not necessarily related to the scope of the postal monopoly, and indeed, may be much greater than the scope of the postal monopoly. In the earlier example, in the Netherlands the postal monopoly is limited to the transport of items weighing up to 0.5 kilograms but the post office is obliged to deliver all items weighing up to 10 kilograms.

(5) "Public service"

233. Virtually any service is a "public service" in the sense that it serves the public. Such a definition of "public service" is so general as to be meaningless. In this paper, "public service" will be defined as follows:

> *"Public service" is an "obligatory service" required by the government that would not be provided by the market under normal competitive conditions.*

234. "Public services" performed by a postal service could include:

- provision of delivery services to places that the post office would not normally serve in its own commercial interest;
- provision of delivery services for the general public at prices less than those the post office would normally offer in its own commercial interest;
- provision of services for governmental agencies, such as registration of births and deaths and distribution of drivers' licenses for free or for rates of compensation below those that would normally be charged.

235. To the extent that such services as noted above would be offered by the postal service acting in its own commercial self interest, they should not be considered "public services," but "commercial services," which may also be "obligatory services."

236. It should be noted that this concept of "public service" does not include artificially low postage rates for classes of mailers especially favoured by some governments, such as publishers, government departments, legislators, etc. Such obligations are not offered to the general *public* and are not intrinsic to the operation of a postal delivery service. They are tantamount to direct subsidies to these mailers and a tax on all other mailers (that is, primarily, businesses). The same subsidy could be paid directly to the mailers in the form of money or tax rebates.

237. Nor does this concept of "public service" include costs that may be ascribed to governmental "interference" in the sound decisions of professional postal managers. No doubt, all managers have "problems" with owners, and all owners' representatives depart slightly from strict economic logic. Governmental involvement in postal decision making should be considered as imposing a "public service" obligation only when it in fact is directed towards a public service goal.

238. There is no question that the typical post office provides "essential services" and "obligatory services," but it is often unclear to what degree the

post office provides "public services," as defined above. For example, some postal officials suggest that the provision of "universal service at a uniform price" is a "public service." As discussed below, however, it appears that such service is generally in the commercial interest of the post office and should not be classified as a "public service."

E. POSTAL MONOPOLY ECONOMICS

239. As described in Chapter II, modern postal service was developed by Rowland Hill as a cost based reform. It was not based upon, nor related to, the development of the postal monopoly. Nonetheless, the postal monopoly is today frequently said to be *necessary* to support modern postal service.

240. Two major economic theories are used to support this position. The first rests upon the concept of cross subsidy from urban areas to rural areas. The second is the relatively recent theory of natural monopoly and contestable markets. It should be noted at the outset that the theories appear to be largely inconsistent with each other, as explained below.

(1) Theory of cross subsidy

241. The essence of the cross subsidy theory is that a post office requires a monopoly in some markets so that it can charge more than normal commercial rates and thereby make up for money lost in serving markets that would not be served but for the post office's "public service" obligations.[84] The extent to which "public service" obligations require internal "cross subsidies" to preserve service is very difficult to ascertain.

242. The issue is not unduly complicated in principle. A post office, or any other delivery service, will normally, and in its own commercial self interest, provide service to all areas where marginal revenues exceed marginal costs.

243. The *marginal revenue* is simply the postage rate. In a commercial post office, postage rates are generally set to just pay for the services provided. Since postage is the same for all similar customers, the postage rate is also equal to the *average cost* of providing the service.

244. The *marginal cost* for a postal delivery service is the cost of delivering a significant quantity of additional items. Marginal cost depends upon the

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[84] Consider the following explanation by the French post office in the UPU magazine, *Union Postale*, in 1981:

> [T]he postal monopoly . . . is justified by the obligations and constraints inherent in the nature of the public service provided by the PTT administration.
>
> The costs of the services provided by the Post are extremely variable. In order that the price of the postal service can be kept at a reasonable level for all users, it is necessary that, through equalization of tariffs, *the expenditure of large-deficit traffic such as that in rural areas should be offset by revenue from profitable traffic*. If this equilibrium was not protected by the monopoly, transport firms would be tempted to organize regular services over heavy-traffic routes, . . . thus a "creaming-off" of traffic. . . . the postal service would be reduced to conveying only the least profitable fraction of the mail at a prohibitive price. Those penalized would be mainly small-scale users and the people living in rural areas. [emphasis added]

presence of "economies of scale."[85] If (as is generally accepted) there are economies of scale in the final delivery operation, doubling the amount of mail will not double the total delivery cost. Therefore, the *marginal* (or additional) cost of delivering additional items is less than the *average cost* of delivering all items.

245. The commercial concern of the post office, or any other delivery service, is only that the postage rate should cover the *marginal* cost of additional deliveries. If a post office achieves significant economies of scale, the marginal cost is likely to be well below the average cost, and hence, the postage rate. For this reason, a post office (or any other delivery service) will extend its service to areas where the average costs for serving the particular area are substantially higher than postage rates.[86]

246. The greater the economies of scale, the lower the marginal cost and the further the post office will extend its service in its own commercial self interest.

247. Studies by some post offices suggest that the cost of service to rural areas is not so much higher as to justify a higher rate for rural postal service or a termination of service.[87] Indeed, a recent paper prepared by British postal officials states with conviction,

> *the arguments for not having a 'rural tariff' are strong on purely economic grounds*.[88]

248. In the United States, private express services have reached the same conclusion. They provide express service *to all addresses in the U.S. (except Alaska and Hawaii) for a uniform nationwide price*, despite the absence of any legal compulsion to do so.

249. *It appears therefore that a postal monopoly is not justified by the theory of cross subsidy because the benefits of economies of scale in non rural areas*

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[85]Postal officials often say that it costs no more to drop two letters through a mail slot than one. While true, this hardly conveys the idea of "marginal cost" in an economically illuminating manner. The cost of one more minute of legal advice or one more drop of coffee is probably zero as well, but this does not mean that the marginal cost of lawyers and restaurants is zero. The issue is to what extent costs vary with the volume of mail delivered over a range of commercially significant traffic variations.

[86]The following is a simplified example using numbers drawn from the U.K. Post Office. The normal first class delivery rate is 20p. The marginal cost of postal service is estimated by the U.K. Post to be about 60 percent of average cost. If the average delivery cost per item in a rural area is 33p, the U.K. Post Office will incur a marginal cost of 19.8p but receive revenues of 20p. Hence, the U.K. Post Office will continue to serve such an area, even though the average delivery cost, looked at in insolation, is almost twice as high as the (relatively low) average cost incurred in the major cities.

[87]As noted in Chapter III, the U.S. Postal Rate Commission estimated rural service to cost only 12 percent more than non rural service. After reviewing the U.S. and other studies, the New Zealand government concluded that a post office is likely to offer a uniform nationwide tariff in its own commercial interest. Report of the "Officials Committee" to the Cabinet MCC/SOE Committee, pp. 29-30 (31 Oct 1988).

[88]P. Richards and I. Dobbs, "Competition and Entry in Postal Markets," § 34, in *Competition and Innovation in Postal Services* (M. Crew and P. Kleindorfer, eds., to be published late 1990).

almost certainly outweigh the relatively small increases in marginal costs incurred in serving rural areas.

(2) Theory of contestable markets

250. The latest justification for the monopoly rests not upon cross subsidy but upon an elegant and abstruse economic theory about "natural monopolies" and "unsustainable contestable markets."[89]

251. A monopoly is "natural" if it exhibits continuing economies of scale, as delivery services appear to do to some degree. Since a new competitor does not have the benefit of an incumbent's economies of scale, his initial costs will be comparatively high, and he will be unable to compete effectively against the incumbent. In fact, he would not even try. Therefore, in an industry with strong economies of scale, an undertaking may obtain a monopoly "naturally."

252. For society as a whole, it is desirable, as matter of economic theory, for a natural monopolist to continue to produce as long as at least some buyers are willing to pay the marginal cost of production. Of course, the monopolist must recover his full costs as well, so some buyers have to pay more than the marginal cost if the monopolist is to be financially self sufficient.

253. The natural monopolist does not need the benefit of a legal monopoly, since no one can compete with him economically in any case, even for the customers charged the higher prices.

254. The matter becomes more complicated, however, if a natural monopolist also achieves "economies of scope," that is, if he provides two somewhat different products more cheaply than they can be produced separately. Under these conditions, the mathematics of "contestability theory" attempt to predict which *market structure*, monopolistic or competitive, will produce the various goods most cheaply.

255. Some postal officials suggest that delivery services exhibit the necessary economies of scale and scope to qualify for a legal monopoly under the sustainability theory. The different products involved are the different services:

> letter, parcel and financial services . . . even within the letter service itself, private letters and business letters, distant and nearby letters.[90]

256. A more precise description of the economies of scope involved would conform to the "natural" parameters of the market discussed above. That is, the post office may arguably achieve "economies of scope" by combining into one delivery operation the delivery of different items that would ideally be handled by slightly different delivery services, that is, different in terms of levels of priority, geographic scope, or other factors.

257. However, for delivery services, the grouping of these different types of

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[89]The seminal book for this theory is W. Baumol, J. Panzar, and R.D. Willig, *Contestable Markets and the Theory of Industry Structure* (New York, 1982).

[90]R. Tabor, "Can Competitors Pass 'Go' with a Natural Monopoly?," p. 12 *Public Finance and Accountancy* (UK, May 1987).

traffic into a single delivery operation implies *costs* for society as well as benefits. If speed and regularity of delivery are economically beneficial, then delay and irregularity generate economic costs, even though they may be very difficult to measure.

258. Nonetheless, the economic costs of combining different traffic streams are apparent in some cases. For example, postal officials resist suggestions that a more competitive market would produce a consolidation of delivery services by noting:

> *combining milk delivery with letter delivery in urban areas would be unlikely to ensure that service standards are attained for either product. . . .* it is also implausible that newspaper delivery could easily be assimilated with letter delivery (at least for the bulk of ordinary letters). Reconfiguring the delivery rounds to cope with traffic change would also be difficult and the same problems would apply to collections.[91]

259. This is but another way of saying that the costs and benefits of "economies of scope" are not easy to quantify in the delivery services sector. They may not, on balance, be positive.

260. More generally, the mathematics of contestability theory depend heavily upon additional variables—such as elasticities of demand, cross elasticities between products, economies of scale, and prices and pricing policies of the competitors—which are also difficult to measure in a real life situation.

261. Contestability theory does not attempt to consider two costs of a legal monopoly that many economists consider the most significant. First, economists suggest that a legal monopoly may lead to inflated costs, since the producer is not disciplined by the threat of loss of business.[92]

262. Second, economists suggest that a legal monopoly may inhibit innovation to the detriment of society. A monopolist is little motivated to try new ideas, and competitors are not allowed to. While one famous economist has observed that the greatest of all monopoly profits is "the quiet life" (Hicks), another has characterized competition as "a discovery process" (von Hayek).

263. In view of these limitations to contestability theory, some economists conclude that, in the delivery services sector, it amounts to little more than a small island of elegance in a broad sea of imprecision and hence presents no issues adequate to offset more fundamental economic considerations.[93] Other economists [94] suggest that the theory of contestable markets offers some

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[91]P. Richards and I. Dobbs, "Competition and Entry in Postal Markets," Appendix 2, in *Competition and Innovation in Postal Services* (M. Crew and P. Kleindorfer, eds.,to be published late 1990) (emphasis added).

[92]In the delivery services sector, the major cost is for labour. Labour costs can be inflated either by excessive wages or by over staffing.

[93]See, e.g., Groner, "Denationalization of the Postal Service in the Single European Market," presented at a seminar sponsored by the German chapter of the International Chamber of Commerce in Dusseldorf, 19 Feb 1990.

[94]Two "pro sustainability" economists at the London School of Economics have offered a number of suggestions regarding postal monopoly reform. One is to limit competitors to services

support for a postal monopoly and implies that relaxation of a postal monopoly should be approached carefully.

264. To summarize, contestability theory is an economic theory of market structure. It suggests that, elimination of all or most of the postal monopoly may present some economic questions that cannot be answered with finality. Of course, public policies are rarely characterized by perfect, or even logically sufficient, information. More importantly, as far as Community delivery service policy is concerned, it appears, as discussed below, that contestability theory is *not* an impediment to competition on a small portion of a larger market, such as intra EC portion of the Community delivery services market.

2. MARKET DATA

265. As virtually all observers note, economic analysis is difficult in the delivery services market due to an inadequacy of data.

266. The relative scarcity of data results, in part, from long standing regulatory intervention in the underlying market. The traditional postal monopoly over "letters" artificially separates the market into segments based upon content. In the intra EC market, customs and VAT intervention introduce additional artificial considerations by slowing and depressing the traffic in "dutiable" as opposed to "non dutiable" items. The customs process also tends to reinforce distinctions between postal and private delivery services.[95]

267. The data base for this market is rendered still more unsatisfactory by the following factors:

- postal data is often old, inconsistent between post offices, and non public; and
- there is no source for standardized data on private delivery services.

A. TOTAL COMMUNITY MARKET

268. Despite these limitations, a review of available data permits some important conclusions for development of the Community policy. The Community delivery market—excluding very urgent local deliveries such as milk, newspapers, etc.—appears to consist of about 75 billion items.[96] Of this, the private delivery services account for about 0.3 percent. See Figure 5 and Table 8.

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that are distinctly different from most postal services by requiring competitors to charge a minimum price, such as the UK£ 1.00 or 50p. Another is to require competitors to pay a fee to the post office to compensate for the loss of economies of scale and scope. S. Estrin and D. de Meza, "Delivering Letters: Should it be Decriminalized?," in *Competition and Innovation in Postal Services* (M. Crew and P. Kleindorfer, eds., to be published late 1990).

[95]Customs and VAT complexities affect both postal and private traffic negatively, in terms of cost and delay. However, the problems presented to postal officials appear to be different from those presented to private delivery services, so it is not necessarily clear which sector is hindered the most.

The EEO believes that *identical*, simplified, customs and VAT treatment should be accorded identical presentations of identical goods.

[96]The EEO has no data on revenue for Community delivery services.

Table 8. EC delivery services market[97]

(All figures in millions)	Domestic (National) Market					Intra EC & Intl Details Table 9
	Member State post offices				Private Delivery	
	Letters &Cards	Printed Matter	Parcel Post	Express Mail		
Belgium	1,003	1,603	8	0	2	242
Denmark	1,079	534	24	0	0	68
France	10,769	7,176	0	18	31	282
Germany	7,187	7,565	236	14	52	494
Greece	259	86	2	NA	NA	68
Ireland	NA	NA	NA	NA	NA	NA
Italy	4,190	3,477	48	0	67	291
Luxembourg	70	22	0	0	0	41
Netherlands	2,628	2,729	4	0	3	321
Portugal	382	139	6	1	3	50
Spain (1987)	2,859	1,055	9	4	33	256
U.K.	6,067	7,137	183	9	53	557
EC	36,494	31,522	519	47	245	2,670
	51%	44%	0.7%	0.1%	0.3%	3.7%

B. INTRA EC AND INTERNATIONAL MARKET

269. The delivery service market is predominantly local and national in nature. Only about 3.7 percent of all shipments are transported between Member States or internationally. Of these shipments, the post offices carry about 97.6 percent. See Figure 6 and Table 9.

270. The two tables do not identify remail traffic, although remail may be included in both the postal figures (either domestic or international) and the private delivery service figures (as total consolidated shipments rather than individual items). Table 10 provides rough estimates of remail and private "direct delivery" traffic in the Community in 1989. These estimates are projected from incomplete information, but are believed to reflect correct orders of magnitude. "Direct delivery" refers to an item that is delivered by the private delivery service to the addressee rather than forwarded via a post office. Perhaps one quarter or more of the items listed are directly deli vered.

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[97]Sources: UPU, *Statistique des services postaux*, 1988; Prognos, *Courier, Express, and Parcel Service Markets in Europe* (1990). In the following cases, the postal figures refer to 1987: Belgium (parcels only) and Spain (all figures). U.K. figures for "first class" and "second class" were used for "letters" and "printed matter" categories, although the two categories are not identical. U.K. international letter post traffic was separated into "letters" and "printed matter" by multiplying the total by the fraction of LC/AO traffic in the EC cross border market as a whole.

The Prognos estimates are for the year 1989; Prognos data have been revised and interpreted by EEO in consultation with Prognos. There may be overlap between the estimated "express mail" figures and "parcel post" figures provided by the UPU, especially in France.

Figure 5. EC delivery services market

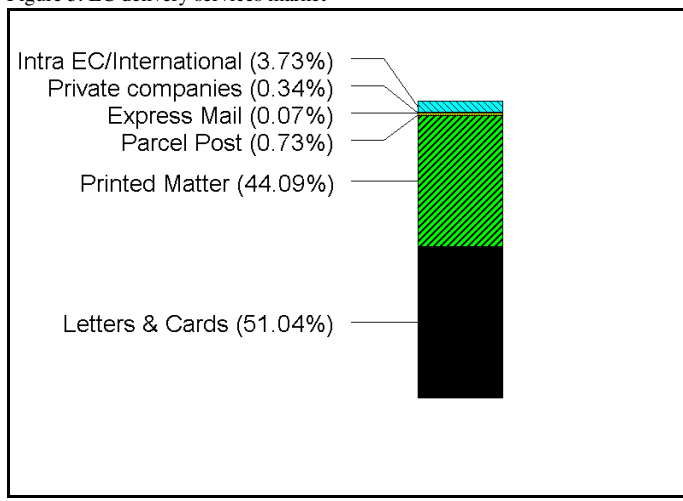
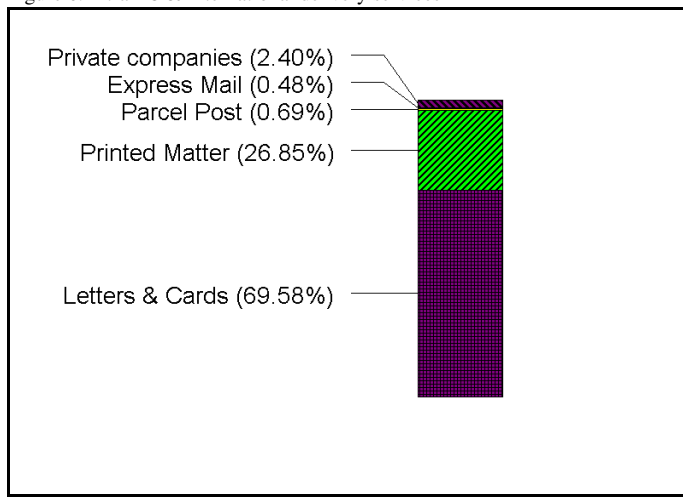


Figure 6. Intra EC & international delivery services



271. This table indicates two important points:

- remail and direct delivery represent an extremely small fraction of postal business in the intra EC market, e.g., only about 2 to 4 percent of intra EC letters;
- Member State post offices as a group are substantial net beneficiaries of remail procedures since the Community receives more than twice as many letter post items as it sends out.

Table 9. Intra EC and international market[98]

(All figures in millions)	Member State post offices				Private Delivery
	Letters & Cards	Printed Matter	Parcel Post	Express Mail	
Belgium	139	97	0	0	5
Denmark	60	5	1	1	1
France	233	33	1	5	9
Germany	367	104	9	3	11
Greece	58	9	0	NA	NA
Ireland	NA	NA	NA	NA	NA
Italy	228	49	1	0	13
Luxembourg	33	7	0	0	0
Netherlands	94	220	1	0	6
Portugal	42	5	0	1	2
Spain (1987)	220	31	0	0	4
U.K.	382	156	5	2	13
EC	1,857	717	18	13	64
	70%	27%	0.7%	0.5%	2.4%

Table 10. Estimated remail & direct delivery

(Millions of items)	Letters	Printed Matter	Total
From EC to EC	20-50	20-45	40-95
From EC to non EC	20-45	15-35	35-80
To EC from non EC	55-95	45-85	100-180

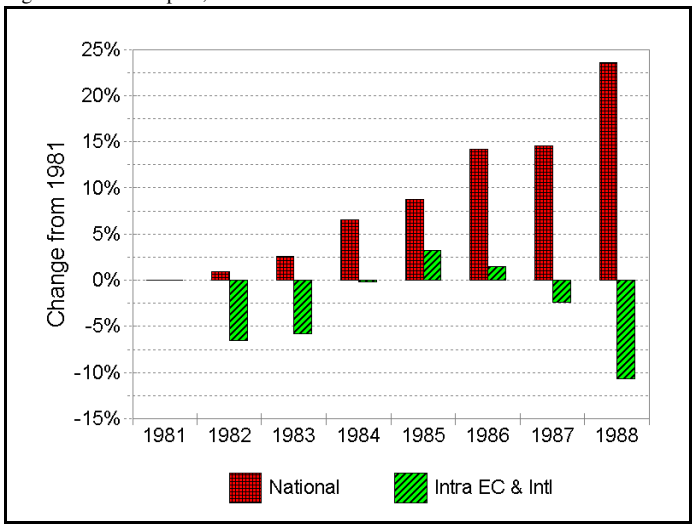
272. Indeed, the net inflow of remail into the Community is about as large as the remail traffic within the intra EC market. Even allowing for postal "losses" due to direct delivery and conversion of international into domestic mail by ABB remailing,[99] it appears *highly likely that remail has increased total Community postal traffic in the intra EC and international market.*

273. As described in Chapter II, there has been a general decline in international postal services compared to national postal services during the last decade or two. Member State post offices have participated in this trend. Between 1981 and 1988, postal traffic in the Member States grew an average of 24 percent. However, for Member State post offices as a group, intra EC and international traffic did not keep pace with the national market. Indeed, international and intra EC postal traffic *declined 11 percent* during this period.

[98]See previous footnote. U.K. international letter post traffic was separated into "letters" and "printed matter" by multiplying the total by the fraction of LC/AO traffic in the EC cross border market as a whole.

[99]A letter which is sent by private express to the country of destination and delivered by the domestic post ("ABB" remail) is transformed statistically from "international" postal traffic to "national" postal traffic. As far as the EEO is aware, there is no significant amount of traffic in the Community that physically originates in Member State A and is posted in post office B for return to addressees in Member State A ("ABA" traffic).

Figure 7. EC letter post, 1981-1988



See Figure 7.[100]

274. During the same period (1981 to 1988), private delivery services grew rapidly, primarily in the field of express services. Although consistent figures are difficult to develop, a recent study by Prognos suggests that private delivery services may account for about 309 million shipments (245 million in national markets and 64 million in the intra EC and international markets).[101]

275. Based upon these estimates, relative to the post, *private delivery services appear to be five times more important in the cross border market than in the national market*. Nonetheless, private delivery services account for only about 2.4 percent of all intra EC and international deliveries, although, looking only at express shipments, the private services transport about three quarters of intra EC and international traffic.

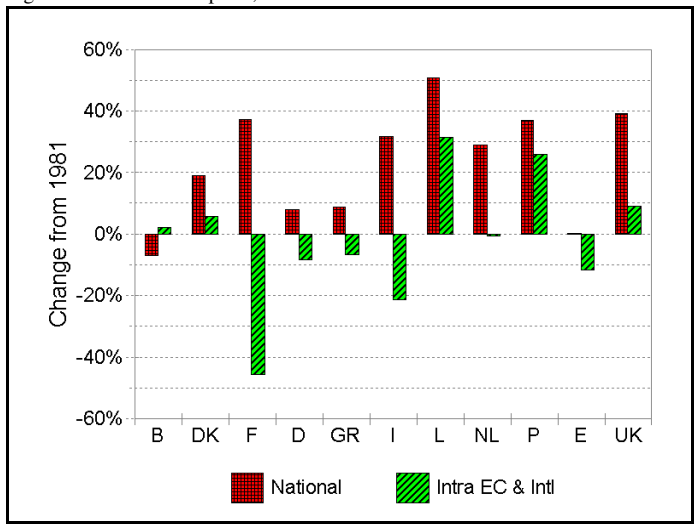
C. NATIONAL POST OFFICES

276. Postal data makes clear that there are very significant differences among

[100] Source: UPU, *Statistique des services postaux* (1981-1988). Where, in a few cases, data is missing, the previous year's data was used, except that the data for the Greek post office in 1983 was taken to be an average of 1982 and 1984 data. No data for Ireland is included.

[101] Prognos, *Courier, Express, and Parcel Service Markets in Europe* (1990). The figures were developed from the Prognos data by EEO in consultation with Prognos. In providing information for the Community's EC Panorama report, the International Express Carriers Conference estimated the intra EC market for private *express* shipments in *1988* to be about 21 million shipments. This estimate was derived from estimates of the traffic of selected express carriers. A recent report by Prognos, based upon user interviews, estimated the intra EC market for *all types* of private shipments in *1989* to be about 64 million shipments, of which about one half, or about 32 million, were denominated by the shipper as "courier/express." Allowing for traffic growth from 1988 to 1989 and the independence of the sources and the vagaries of estimates, these figures appear reasonably consistent.

Figure 8. Member state posts, 1981-1988



the various Community post offices. Figure 8 is similar to the previous figure, except that it indicates differences in growth rates between individual post offices, both relative to each other and absolutely. Table 11 examines more closely the differences between the national postal systems of the Member States.

277. Differences between the post offices require individual scrutiny; in many cases, they are not as portentous for Community policy as they seem at first glance. For example, the relatively high level of intra EC and international traffic for the Greek post office does not appear to indicate that Greek businessmen are especially sensitive to intra EC postal policies. Rather it reflects the vast numbers of post cards sent from Greece by tourists. Post cards comprise almost 60 percent of intra EC and international mail leaving Greece. For most other Member State post offices, the corresponding figure is less than 5 percent (Portugal also exports a large percentage of postcards).

D. EFFECTS OF COMPETITION

278. Despite the relative success of the private delivery services in the intra EC and international market, their growth cannot explain the decline in postal traffic in this market. As seen in Chapter II, international postal traffic in the Community has remained a relatively constant fraction of total postal traffic for most of this century. If, during the 1981 to 1988 period, intra EC and international traffic had grown at the same rate as the national traffic (24 percent), it would have increased from 2.9 billion to 3.6 billion letter post items. Instead, it declined to 2.6 billion items. Thus, in 1988, intra EC and international letter post traffic for Community post offices was about *1 billion items* below levels that would have been expected in 1980.

Table 11. Member state post offices

Letter post includes letters, cards, and printed items							
(All items in billions)	All Letter Post		Intra EC/Intl (Outward)			Items Per Capita	Employ Per Mil Items
	Items	%EC	Items	%LP	%EC		
Belgium	2.8	4%	0.24	8.3%	9%	288	16
Denmark	1.7	2%	0.07	3.9%	3%	327	20
France	18.2	26%	0.27	1.5%	10%	326	16
Germany	15.2	22%	0.47	3.1%	18%	248	18
Greece	0.4	1%	0.07	16.3%	3%	41	28
Ireland	NA	0%	0.00	0.0%	0%	NA	NA
Italy	7.9	11%	0.28	3.5%	11%	138	30
Luxembourg	0.1	0%	0.04	30.3%	2%	352	13
Netherlands	5.7	8%	0.31	5.5%	12%	384	11
Portugal	0.6	1%	0.05	8.4%	2%	55	29
Spain 1987	4.2	6%	0.25	6.0%	10%	107	14
U.K.	13.7	19%	0.54	3.9%	21%	241	16
EC (ex IRL)	70.6	100%	2.57	3.6%	100%	220	18
USA	159.9	226%	0.71	0.4%	28%	649	5

279. The private delivery service sector handles only about 64 million items in the intra EC and international market (indeed, this is a 1989 estimate). Judging from experience at the national level, only a small fraction of express traffic, if any at all, represents diversions from traditional postal traffic.[102] Furthermore, even after allowing for "direct delivery" and "ABB" traffic, remail traffic has probably, on balance, *increased* intra EC postal traffic. In any case, the net effect of remail can account for only tens of millions of items at most. Yet, *even under the unsupportable assumption that every single item carried by a private delivery service or by remail procedures has been diverted from traditional postal traffic, this could not explain more than one quarter of the "missing" postal traffic in the intra EC and international market.*

280. In short, the trends in postal traffic in the intra EC and international markets can be explained only by reference to more integral factors than competition. The answer, it is submitted, can be found in terms of the concepts developed above. The servicing of distant delivery markets is not the same business as the servicing of local markets, and post offices are necessarily oriented towards the local market. The ill fit between local and distant delivery service operations is exacerbated, as postal officials themselves recognize, by the absence of end to end administrative control over traffic traveling between postal administrations.

[102]The Member State with the most highly developed national express industry is the U.K., which has, since 1981, permitted private express services to deliver shipments if they charge more than UK£ 1.00. Despite the success of the express since 1981, from 1981 to 1988, the U.K. post office's national first and second class letter traffic grew by 36 percent, *the highest rate of the major Member State post offices* (topped only by Luxembourg).

281. Put simply, loosely coordinated local delivery systems are becoming increasingly inadequate to meet the needs of modern commerce for delivery to distant areas. This appears to be an inherent structural limitation of local delivery services, postal or private, not a failure of management by postal officials. Indeed, it is for precisely such structural reasons that, as noted above, some thoughtful observers of postal affairs are recommending greater decentralization of national postal systems.

Table 12. Improvements in the international post[103]

Percentage of respondent post offices implementing indicated improvements	
Improved services	87%
New or modified services	82%
Lower prices	80%
Improved marketing	73%
Agreements with competing firms	11%
Agreements with other post offices	76%

282. Looking at the Community market as a whole, what appears to be developing is a system of *overlapping delivery services*, which complement each other in terms of both service level and geographic scope. Some services (primarily national post offices) are best equipped to service local markets, and other delivery services (including, in some respects, the International Postal Corporation) are specifically designed to serve more distant markets.

283. Moreover, in evaluating the effects of competition in the intra EC and international markets, one must also consider the stimulative effects on postal services. As described in Chapter II, post offices have responded to increased competition in the international market with a variety of improvements. A 1988 UPU survey noted the following competitive responses by the percentage of respondent post offices in Table 12.

3. INTRA EC ISSUES

284. A discussion of Community delivery services policy also requires consideration of certain specific, interrelated issues arising out of relations between the Member State post offices. Many of these have been highlighted by the development of "remail" competition between post offices.

A. CHARGES FOR INTRA EC POSTAL DELIVERY

285. As noted above, the major operational component of an end to end delivery service is the final delivery process. Final delivery accounts for about 70 percent of total cost (and even more for bulk mail that has, in effect, been collected and sorted by the shipper). Therefore, in regard to postal traffic

[103]UPU, Executive Council, CE 1988/C 4 - Doc 9 ("Study on Remailing"), *reproduced in*, UPU, "Terminal Dues Round Table, 6-7 April 1989," Annex 3, at paragraph 13.

exchanged between national post offices, any deviation from the correct pricing of final delivery services will substantially distort the entire pattern of intra EC delivery services.

286. Some post offices have suggested that charges for the delivery of intra EC mail should be uniform (per kilogram or per piece) among post offices. Uniform charges between post offices, it is said, will make possible postage rates to mailers that are easier to use and thus facilitate the formation of a Single Market. The possibility that large mailers, acting in concert with private delivery service, might take advantage of deviations between uniform charges and actual costs leads some post offices to recommend legal prohibitions against intra EC access of postal services. This section will consider the economic aspects of these interrelated ideas.

(1) 1989 UPU terminal dues

287. Within the Community, the post offices of the Member States have traditionally participated in the compensation formula of the Universal Postal Convention. Under the Convention, post offices do not negotiate delivery prices with one another or compensate each other on the basis of normal postage rates. Instead, from 1969 to 1989, post offices agreed upon a common worldwide delivery rate for each kilogram [104] of international mail by all post offices worldwide. This compensation rate is known as the "terminal dues" charge.

288. The 1989 Washington Congress of the Universal Postal Union continued the concept of a uniformly applicable compensation formula, but substituted a very complicated new version:

- 8.115 SDR per kilogram for letters and cards (or optionally, for priority mail) if there are fewer than 55 items per kilogram; and
- 2.058 SDR per kilogram for printed papers (or optionally, for non priority mail) if there are fewer than 7 items per kilogram; or
- 0.143 SDR per item plus 1.2584 SDR per kilogram, applicable in either category, if the average number of items per kilogram exceeds the above limits; or
- 2.940 SDR per kilogram for all mail if the origin post office sends the delivering post office less than 150 tonnes per year; or
- any other bilaterally agreed rate.

289. This uniform, primarily weight based delivery charge, is inconsistent with actual economic costs in two major respects:

- it applies equally to all post offices, despite the fact that, according to a 1988 UPU survey, actual postal delivery costs within the Community

[104] The delivery rate per kilogram was set at SDR 0.16 in 1969, SDR 0.49 in 1974, SDR 1.90 in 1979, and SDR 2.614 in 1984. Prior to 1969, post offices assumed equal amounts of mail were exchanged between pairs of post offices and that all postal delivery services were equally valued (hence, no net compensation was paid any post office).

vary by a factor of three or more;[105] and

- a weight based terminal dues rate ignores the number of pieces of mail, even though local delivery costs vary more by number of pieces.

290. In essence, some post offices are paid too much for local delivery and some too little. In addition, commercial cooperation between post offices and private delivery services are skewed. These distortions are shown graphically in Figures 9 - 10.[106] They illustrate, for different weight steps, the differences between normal domestic delivery rates by major EC post offices and the 1989 UPU terminal dues formula.

(2) Uniform charges between post offices

291. The major flaw in the 1989 UPU terminal dues system is that a uniform rate, *any* uniform rate, fails to take into account the substantial differences between local delivery costs. The discrepancies are so significant that they create strong economic incentives for large businesses to redirect their mail:

- In high cost postal areas, shippers will have an incentive to leave the national post in favour of using lower cost post offices as regional hubs.
- All large mailers will have an incentive to transmit mail directly to any low cost post offices whose domestic postage is less than the terminal dues rate.

292. Mail can be withdrawn from the normal international post and directed to low cost postal areas by several methods:

- express shipment of mail across borders to post offices whose rates are below terminal dues ("remail");
- electronic transmission of data or documents to permit preparation of documents in another Member State; and
- movement of printing and data processing facilities to low cost postal areas.

293. A uniform terminal dues approach, therefore, not only distorts trade in the delivery service sector but it also creates an excuse for still further regulatory distortions in order to prevent the competitive market from correcting the problems created.

294. From an economic standpoint, it is clear that a Community post office should set postage rates according to costs and charge the same rates to all Community shippers, regardless of whether they live in the Member State served

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[105]UPU Executive Council, CE 1988/C 5 - Doc 8 ("Study on terminal dues") in "Terminal Dues Roundtable," Annex 4. Around the world, postal delivery costs vary by a factor of 16 or more.

[106]This figure is based upon the estimate that 60 percent of domestic postage represents the portion of postage that can be allocated to delivery, an approach adopted from 1 January 1989 by the four Nordic post offices for mail exchanged among themselves. Even where a Member State has decided, as a matter of national policy, to subsidize postal services, it appears reasonable to suppose that, within a Single Market, each EC post office should deliver cross border mail for the same price as domestic mail.

Figure 9. Terminal dues compared to costs for inward postal delivery (letters)

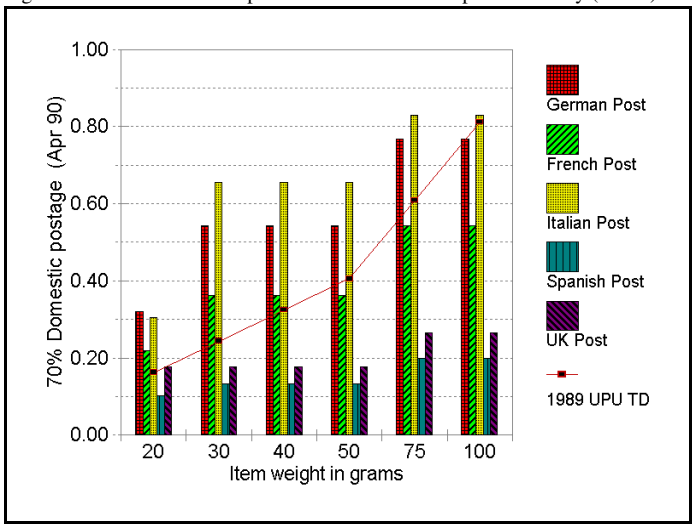
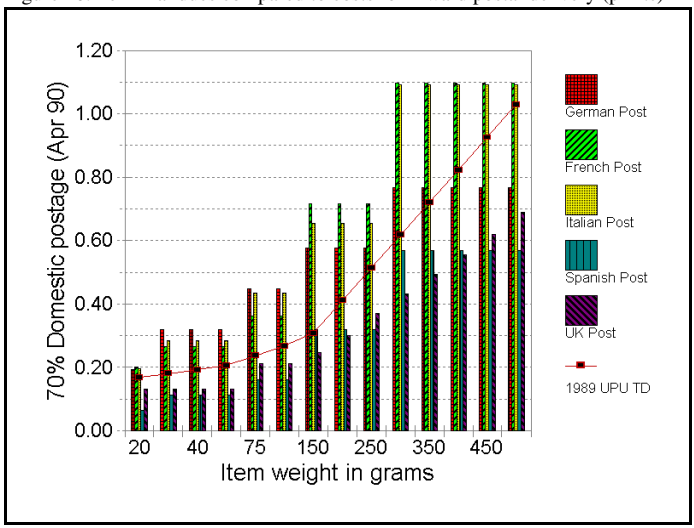


Figure 10. Terminal dues compared to costs for inward postal delivery (prints)



by the post office.

295. Some supporters of a uniform terminal dues approach have suggested that, despite the economic difficulties of a uniform charge for intra EC postal delivery, a uniform charge serves social interests because it facilitates uniformity of intra EC postage rates *charged to mailers in a given Member State*. This uniformity of outward intra EC postage rates, in turn, will facilitate the development of a Single Market. Elementary economic analysis reveals the flaw in this suggestion.

296. Under a uniform terminal dues approach, a Member State post office must pay every other Community post office a uniform rate for the delivery of its intra EC mail. This rate, in an ideal version of the uniform terminal dues approach, represents an average of the actual delivery costs. So that the Member State post office would, in fact, pay actual delivery costs in total.[107]

297. If terminal dues are, on the other hand, set by reference to the local postage rates in other Member States, the origin post office will likewise pay the actual delivery costs in total (and in addition would pay each post office the proper delivery charges). *Thus, under both approaches, a Member State would pay other EC post offices the same total amount for delivery of the same mail.*

298. In both cases, the origin post office must decide how to design its intra EC postage rates so as to recoup this total delivery charge paid to other Community post offices. The origin post office will first add its own collection, outward sorting, and transport costs. The origin post office will then have to consider whether to establish a special rate category for intra EC mail. Since intra EC mail is only about 2 to 8 percent of all mail, it seems unlikely that the post office will incur the costs of administering a separate rate classification, except for bulk mailings.[108]

299. More fundamentally, *under a system of inter postal charges based upon domestic postage rate, a post office has no more (and no less) economic incentive to create a separate tariff classification for intra EC mail than it does under a uniform terminal dues scheme.*

300. As for intra Community bulk mailings, it seems reasonable to suppose that the benefits of aligning postage tariffs with costs could justify the administrative costs of separate rates for different destinations (perhaps grouping EC destinations into two or three rate zones). Bulk mailings, however, are invariably commercial in nature and should pay the proper associated costs. Indeed, any discrepancy between postage rates and postal costs will either artificially encourage the bulk mailer to print his material out of the Member State or represent a subsidy from other mailers to his business. Neither result is desirable.

301. Therefore, *for small mailers, individual or corporate, there is precisely no economic difference in terms of outbound intra EC postage, or otherwise, between a properly calculated uniform terminal dues rate and a postage based*

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[107]To be very precise, each origin post office will pay the proper costs of outbound delivery to the extent that its outbound mail conforms to the formula by which the "average" terminal dues rate was set. To give a rough example, if the uniform terminal dues rate was calculated according to a weighted average of international traffic in the Community, an origin post office would pay the proper costs of delivery if its traffic was apportioned among Member State post offices in the same proportions.

[108]Except, perhaps, the post offices of Greece, Spain, and Portugal. These post offices have relatively high percentages of outward intra EC mail and their normal postage rates are substantially below the average delivery cost for Community post offices.

terminal dues rate like the Nordic one.[109]

B. DOMESTIC POSTAGE FOR INTRA EC TRAFFIC

302. In order to facilitate intra EC mailings within the Community, the Commission has encouraged Member State post offices to apply the same postage rate to intra Community mail as they apply to domestic mail. Most, but not all, post offices have done so.

303. The concept of applying domestic postage for outbound intra EC mail appears to be based upon the following premises:

- Most individuals and small businesses pay for postal services by postage stamps.
- Domestic postage stamps are commonly available while especially denominated "international" stamps are used infrequently and are troublesome to obtain.
- In the interest of encouraging intra EC social and commercial ties, the intra EC postal service should be as convenient to use as the domestic postal system.

304. There can be doubt as to the correctness of these premises. The point of making them explicit is to make clear that *uniformity of inter post office delivery charges bears no relationship to satisfying these desirable social and economic policy goals.*

305. As explained above, a uniform terminal dues approach does not alter the total charge that a Member State post office must pay other EC post offices for delivery of intra Community mail. By way of example, assume that the average cost per letter dispatched by the U.K. post office comes out to 24 pence per letter. The standard domestic postage stamp in the U.K. is 20 pence. For the U.K. post office, the commercial question is whether the extra cost of intra EC mail is worth the expense of printing and distributing 24 pence (or 4 pence) stamps. In essence, the aim of the Commission's social policy is to save the intra Community mailer the difficulties and inconveniences posed by a creation of the 24 pence stamp. The uniform "terminal dues" charge, however, in no way assists in fulfilling this goal or relieves the U.K. post office of the economic burdens associated with it.

306. *The economic ramifications of using domestic postage stamps for intra Community mail must therefore be considered separately from the question of the proper method of assessing delivery charges between post offices.*

307. It appears clear that the correct "economic" rate for the delivery of intra EC letters may be approximated by adding 30 percent of the domestic postage

[109]Moreover, there is a significant economic benefit to Member State post offices in terms of inward charges. If the terminal dues rate is set according to average inward delivery costs, each destination post office will be paid the proper total cost of foreign postal delivery. Under a uniform terminal dues approach, a destination post office will gain or lose in an absolute sense on its own inbound delivery of Community mail, depending on whether the uniform rate is above or below its actual delivery cost.

Table 13. Bilateral "economic" intra EC postage rates

Economic rates constructed by adding 30% of outward postage rate and 70% of inward postage rate, expressed as percentage above or below domestic postage of outward post office										
Origin (Outward) Post Office	20g Rate SDR	Destination (Inward) Post Offices								
		B	DK	D	F	GR	I	NL	E	UK
Belgium	0.31		25	33	1	-43	28	-6	-37	-13
Denmark	0.42	-18		6	-18	-50	3	-23	-46	-28
Germany	0.46	-22	-6		-22	-51	-3	-26	-48	-31
France	0.31	-1	24	32		-43	27	-6	-38	-14
Greece	0.12	109	172	193	111		182	94	14	76
Italy	0.44	-20	-3	3	-20	-51		-24	-47	-29
Netherlands	0.28	6	33	42	7	-40	37		-34	-8
Spain	0.14	80	133	151	81	-11	141	67		52
U.K.	0.25	16	47	57	17	-36	51	9	-30	

Table 14. Overall "economic" intra EC postage rates

"Economic" intra EC postage rates. Weighted according to approximate traffic and expressed as percentage above or below domestic postage of outward post office	
Belgium	4
Denmark	-16
Germany	-24
France	4
Greece	121
Italy	-21
Netherlands	12
Spain	101
United Kingdom	26

rate of the outward post office and seventy percent of the postage of the inward post office.[110] The resulting economic charge will be a certain percentage more or less than the domestic postage rate of the outward post office. Table 13 shows how much above or below domestic postage these "economic" intra EC postage rates would be for a number of Member State post offices, using the basic 20 gram letter rate.[111]

308. In order to interpret the impact of differences between the domestic postage rates and the underlying cost of intra EC postal service, an allowance must be made for the different amounts of traffic between pairs of Member States. By correctly "weighting" each destination, an overall difference

[110]It is assumed that the first class or letter postage rate fully covers actual handling costs. If a Member State has chosen to subsidize its postal service, then an unsubsidized postage rate should be substituted in the following analysis. Whether a Member State post office may give its own citizens a subsidized postage rate while charging other Community mailers an unsubsidized rate is a matter of law, but, either way, it will not alter the fundamental conclusions of the analysis in the text.

[111]The postage rates used were those in effect in April 1990. No rates are available for the post offices of Portugal, Ireland, and Luxembourg.

between cost and revenue can be calculated. Table 13 presents the results for the nine Member State post offices in Table 14. In essence, this table shows approximately how much higher or lower a uniform "intra EC" stamp would be than a domestic stamp for a basic 20 gram letter. For example, an "intra EC stamp" in Belgium would be about 4 percent more than the domestic stamp for a 20 gram letter; in Denmark, about 24 percent less.

309. Table 14[112] suggests strongly that it is in the self interest of most Member State post offices to continue to charge domestic rates for intra EC mail tendered in small quantities. The exceptions are Greece and Spain (and probably Portugal). In these countries, the post offices should charge *twice* domestic postage, also a solution that is convenient to the small mailer.[113]

C. ABC AND ABB REMAIL

310. "ABC remail" refers to items, usually bulk mailings, that a shipper in Member State A has sent by private express service to a post office in Member State B for delivery to addressees in another Member State C. "ABB remail" refers to items that have been forwarded by private express to a post office in the Member State in which the addressees reside, i.e., they are delivered by post office B to addressees in Member State B.

311. As described in Chapter II, the growth of intra EC remail competition between Member State post offices has stimulated substantial, even dramatic, improvements in the price and quality of intra EC and international postal and delivery services. However, as with any economic competition, ABC and ABB remail can have an adverse economic impact upon the losing competitor, in this case the outward post office.

312. The only difference between ABB and ABC remail is what the inward or destination post office is paid. If it delivers ABB traffic, the inward post office is paid *domestic postage* by the express company tendering the mail. With ABC remail, the inward post office is paid *terminal dues* by the "hub" post office B.

313. As noted above, although terminal dues have been set by the UPU Convention at levels considerably different from domestic postage rates, there

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[112]Allocation of traffic was derived by UPU statistics for 1988 for inbound letters and cards. 1987 data was used for Spain. U.K. figures were derived for total letter post inbound figures by assuming the same 'inbound LC to inbound letter post' ratio as for the other eight post offices collectively. An example calculation: of the 8 post offices, B through I, post office B imported X % of the mail. It is assumed that X % of post office A's mail was sent to post office B. The underlying presumption is that post office A distributes its mail to other Community post offices in the same percentage as the world as a whole. This appears to be a sufficiently reasonable approximation for the purposes of the table.

[113]Given the high proportion of postcards in the intra EC mail of these three countries, it appears likely that a rule permitting intra EC postcard rates which are not an even multiple of domestic postage rates would be economically significant but not burden local mailers who, presumably, have domestic stamps on hand. An intra EC postcard postage rate could be used to make any small adjustments that may be economically justified by the "two stamp" approach suggested.

is no economic justification for this practice. As discussed in Chapter VI, below, a difference in inward delivery charges for ABB and ABC mail appears to be inconsistent with the Treaty of Rome. *In this analysis, therefore, it will be presumed that policy must be based upon the fact that terminal dues will be adjusted to economically correct levels, that is, so that they are equivalent to the delivery portion of domestic postage rates.* Under this assumption, there are no economic differences between ABB and ABC remail, and there is no possible adverse impact from either type of remail upon the inward post office.

314. The *maximum potential impact* of this competition upon the business of the *outward* post office may be estimated by considering:

- the percentage of the outward post office's business that is intra EC;
- the percentage of outward postal revenues properly allocatable to the work of the outward post office; and
- the percentage of costs saved on work not done by the outward post office.

315. The percentage of the letter post business *revenue* attributable to intra EC traffic may be estimated from *traffic* figures. Postal officials sometimes suggest that revenues for intra EC and international services are more than proportional to traffic, and therefore traffic figures understate the economic importance of intra EC and international business.

316. This position appears untenable, however, as a matter of sound policy. The work performed by a post office for intra EC and international mail is not materially different from that performed for national mail. The only significant difference is the need to pass through the (relatively small) cost of the additional long distance transportation purchased from common carriers. While higher contracted transportation costs may lead to somewhat higher postage rates, and therefore higher revenues, this is no reason why the post office should earn a greater profit on intra EC or international services, as compared to national mail. For all services, the *postal* work is the same for each item of mail.[114]

317. In order to estimate the potential revenue impact of competition for *outward* intra EC business, outward traffic must be reduced to reflect the fact that the outward post office performs only about 30 percent of the work associated with outward mail and, under an economic system of terminal dues, would receive only 30 percent of the revenue. For revenue calculations, the "*net outward letter post*" traffic may be thought of as equivalent to 30 percent of the same number of fully compensated national letter post items. This is the *gross revenue loss* that the outward post office would experience.

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[114]In the Community, most post offices charge domestic postage rates for intra EC mail, so that the cost of any additional purchased transportation is *not* reflected in higher postage rates. Hence, the profitability of intra EC mail must be *lower* than for national mail on the average (that is, allowing for the varying effects of misaligned terminal dues). Hence, traffic figures *overstate* the importance of intra EC business for Member State post offices.

318. If a competitor, whether a private delivery service or another Member State post office, diverts outward traffic from a post office, the outward post office will lose the revenue, but it will be able to reduce its costs. Since an outward post office appears to experience moderate economies of scale in outward collection and delivery, it may be assumed (for the purpose of rough estimates), that 20 percent of outward letter post is "profit," i.e. not offset by direct costs saved. In revenue terms, the *net revenue loss* from losing outward letter post revenue is the equivalent of losing *all* the revenue from a number of national letter post items equal to 20 percent of "net outward letter post" traffic.

319. For example, suppose a post office's national traffic is 10 million letter post items and its outward intra EC and international traffic is 1 million. The *net outward letter post* may be thought of as 300,000 full revenue national post items. The net loss of losing *all* outward traffic would be about 20 percent of revenue that would be earned from 300,000 letter post items, or the equivalent of the revenue earned from 60,000 national letter post items. The impact of losing its entire outward business to a competitor may be estimated as the equivalent of losing between 3 percent (gross) and 0.6 percent (net) of its domestic revenues.[115] To provide a further sense of the financial impact, these figures may be compared, in percentage terms, with the normal growth that may be reasonably expected in postal traffic in the Community, about 3.1 percent per year.[116]

320. The results of these calculations for the Member State post offices are shown in Table 15. This table presents the "worst case" effects of a *total loss of all outward postal revenues* due to competition in the outward EC market. This analysis is not intended to be definitive, but to provide an order of magnitude sense of the potential adverse effects of ABC or ABB remail competition on the post offices of Member States. Different assumptions would change the numbers somewhat, but they are unlikely to modify the orders of magnitude.

321. It appears from Table 15, that competition for *outward* traffic might, *in the "worst case*," have the overall effect of setting back postal revenues between 0.2 percent (net) and 1 percent (gross) of total revenues, the equivalent of a few weeks to a few months of reasonable average growth in

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[115]The gross revenue loss appears to overstate the economic loss because it does not take into account the degree of economies of scale. On the other hand, the net revenue loss may appear to understate the economic loss when compared to *total* revenue growth (there being no clear way to define net revenue growth for the post office). Hence, both figures are given in the text.

[116]The average rate of growth of postal traffic in the Community during the period 1981 to 1988 was 3.1 percent. The rate of growth among individual Member State post offices differed substantially, for unknown reasons. For the purposes of order of magnitude estimates for the future, in order to provide a sense of how long it might take a well managed post office to regain revenues lost in the "worst case" scenario, 3.1 percent is taken as a reasonable expectation for all post offices. However, in reality, growth rates are likely to differ among post offices depending upon managerial decisions and macro economic considerations beyond the control of the post offices.

postal revenues. There is, however, no reason to assume the worst of circumstances. Given the large collection system that a post office maintains for national service, it is impossible to imagine a post office losing *all* of its outbound traffic in the foreseeable future.

Table 15. "Worst case" effects of ABC/ABB remail

(Traffic in Millions of Items)	LP Natl	LP Out	Net LP/O (30%)	Net LP/O % LP Natl	Net Loss (20%)	Net Loss % LP Natl	Ave LP Incr. 81-88
Belgium	2,606	236	71	3%	14	0.5%	-1.0%
Denmark	1,613	65	20	1%	4	0.2%	2.5%
France	17,945	267	80	0%	16	0.1%	4.6%
Germany	14,752	471	141	1%	28	0.2%	1.1%
Greece	345	67	20	6%	4	1.2%	1.2%
Italy	7,668	277	83	1%	17	0.2%	4.0%
Luxembourg	92	40	12	13%	2	2.6%	6.0%
Netherlands	5,356	314	94	2%	19	0.4%	3.7%
Portugal	521	48	14	3%	3	0.5%	4.6%
Spain(87)	3,913	252	75	2%	15	0.4%	0.0%
U.K.	13,204	538	161	1%	32	0.2%	4.8%
EC	68,017	2574	772	1%	154	0.2%	3.1%

322. One further correction is necessary in order to assess the actual policy implications of this analysis. A certain percentage of intra EC traffic is already outside the scope of the effective postal monopoly and therefore is already subject to competition. For this percentage of the traffic (which may be quite high), ABC and ABB competition is already a commercial possibility, yet the outward post office has already retained the customers' business. Hence, the above calculation overstates the true "worst case" by whatever percentage of outward intra EC traffic is in fact subject to competition today. Indeed, in consideration of this factor alone, the true "worst case" may be only half of the figures presented.

323. As the calculations indicate, special consideration of certain individual Member State post offices may be appropriate. However, such a decision requires case by case analysis. Superficially, the post office most sensitive to competition in the intra EC market is the post office of Luxembourg, yet it is also the post office that has been the most successful in expanding its intra EC and international traffic in recent years. The second most vulnerable post office would appear to be the Greek post office, but most of its outward mail is postcards, an area in which the post office would seem especially well suited to compete.

324. Finally, it may be considered to what degree the proportion of intra EC traffic to national traffic might increase as the Community moves towards greater economic unity after 1992. While such a trend seems intuitively

plausible over the long run, Europe, and the world, increased their economic integration between 1913 and 1988, yet this did not translate into a substantial increase in the fraction of postal services devoted to international markets. As shown in Chapter II, the trend in recent years has been the reverse. Moderate growth in intra EC traffic as a fraction of total postal traffic *may* occur in the future, but it appears unlikely to happen rapidly or to affect the post offices as deeply as other long term trends, such as the development of the fax.

325. Against these possible costs, the proven benefits of ABC and ABB remail must be also be placed. In both cases, Community mailers are making use of a network of improved intra EC transportation links to seek from intermediate post offices and inward post offices the best possible services at the best possible prices. As seen in Chapter II, postal studies indicate that these new possibilities have already led to substantial improvements in services and prices. Limited ABC and ABB remail competition has, in turn, spurred post offices to raise the level of their service for the entire market.

326. In addition, it may be noted that ABB remail is in essence a matter of bypassing the outward post office's collection and transport operations, which are organized primarily to meet the needs of local delivery operations and are not optimal for intra EC traffic. Operationally, this is the same as the large national mailer tendering his mail "downstream" to the destination post office, a procedure which large mailers appear to be using more and more.

327. *In sum, assuming correctly set terminal dues, ABC and ABB remail competition for outward intra EC and international traffic appear:*

- *to offer intra EC mailers the possibility of obtaining enhanced services in collection, outward sorting, and transport services and, in the case of ABB mail, the operational advantage of tendering distant mail "downstream" closer to the postal delivery operations; and*
- *to pose no overall revenue threat to outward Member State post offices, on average, greater than between 0.2 percent (net) and 1 percent (gross) of total revenues, roughly equivalent to between a few weeks and few months in normal growth in the postal sector.*

D. AB DIRECT DELIVERY

328. "AB direct delivery" refers to items that a private express company delivers directly from a shipper in Member State A to the addressees in Member State B, without tendering them to a post office for delivery. "Direct delivery," as used here, connotes a service level that is less than "express," that is, for example, a service level similar to that offered by the Member State post offices in the local market.

329. In terms of economic impact upon the *outward* post office, direct delivery of intra EC mail is the same as ABC and ABB remail for the post office in the country of origin. It poses no additional threat.

330. In the case of "direct delivery," however, one must also consider the possible losses to the inward post office. The calculation of the maximum net

injury for the inward post office is similar to the above calculation, except that the inward post office does more of the work (about 70 percent) and, due to higher economies of scale, suffers a larger net loss. For inward delivery operations, it has been assumed that, due to economies of scale, the net loss would be 40 percent of revenues. The calculations are displayed in Table 16.

Table 16. "Worst case" effects of AB direct delivery

(Traffic in millions of items)	LP Natl	LP In	Net LP/I (70%)	Net LP/I % LP Natl	Net Loss (40%)	Net Loss % LP Natl	Ave LP Incr. 81-88
Belgium	2,606	241	169	6%	67	2.6%	-1.0%
Denmark	1,613	66	46	3%	18	1.1%	2.5%
France	17,945	348	244	1%	98	0.5%	4.6%
Germany	14,752	620	434	3%	174	1.2%	1.1%
Greece	345	39	27	8%	11	3.1%	1.2%
Italy	7,668	384	269	4%	108	1.4%	4.0%
Luxembourg	92	40	28	31%	11	12.2%	6.0%
Netherlands	5,356	219	154	3%	61	1.1%	3.7%
Portugal	521	32	22	4%	9	1.7%	4.6%
Spain (1987)	3,913	269	188	5%	75	1.9%	0.0%
U.K.	13,204	500	350	3%	140	1.1%	4.8%
EC	68,017	2,759	1,931	3%	773	1.1%	3.1%

331. As this table shows, direct delivery of inward intra EC mail poses on the average, in the worst case, a revenue threat equivalent to between 1.1 percent (net) and 3 percent (gross) of national postal revenues. This is roughly equivalent to the normal growth in the postal sector of about four months to one year. As noted above in the case of ABC/ABB remail, this threat overstates the true "worst case" by the degree to which such traffic is, in fact, already subject to competition.

332. The increased financial risk is due in part to the fact that inward delivery is the operational component upon which the post office achieves the greatest economies of scale and hence makes the most "profit." But this also implies that direct delivery competition is likely to be limited, because postal economies of scale make it more difficult for a private delivery service to provide competitive service at the same price.

333. The economic equation for direct delivery of inward intra EC traffic also includes considerable benefits for the shipper, benefits that cannot be achieved by handing off the mail to the inward post office via remail. These include:

- better end to end service due to end to end control;
- the possibility of dealing locally with an undertaking that is legally responsible for final delivery;
- collection, sorting, transport, and delivery functions appropriately coordinated to the geographic scale being served; and

- the reliability and innovation that results from competitive suppliers of a service.

334. The theory of contestable markets does appear to present difficulties in connection with direct delivery of intra EC traffic. Competition confined to the intra EC market, by definition, does not pose a threat to the entire postal market structure. Indeed, if there is any submarket in which post offices have difficulties satisfactorily serving two masters at the same time ("diseconomies of scope"), it is in the intra EC market.

335. *Hence, assuming correctly set terminal dues, AB direct delivery competition for inward intra EC and international traffic appears:*

- *to offer intra EC mailers the possibility of obtaining end to end delivery services from service providers who are directly responsible to the mailer and organized to serve "distant" markets in the most efficient manner;*
- *to pose no additional revenue threat to outward Member State post offices beyond that posed by ABC/ABB remail; and*
- *to pose no overall revenue threat to inward Member State post offices, on the average, greater than between 1.1 percent (net) and 3 percent (gross) of national postal revenues, roughly the equivalent of between several months and one year in normal growth in the postal sector.*

E. ABA REMAIL

336. "ABA remail" refers to items that originate in Member State A and are sent by private delivery service to the post office in Member State B for posting back to Member State A and delivery. In terms of the preceding analysis, post office A is both the *outward* and the *inward* post office.

337. The risk posed by ABA remail is limited by the "terminal dues" charge, since with ABA remail, post office A will continue to perform the inward delivery functions, the lion's share of the work. If the terminal dues rates are set at correct economic levels, post office A will receive the same revenue for the inward delivery of all items, regardless of whether the mail is posted with post office A itself or "remailed" via post office B.

338. The potential loss for ABA remail is thus confined to the possible loss of the revenue associated with the collection and outward sorting. However, these functions form the minor portion of postal operations and yield only moderate economies of scale at best. In adapting to the increasing role of "bulk mailings" in modern business, many Member State post offices (and non Member State post offices) already permit large businesses to aggregate and sort their own mail; these large mailers are given a discounted, "delivery only" rate.

339. If terminal dues are set at correct levels, ABA remail is essentially the same as tendering mail to post office A at a bulk mail discount equal to the terminal dues rate. Since there is no apparent economic reason to apply different bulk mail rates to intra EC and national mailers, presumably the terminal dues rates will be the same as the national bulk mail rates, for

equivalent mailings. Since only a relatively large business mailer would, in any event, consider ABA remail service, it is difficult to perceive how ABA remail will have any effect on post office A.[117] The bottom line is simply that large domestic mailers will be able to obtain the same "delivery only" postage rate accorded other Community mailers, a commercial possibility that is believed to occur already in most Member States.

340. Since ABA remail is equivalent to a bulk discount in the domestic postage rates, there is no reason to suppose that a shipper in Member State A will use ABA remail for mail that is primarily or exclusively destined for Member State A. He would prefer to deal directly with post office A. The major economic advantage in ABA remail probably will derive from its use as an adjunct to ABC and ABB services. If ABA remail is permissible, a large business would be able to tender a Community wide mailing to whichever undertaking, public or private, could provide the best price and service, without physically separating the mail into national and intra EC portions. As private companies and some post offices provide more and more mail preparation services, the economic advantages of such consolidated operations may become significant.

341. *In sum, assuming correctly set terminal dues, ABA remail appears:*

- *to offer intra EC shippers an advantage over ABC/ABB only remail by offering them the possibility of consolidated tenders of Community wide mailings to whichever Member State post office, private delivery service, or mail preparation company will provide the best Community wide distribution services; and*
- *to pose no revenue threat at all to a Member State post office that offers appropriate bulk discounts to large national mailers.*

F. ABA DIRECT DELIVERY

342. "ABA direct delivery" refers to the physical carriage of mail from a shipper in Member State A to a point outside of Member State A and then reimport of the mail for direct delivery to addressees in Member State A.

343. Unlike the other forms of competition discussed above, ABA direct delivery offers the possibility of subjecting a significant portion of the current business of the Member State post offices to increased competition. However, even in the case of ABA direct delivery, there appear to be firm limits to the potential threat.

344. The concept of geographic scales for delivery services described at the beginning of this chapter suggests strongly that it would be very difficult for an ABA service to compete with a Member State post office in a "local market" (i.e., a market that can be traversed in an hour or two by truck). An

[117] As noted in Chapter III, in the United States, under the influence of the U.S. Postal Rate Commission, substantial bulk and presort discounts have been introduced widely over the last decade, and postal traffic has expanded dramatically.

ABA direct delivery system would be serving a local market and yet would be burdened with the operational difficulties of a regional operational system. Moreover, the ABA service would also be handicapped by additional (although relatively small) transportation costs. These difficulties probably preclude a realistic threat of competition in the local market.[118]

345. Some Member States, however, are so small that they could be considered entirely "local" delivery services markets. For these smaller Member States, ABA competition would be tantamount to total deregulation of the postal monopoly (a possibility we do not endorse; see Chapter VI).

346. In the larger Member States, no estimates are known of the proportion of "local" traffic to "regional" or "distant" traffic. Some clues may be gleaned, however, from a consideration of the division between national and international (including intra EC) traffic for the smallest Member States. The smallest Member State, Luxembourg, retains 70 percent of letter post items within its borders. For the next largest Member States, Belgium and the Netherlands (both of which might be considered wholly "local" delivery service markets), the figures are 92 and 95 percent, respectively.

347. It does not appear implausible, therefore, to presume that 70 to 90 percent of the traffic of a larger Member State would be considered "local." It believed that, within this "local" traffic, about 50 percent of mail stays within the same city.

348. The larger Member States must be considered to include more than one "local" delivery services area. An ABA direct delivery service would appear to be on a more or less equal competitive footing with post office A in providing service *between* these local markets by means of a point outside the Member State. According to the preceding estimates, such competition could threaten up 10 to 30 percent of the revenues of a Member State post office.

349. For all the reasons discussed in the preceding sections, it is unlikely that the post office would lose all traffic, even in the fiercest competition. Some traffic is already subject to competition and yet retained by the post. The post office begins the competition with a large array of offices and delivery operations by virtue of its dominance in the local markets, and so forth. The prospect of such competition could be characterized as a "material" threat, but not a "critical" threat, to the post office of a larger Member State.

350. It must be noted that ABA competition, like "parallel imports," holds the potential for powerful improvements in service for the national mailers. It will inevitably result in a certain "levelling up" of the quality of Member State postal services. In many *other* industrial sectors, ABA competition is probably the most efficacious step the Commission has taken to encourage the development of a higher, and more uniform, standard of service for all Community residents.

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[118] As priority decreases, ABA competition probably becomes more possible; however, lower priority services, such as for parcels and magazines, are also the ones least likely to be subject to the postal monopoly.

351. *To summarize, ABA direct delivery appears:*

- *to offer the potential for "levelling up" non local delivery services wholly within a larger Member State;*
- *to pose the possibility of a material, but not a critical, threat to perhaps as much as one third of the revenues of a post office in a larger Member State; and*
- *to be tantamount to total deregulation of the postal monopoly in a smaller Member State.*

V. LAW

352. The legal framework for a Community policy on delivery services is the Treaty of Rome, the basic charter for the European Community.[119] The first section of this chapter reviews briefly the principles of the Treaty that are especially pertinent to the development of a Community policy on delivery services and their past application, if any, to post offices or other delivery services.

353. Sections 2, 3 and 4 will review three subsidiary legal structures which are also relevant to delivery service policy:

- the Universal Postal Union;
- the national postal laws, particularly the national postal monopoly laws; and
- Unipost, a private Dutch company formed by 20 major post offices, including almost all of the Community post offices.

1. COMMUNITY LAW

354. The Treaty is a political constitution that embodies an overall philosophy and strikes a balance between the interests of the Community and the interests of the Member States. This philosophy is set out in various specific provisions which regulate the conduct of persons and undertakings within the Community.

A. FREE TRADE IN GOODS

355. Article 30 provides that "quantitative restrictions on imports and all measures having equivalent effect shall . . . be prohibited between Member States."[120]

356. The nature of an activity is not always sufficient to determine whether

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[119]Technically, the Treaty of Rome establishes the European *Economic* Community, which was merged with two other specialized legal communities, dealing with coal and steel and with atomic energy, by the Treaty Establishing a Single Council and a Single Commission of the European Communities (1965).

[120]Article 30 provides in full, "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States."

Article 30 or Article 59 (pertaining to services, see below) is to be applied. For example, the European Court of Justice (ECJ) has held that televised advertisements could fall under Article 30 if the advertisements were directed to specific products so that restrictions could have a negative impact on the free flow of these products within the European Community.[121]

357. If an *advertisement* falls within the ambit of Article 30 on the grounds that it is directed at the sale of products and may influence their commercial flow, the transportation of *documents* in support of the sale of products would likewise seem to fall under Article 30 of the Treaty.[122]

358. To be compatible with Article 30, restrictions on the cross border flow of goods are permissible only if either the exemption clause in Article 36 is applicable or the import restrictions are necessary to accomplish "imperative requirements" of the Member State such as the protection of consumers. Import restrictions have been permitted if they are in the public interest and the overall purpose of the restriction is consistent with the purposes of the Treaty.

B. FREE TRADE IN SERVICES

359. Article 59 provides that "within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended." Article 62 continues by stating that Member States may not introduce any further restrictions on the freedom to provide services.

360. Article 60 defines "services" as services which are "normally provided for remuneration" to the extent that they are not covered by the other freedoms.

361. Article 59 protects the "freedom to provide services within the Community." That is, services whereby the person established in one Member State provides services to a person established in another Member State.[123] In

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[121]Case 155/73, *Sacchi*, 1974 ECJ 409. Similarly, Article 2(3)m of Commission Directive 70/50, OJ 1979 L 13/29, lists among the "measures of equivalent effect" within the meaning of Article 30, measures which prohibit or limit advertising with regard to imported products but not domestic products.

[122]It is apparent from the reasoning of the Court and also from the other decisions relating to advertising that the technical form of the advertisement, i.e. whether the advertising material is being transmitted through broadcast or the use and sending of physical material, cannot be decisive to determine the applicability of Article 30. The ultimate criterion any advertising has to be measured against is whether the free movement of goods is directly or indirectly affected.

[123]In Case 62/79, *Coditel SA v Ciné-Vog Films SA*, 1980 ECR 1881, the ECJ stated that the object of Article 59 is to remove restrictions on persons "who do not reside in the State where the service is to be provided." Although Article 59 refers to "nationals of Member States who are established in a State of the Community," the effect of Articles 58 and 66 is to extend it to profit-making companies "formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community."

addition, Article 59 includes the freedom to carry out such services where both the person providing the services and the recipient are established in the same Member State, but the service is carried out in another State.[124] In a recent discussion of Article 59, the ECJ has said:

> the strict requirements of that provision involve the abolition of all discrimination against a provider of services on the grounds of his nationality *or the fact that he is established in a Member State other than that where the service is to be provided*.[125]

362. Freedom of services not only contemplates a rule of national treatment,[126] but also a general restriction against obstacles to the provision of intra community services. The ECJ has long held that a residency requirement contravenes the freedom of services even where foreigners and nationals are treated alike.[127] In 1986, the ECJ extended this principle by ruling that Article 59 requires the abolition of all restrictions on services which arise from the fact that the service provider is resident in a Member State other than the one in which the service is performed.[128]

363. The only exception from the liberal regime of Article 59 is where a restriction is justified by "compelling reasons in the public interest justifying restrictions on the free flow of services." In each case, the special national interest must be proved and must be one that the State of the service provider has not considered. Further, the service restriction must be the least restrictive necessary to satisfy the "compelling reasons" of the Member State.[129]

C. COMPETITION RULES

364. The "competition rules" consist of Articles 85 to 94 of the Treaty. They generally require all undertakings and all Member States to refrain from activities which would distort trade "between Member States."

365. The fundamental prohibitions are contained in Articles 85 and 86 which prohibit "agreements between undertakings . . . which have as their object or effect the prevention, restriction or distortion of competition within

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[124]For example, where a private delivery service is established in State A, collects a package from a customer in State A, and delivers it to an addressee in State B.

[125]Case 52/79, *Procureur du Roi v Marc Debauve*, 1980 ECR 833, at paragraph 11 (emphasis added). Such a wide formulation is in line with the general objectives of the Treaty and particularly Articles 3(c) and 7, and would allow services to be provided regardless of the situation of the provider and the recipient.

[126]Freedom of services was for a long time interpreted only as a rule of national treatment. That is, foreigners have a right to be treated as well as the subjects of the state itself.

[127]Case 33/74, *van Binsbergen*, 1974 ECR 1299; Case 39/75, *Coenen*, 1975 ECR 1547.

[128]Case 205/84, *Commission v Germany*, 1986 ECR 3755.

[129]There are few rulings that offer further guidance to this exception. The Court has accepted that a radio station with exclusive rights does not by itself contradict Article 59. While the prohibition of employment agencies which operate cross-border is permitted, the applicable provisions in the home state of the employment agency must be considered very carefully. In Case 52/79, *Procureur du Roi v Marc Debauve*, 1980 ECR 833, the Court determined that the prohibition on advertising during television programs was a restriction permissible on public interest grounds, without precisely defining the public interest.

the common market"[130] and "any abuse by one or more undertakings having a dominant position in the common market or in a substantial part of it."[131]

366. Article 90(1) applies the prohibitions of Articles 85 and 86 to Member States, while Article 90(2) creates a narrow exception for "undertakings entrusted with a particular task of general economic interest." Article 92 prohibits the distortion of trade by the granting of "state aids."

367. The competition rules define a number of concepts important to consideration of a Community policy on delivery services.

(1) Undertakings

368. Although the Treaty does not define "undertaking," the ECJ has stated the scope of the term does not depend upon the precise characteristics of a legal entity,[132] but rather upon the pursuit of economic or commercial activities, regardless of the existence of a profit motive and regardless of whether services or goods are provided by the undertaking.[133] It is immaterial whether the economic actor is in the private or public sector (or a government

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[130]Article 85(1) and (2) provide in full:

1. The following shall be prohibited as incompatible with the common market: 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 common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

[131]Article 86 provides in full,

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets, or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[132]Case 32/65, *Italy v EEC Council and EEC Commission*, 1966 ECR 389 (at 418, 419; see opinion of Advocate-General Warner).

[133]Case 155/73 *Sacchi*, 1974 ECR 409 (at page 430).

department).[134]

369. A legal monopoly does not exempt an organization from the status of "undertaking" and application of the competition rules. An undertaking vested with a legal monopoly would be treated just as any other undertaking in regard to activities in a related, unmonopolized market. Even within the monopolized market, an undertaking may not "abuse its dominant position."[135]

370. In regard to post offices, the ECJ has applied the competition rules to the telecommunications activities of the British Post Office.[136] In a series of Decisions and successful pre litigation interventions, the Commission has also applied the competition rules to the post offices of Denmark, France, Ireland, Italy, and Germany.[137]

371. It appears clear that post offices in all Member States must be considered "undertakings," despite differences in legal form.

(2) Market definition

372. In applying the competition rules, the Commission has explained its general criteria for defining a relevant product (or services) market as follows:

> The relevant product market includes, besides the contract products, *any other products which are identical or equivalent to them*. This rule applies to the products of the participating undertakings as well as to the market for such products. The products in question must be interchangeable. Whether or not this is the case must be judged *from the vantage point of the user*, normally taking the *characteristics of price and intended use* of the goods together. *In certain cases, however, products can form a separate market on the basis of their characteristics, their price or their intended use alone. This is true especially where consumer preferences have developed*.[138]

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[134]Case 41/83, *Italy v Commission*, 1985 ECR 873; Commission, *Ninth Report on Competition Policy*, at paragraphs 114 and 115 (1980) (France/Suralmo) and Decision 85/206, *Aluminium Imports from Eastern Europe* OJ 1985 L 92/1. In the latter, in the context of a State trading organization, the Commission stated that, whatever its precise status may be under the domestic law of the country of origin, and even where it is given no separate status from the State, an entity or administration which engages in the activity of trading is to be regarded as an undertaking for the purpose of Article 85. Paragraph 9(2).

[135] The Court of Justice has characterized a legal monopoly as a dominant market position within the meaning of Article 86. Case 26/75, *General Motors v Commission*, 1975 ECR 1367, at paragraph 9. However, the existence of a legal monopoly may be evidence that a Member State has assigned a "particular task" to the undertaking, requiring further examination under Article 90(2) (see below).

[136] Case 41/83, *Italy v Commission*, 1983 ECR 873.

[137]Commission, *Fifteenth Report on Competition Policy*, 1986, at paragraph 259. Further, in its 1987 Telecommunications Green Paper, the Commission stated that, in reference to the international express carriers, "the Member States' *postal* and telecommunications authorities" are to be regarded "as commercial undertakings since they supply goods and services for payments [emphasis added]." COM(87)290 Final, *Green Paper on the Development of the Common Market for Telecommunications Services and Equipment*, at page 129.

[138]Notice on Agreements of Minor Importance, OJ 1986 C 231/2 (emphasis added). The notice concerned the concept of market definition in regard to Article 85(1).

373. The ECJ has used two methods to identify a specific product or service market: (i) substitutability in demand and (ii) substitutability in supply. Of these two methods, the substitutability in demand test is used most often by the Court.[139]

374. Demand substitutability considers products or services to be reasonably interchangeable substitutes for each other if they are similar in function, price, and attributes. Small differences in features or use, however, may render a product or service sufficiently distinct as to constitute a specific market:

- The banana market is sufficiently distinctive so as to constitute a specific market independent of the overall fresh fruit market.[140]
- Replacement tyres for trucks and buses are distinct from replacement tyres for cars and light vans; and retread tyres are distinct from new replacement tyres.[141]
- the same product when used for different applications may fall into two different product markets.[142]

375. In regard to delivery services, the Commission has held that "express" delivery service constitutes a separate market from "basic" delivery service. "Express" delivery service was found to be faster and to include other important attributes such as guaranteed delivery, pick up at the shipper's office, acknowledgment of delivery, etc.[143] More generally, in distinguishing the intra community express services market from the traditional postal service market, the Commission noted that private delivery services could provide constant, end to end supervision which national post offices could not.[144]

(3) Anticompetitive agreements

376. Article 85 of the competition rules prohibits all forms of cooperation between undertakings—agreements, decisions, concerted practices—whose "object or effect" is to distort commerce between Member States. For example, undertakings may not agree to fix prices, divide markets, and collectively boycott suppliers.[145]

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[139]The ECJ has usually considered market definition in the context of Article 86 cases, although there is case law concerning market identification under Article 85 (1). In each instance, the general principles appear to be the same. See Bellamy and Child, *Common Market Law of Competition*, Paragraph 2.093 (3d ed., 1987) (and cases cited there); H. Schröter, "Le marché en cause," in *Regulating the Behaviour of Monopolies and Dominant Undertakings in Community Law*, at 506 (1977).

[140] Case 27/76 *United Brands v Commission*, (1978) ECR 207 (at paragraphs 10-35).

[141]Case 322/81, *Michelin v Commission*, 1983 ECR 3461 (at paragraphs 35-52).

[142]Case 85/76, *Hoffman-La Roche v Commission*, 1979 ECR 461 (at paragraphs 21-30).

[143]Commission Decision 90/16 OJ 1990 L 10/47, *appeal pending*, Case 48/90 and Case 66/90, at paragraphs 3-4 (Netherlands); Commission Decision 90/456, OJ 1990 L 233/19, at paragraphs 2-3 (Spain).

[144]EEC Bulletin, I-1985, at paragraph 2.1.10.

[145]See, e.g., Case 41/69, *ACF - Chemiefarma v Commission*, 1970 ECR 661 (price fixing); Case 40/73 *et al*., *Suiker Unie v Commission*, 1975 ECR 1663 (allocation of markets); Commission Decision 78/508, *RAI-UNITEL*, OJ 1978 L 157/30 (boycott of television broadcast of "Don Carlos").

377. A legal monopoly does not diminish the applicability of this prohibition. An undertaking with a legal monopoly may not enter into an agreement or concerted practice with other undertakings to distort trade or bolster its monopoly any more than it can do so to improve its commercial position outside of the scope of its monopoly. As the ECJ has said:

> the new legal framework within which such agreements are made and such decisions are taken *and the classification given to that framework by the various national legal systems* are *irrelevant* as far as the applicability of the Community rules on competition and in particular Article 85 of the Treaty are concerned.[146]

378. Under Article 85(3),[147] an anticompetitive agreement may be registered with the Commission for an exemption to the general rule. However, the criteria for an exemption are narrow and depend only upon the demonstration of objective benefits to society, not upon the benefits to the undertakings:[148]

- the agreement must contribute to improve the production or distribution of goods or to promoting technical or economic progress;
- consumers must receive a fair share of the resulting benefit;
- the agreement must not impose restrictions which are not indispensable to the attainment of those objectives; and
- the agreement must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the product in question.

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[146]Case 123/83, *BNIC v Clair*, 1985 ECR 391 (at paragraph 17) ((emphasis added). Moreover, an undertaking may commit an "abuse of dominant position" (a position held by an legal monopolist almost automatically) and infringe Article 85 simultaneously. For example, the Commission recently fined Italian manufacturers of flat glass not only for abuse of their "collective dominant market position" (Article 86) but also for infringing Article 85 through concerted price fixing and quota-setting arrangement. Decision 89/93, *Flat Glass*, OJ 1989 L 33/44.

[147]Article 85(3) reads in full:

> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>
> - any agreement or category of agreements between undertakings;
> - any decision or category of decisions by associations of undertakings:
> - any concerted practice or category of concerted practices;
>
> which 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, and which does not:
>
> a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
>
> b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[148]In *Fedetab*, 1978 OJ L224/29, *affirmed* Case 209-215, 218/78, *Van Landewyck v Commission*, 1980 ECR 3125, 3278, the Commission rejected survival of the participants as a defense for an anticompetitive agreement (paragraph 213): "granting them more favourable conditions in order to ensure their survival . . . can only be interpreted as an attempt artificially to keep businesses on the market when the ultimate buyer is not convinced that they are so essential and the normal forces of competition would have put them out of business."

379. Although neither the ECJ nor the Commission has formally[149] applied Article 85 to the post offices of the Member States, there appears to be no doubt that the foregoing principles apply to them and to the delivery services sector generally.[150]

380. In July 1988, the International Express Carriers Conference (IECC) suggested to the Commission that two types of agreements relating to the Universal Postal Union (UPU) are inconsistent with the competition rules.[151] Member State post offices, and other post offices, are participants in agreements and activities to further agreements that seek, for the purposes of suppressing competition:

- to implement a market sharing provision of the UPU Convention; and
- to fix the charges post offices pay each other for the delivery of foreign mail.

(4) Abuse of a dominant position

381. Article 86 prohibits an abuse of a dominant position. A "dominant position" has been defined by the ECJ as

> a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave, to an appreciable extent, independently of its competitors, its customers and ultimately of the consumers.[152]

382. A legal monopoly, such as the postal monopoly, allows an undertaking to "prevent effective competition," and hence establishes a "dominant position" virtually automatically.[153]

383. It is not a "dominant position" per se that is illegal,[154] but the "abuse" of a dominant position. The ECJ has defined an "abuse" as:

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[149]In a pre-litigation intervention in 1985, the Commission condemned certain agreements which the French postal administration had forced upon members of the private express industry under which the private carriers paid a fee to the post office and agreed to restrict the scope of their services in France to the Paris area. The French administration accepted this position and declared the agreements void.

[150]Indeed, the prohibition against anticompetitive agreements has been applied with great vigour in several cases concerning the undistorted distribution of documentary material. Case 126/80, *Salonia*, 1981 ECR 1563; Case 43 and 63/82, *VBVB and VBBB v Commission*, 1984 ECR 19; Case 243/83, *Binon*, 1985 ECR 2015.

[151]Case IV/32791 (complaint filed, 13 Jul 1988). The Commission has not rendered a decision in this matter. The provisions of the UPU Convention are discussed in Section 2, below.

[152] Case 85/76, *Hoffman-La-Roche v Commission*, 1979 ECR 461 (at paragraphs 38)(emphasis added).

[153]Case 26/75, *General Motors v Commission*, 1975 ECR 1367 (at paragraph 9); Case 226/84, *British Leyland v Commission*, 1986 ECR 3263 (paragraph 9). In Case 311/84, *Centre Belge d'Etudes de Marché -Telemarketing v CLT*, 1985 ECR 3261, the Court stated, "Article 86 of the EEC Treaty must be interpreted as applying to an undertaking holding a dominant position on a particular market, *even where that position is due not to the activity of the undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on that market*." (Emphasis added) (at paragraph 27)

[154]Hence, a monopoly per se is not incompatible with Article 86. Case 155/73, *Sacchi*, 1974 ECR 409 (at paragraph 14).

> an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, *the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.*[155]

384. An undertaking with a "dominant position" may not abuse its position by distorting competition in the market in which it is dominant. Nor may it do so by distorting competition in a "neighbouring but separate market" in which it is not dominant[156] by, for example, using revenues from the market in which it is dominant to subsidize below cost prices in the neighbouring market.

385. In the *British Telecommunications* case,[157] the Court upheld a finding of "abuse of dominant position" against the British Post Office for activities related to its telecommunications business. In that case, it was considered an "abuse" for a telecommunications administration to apply different tariffs for telex services depending upon whether the telex originated in the U.K. or in another Member State. This landmark case is especially important for the concept of being able to access telecommunications services in one Member State from another, and by extension, similarly for postal services.

386. In a series of cases, the Commission has also taken the position that it is an "abuse" for a Member State post office or the Member State itself to prohibit,[158] license,[159] tax,[160] or set minimum prices for[161] private express services operating between Member States.

(5) Trade between Member States

387. The competition rules apply only to conduct that may "affect trade between Member States," a phrase which, in the words of Advocate General Trabucchi, performs "the function of tracing the dividing line between the area exclusively within the national jurisdiction and that subject to Community law

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[155] Case 85/76, *Hoffman-La Roche*, 1979 ECR 461 (at paragraph 91).

[156] Case 311/84, *Centre Belge d'Etudes de Marché - Telemarketing v CLT*, 1985 ECR 3270 (at paragraph 27).

[157] Commission Decision 82/861, *British Telecommunications*, 1983 OJ L 360/36, *affirmed*, Case 41/83, *Italy v Commission*, 1985 ECR 873. The Post Office's telecommunications operations were split off into British Telecommunications during the course of the case.

[158] Commission Decision 90/456 OJ 1990 L 233/19, at paragraphs 10-11 (Spain). Pre litigation interventions were accepted by Germany (1984), Belgium (1985), and France (1986). Commission, *Fifteenth Report on Competition Policy*, 1986, at paragraph 259; Commission, *Seventeenth Report on Competition Policy*, 1988, at paragraph 298.

[159] Pre litigation intervention accepted by Ireland (1987). Commission, *Seventeenth Report on Competition Policy*, 1987, at paragraph 298.

[160] Pre litigation intervention accepted by Italy (1989).

[161] Commission Decision 90/16 OJ 1990 L 10/47, *appeal pending*, Case 48/90 and Case 66/90, at paragraphs 11-14 (Netherlands).

on competition."[162]

388. Since 1966, the ECJ and the Commission have repeatedly held that an agreement by undertakings is capable of affecting trade between Member States if it is:

> possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement, decision or concerted practice in question *may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States*. . . . [giving] rise to a fear that the realization of a single market between Member States might be impeded.[163]

389. It is generally recognized that the concept of affecting trade between Member States must be given broader interpretation as the common market becomes more integrated. The sphere of activities considered purely "local" in nature, and hence beyond the reach of the Treaty, is diminishing each year. A distinguished official of the Commission recently summed up this trend:

> [T]he notion of effect on trade between Member States is *a flexible criterion of jurisdiction and division of responsibilities*. As the Community develops into a genuine single market and economy, competition policy will assume great importance. The existence of a jurisdictional criterion which provides for the application of Community law to issues of importance to the Community is therefore of great significance. The notion of effect on trade between Member States, interpreted in the light of the objectives of the Community and the purposes of the competition rules as applied in the real world of the markets of the date, is a *flexible instrument of legal policy*. It will evolve as an expression and an instrument of the Community interest as that interest moves from market building to regulating and ordering a market economy. . . . *Community law is ready and adaptable within the limits of the Treaty's fundamental economic policy requirements: undistorted competition in a single market.*[164]

390. It is clear, therefore, that insofar as a Community policy on delivery services is concerned, the principles of the Treaty may reach beyond purely cross border traffic, and include "non local" domestic activities as well. This conclusion could have important ramifications for the long term future of national postal monopoly laws.

(6) Public undertakings and state measures

391. Article 90(1) of the Treaty is addressed to Member States and provides that "in the case of public undertakings and undertakings to which Member

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[162]Case 73/74, *Papiers Peints case*, 1975 ECR 1491.

[163]Case 209-215, 281/78, *Van Landewyck v Commission*, 1980 ECR 3125, at paragraph 170. See also, Case 56/65, *Société Technique Minière v Maschinenbau Ulm*, 1966 ECR 235 at 249; Commission Decision 78/670, *FEDETAB* 1978 OJ L 224/29, at paragraph 91.

[164]J. Faull, "Effect on Trade Between Member States and Community - Member State Jurisdiction," pp. 16-17, 16th Fordham Corporate Law Institute (27 October 1989) (provisional text) (emphasis added).

States grant special or exclusive rights, *Member States* shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94 [emphasis added]."

392. The Commission has defined a "public undertaking" as "any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it."[165] Member States may not use public undertakings or undertakings to which special rights have been granted to prevent, restrict or distort competition in the Single Market.[166] Article 90(1) likewise applies the principles of the competition rules directly to state "measures" which distort competition, regardless of whether or not the distortion favours a "public undertaking" or an undertaking to which a Member State has granted "special or exclusive rights."[167] A "measure" appears to include a broad range of legislative and regulatory actions.[168] Indeed, undertakings which are the beneficiaries of state "measures" may themselves be liable to the competition rules under Article 90(1). [169]

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[165]Commission Directive 80/723, OJ 1980 L 195/35, at Article 2. This Directive is specifically applicable to national post offices. Directive 85/113, OJ 1985, L 229/20.

[166]See Case 155/73, *Sacchi*, 1974 ECR 409; Commission, *Tenth Report on Competition Policy* (1981), at points 136 ff (Sterling Airways / SAS Denmark).

[167]Case 123/83, *BNIC v Clair*, 1985 ECR 391; Case 209-213/84, *Ministère Public v Asjes*, 1986 ECR 1425; Case 311/85, *Vlaamse Reisbureau v Sociale dienst*, 1987 ECR 3801; Case 136/86, *BNIC v Aubert*, 1987 ECR 4789; Case 254/87, *Syndicat des librairies v Aigle*, July 14, 1988 (unpublished).

In Case 267/86, *Van Eycke*, 21 September 1988 (unpublished), the Court held that a combined reading of Articles 5(2), 3(f) and 85 (or 86) implies that Member States are obliged to not enact economic measures which would deprive Article 85 (or 86) of its effectiveness or prejudice its full and uniform application. This in turn means that a Member State fails to comply with its obligations when (i) it requires or encourages undertakings to conclude cartels contrary to Article 85 or to reinforce the effects thereof or (ii) when it divests regulations of their public character by delegating to the undertakings the responsibility to take decisions concerning the parameters of competition. *Ibid*, (at paragraph 16).

[168]A seminal case was Case 66/86, *Ahmed Saeed Flugreisen*, 11 Apr 1989 (unpublished). Ahmed Saeed Flugreisen was a German travel agency which exploited differences in international airline fares between European cities. A German airline sold tickets for flights from Country A to Germany to Country C for less than the price of the air fare from Germany to Country C available in Germany. Ahmed Saeed purchased airline tickets in Country A and sold them to German customers at the lower prices, prices which were below air tariff agreements between the German airline and other airlines and thereby in contravention of a German law requiring all airline tickets to be sold in conformity with the tariff schedule approved by the German government.

Upon referral from German courts, the ECJ stated that Article 5 of the Treaty obliges the Member States to not enact or maintain in force any provisions contrary to the competition rules, such as encouraging airlines to collude on tariffs, and Article 90(1) obliges Member States, in the event that they have granted special or exclusive rights to special enterprises, to not enact or maintain in force any provision contrary to the competition rules. *Ibid*, at paragraphs 47-50.

[169]In Case 13/77, *GB-Inno v ATAB*, 1977 ECR 2115 (paragraphs 31 - 34), the Court found that an undertaking holding special or exclusive rights could abuse a dominant market position even where such abuse was "encouraged by a national legislative provision." Scholars have differed on whether the undertaking is liable. *Compare* A. Pappalardo, "EEC States and Rules of

393. The firm purpose of Article 90(1) has been summarized by Judge Pescatore as follows:

> the common market is based on the idea of free exchange in conditions of fair competition, . . . that principle applies equally to Member States and to private economic operators. . . . Member States are bound by the competition rules of Articles 85 and 86 as being part of a Treaty to which they have adhered and which they are bound to implement in good faith.[170]

394. In two Decisions, the Commission has held that national post offices are "public undertakings" and that postal monopoly laws or regulations are State "measures" which may be prohibited if tantamount to an abuse of dominant position.[171]

(7) Obstruction of an assigned task

395. Article 90(2) establishes a limited derogation from the competition rules for "undertakings entrusted with the operation of services of general economic interest[172] or having the character of a revenue producing monopoly." The exception applies only if application of the rules of the Treaty would obstruct the performance in law or in fact of the particular tasks assigned to them. It is also required that the derogation will not affect trade "to such an extent as would be contrary to the interests of the Community."

396. "To obstruct the performance" has been interpreted to mean that the exemption applies only if the "undertakings have no other technically feasible and economically attainable means of accomplishing their tasks."[173] Obstruction cannot consist merely of subjecting the undertaking to a possible loss of money or business, for such is the nature of competition.

397. To demonstrate that the competition rules would "obstruct the performance" of a Member State post office, it would be necessary to prove that:

- collection and distribution of mail had been rendered impossible by competition in the relevant markets, not merely more difficult or more

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Competition," *Fordham Corporate Law Institute, 1984*, p. 515 (1985) (no liability because undertaking lacks free will) *with* J.T. Lang, "Community Antitrust Law and Government Measures Relating to Public and Privileged Enterprises: Article 90 EEC Treaty," *Id*. at 543 (liability must attach since repeal of state measure does not provide complete remedy).

[170] P. Pescatore, "Public and Private Aspects of Community Competition Law," *Thirteenth Annual Proceedings of the Fordham Corporate Law Institute (1986)*, at p. 428 (1987). Judge Pescatore was formerly a member of the ECJ.

[171] Commission Decision 90/16 OJ 1990 L 10/47, *appeal pending*, Case 48/90 and Case 66/90, at paragraphs 3-4 (Netherlands); Commission Decision 90/456, OJ 1990 L 233/19, at paragraphs 2-3 (Spain).

[172] An undertaking is not assigned services of a *general* economic nature if it is an "undertaking to which the State has not assigned any tasks and which manages private interests." Case 127/73, *Belgische Radio en Televisie v SABAM*, 1974 ECR 313, at paragraph 23. *See also*, Case 10/71, *Ministère Public Luxembourg v Muller*, 1971 ECR 723 at p 739 (opinion of Advocate General Dutheillet de Lamothe).

[173] See the opinion of Advocate General Da Cruz Vilaca in Case 30/87, *Bodson v Pompes Funèbres des Régions Libérées*, 1988 ECR 2479 at paragraph 86.

complicated,[174] and

- no other sensible economic, technical or legal way existed to perform the particular tasks.[175]

(8) State aids

398. Article 92 of the Treaty of Rome states that

> any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

399. Although no specific definition of types of state aid is given in the Treaty, it may be inferred from Commission Decisions and ECJ judgments that "state aid" is not restricted to subsidies or other particular forms of aid. In particular, aids include "not only positive measures but also measures which alleviate charges which would otherwise have to be borne by the beneficiaries themselves."[176]

400. If an aid has been illegally granted by a Member State, the ECJ has made it clear that the undertaking which received the aid may be required to reimburse it to the Member State which granted it.[177]

401. To date Article 92 has not been applied to a post office of a Member State, but there appears to be no doubt that its principles would apply in an appropriate case.

D. ECONOMIC AND SOCIAL COHESION

402. Article 130a, added to the Treaty by the Single European Act, makes it a Community priority to reduce "disparities between the various regions and the backwardness of the least-favored regions."[178] In February 1988, the

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[174]See, *inter alia*, Case 96/82, *NV IAZ International v Commission*, 1983 ECR 3369; Case 41/83; *Italy v Commission*, 1985 ECR 873; and the opinion of Advocate-General Lenz in Case 209/84, *et al.*, *Ministère public v Asjes*, 1986 ECR 1425. The French text of Article 90 (2) is clearer on this point : "dans les limites où l'application de ces règles ne fait pas échec à l'accomplissement en droit ou *en fait* de la mission particulière . . .." See also, Advocate General da Cruz Vilaça's opinion in Case 30/87, *C. Bodson v Pompes Funèbres des Régions Libérées*, 1988 ECR 2479, echoing the words of the Commission in Commission Decision 87/777, *ANSEAU-NAVENA*, OJ 1982 L 325/20.

[175]Vaughan, *Law of the European Communities*, paragraph 19.112 ("no other technically feasible and economically attainable means of"); Bellamy and Child, *Common Market Law of Competition*, paragraph 13.021.

[176] See "State aids under the EEC Treaty, Articles 92 to 94," Despina Schina, ESC Publishing Limited, Oxford 1987, § 49, p. 14.

[177] See case 70/72, Commission v Federal Republic of Germany, 1973 ECR 813.

[178]Article130a reads in full:

> In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion.
>
> In particular, the Community shall aim at reducing disparities between the various regions and the backwardness of the least-favoured regions.

European Council approved a doubling of the existing structural funds (i.e. Agriculture Fund, Social Fund, Regional Development Fund) in order to reach this goal. Such a dramatic increase will undoubtedly allow the Community to have a substantial impact on the structure of the economies of the Member States as well as on the infrastructure of the less developed regions of the Community.

403. To date, Article 130a has not been applied to postal or other delivery services. However, it principle the Community Support Framework could be used to support the maintenance of postal or other delivery services that the Community concludes (i) are essential to the harmonious development of the Single Market but (ii) unable to be maintained by market forces or by the imposition of legal duties.

E. LEGAL SCALE

404. As the foregoing review makes clear, the provisions setting out norms of conduct are particular cases of a general overall goal of establishing an unified, undistorted market. Article 3 of the Treaty describes this goal in the following terms:

- the elimination of customs duties and quantitative restrictions on trade between Member States;
- the abolition, as between Member States, of obstacles to freedom of movement for persons, services, and capital;
- the institution of a system ensuring that competition in the common market is not distorted.

405. The Single European Act of 1987 reemphasized this goal by amending the Treaty to state:

> the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured.[179]

406. A second explicit goal of the Community is harmonization of national policies, both with respect to the outside world and within the Community "to the extent required for the proper functioning of the common mark et."[180]

407. On the other hand, it must also be noted that the Treaty established the Community while acknowledging the continued role and importance of the Member States.[181] The economic policies of Member States have historically been diverse, not harmonious, and generally more interventionist than decreed

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[179]Treaty of Rome, art 8a.

[180]Treaty of Rome, art 3(h).

[181]Compared to the Member States, the Community's economic powers are purposefully limited. To achieve its ends, *the Community may not resort to the types of regulation and governmental intervention traditionally relied upon by Member States*. To give an example, while the Commission may call for the elimination of national air transportation licenses that restrict cross border air services, the Commission may not issue its own restrictive or exclusive licenses to provide air transportation.

for the Community itself. There is thus an essential tension between the constitutional philosophy of the Community and the collective political philosophy of the Member States.

408. Reconciliation of these different political philosophies will differ in the context of different policies, but in general it is logically necessary that issues, especially economic issues, of broad Community impact must adhere to the principles of the Treaty while issues of more local concern will reflect the varying economic approaches of the Member States. [182]

409. These considerations, and the specifics of the various provisions of the Treaty, give rise to a "legal scale" for Community legal policies. Table 17 outlines this legal scale.

Table 17. Legal scale in Community law

International	a matter that pertains to the Community and a legal jurisdiction outside the Community.
Community	a matter that "affects trade between Member States" or the structure of trade in the Community.
Local or National	a matter that does not affect trade between Member States or the structure of trade in the Community.

410. This "legal scale" must be kept in mind, it is submitted, where, as in the matter of Community delivery services, the Commission is considering a policy towards a market that is:

- predominantly local in nature, viewing the market as a whole;
- of a great importance in the achievement of a Single Market insofar as regional delivery services are concerned; and
- traditionally shaped, and distorted, by the oldest and widest (in terms of individuals affected) of national monopolies.

2. UNIVERSAL POSTAL UNION

411. While the Treaty of Rome establishes the overall legal framework for Community delivery service policy, the preexisting framework for postal relations between Community Member States was that of the Universal Postal Union (UPU). The regulatory principles of the UPU date from the last half of the nineteenth century and continue to shape policy options and discussions, often as unexamined assumptions. This section reviews the institutional organization of the UPU and key provisions of the Convention.

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[182]The Treaty's decision making procedures underscore this point. The Commission and the Court of Justice have considerable authority to compel the elimination to barriers to "trade between Member States" without resorting to the Council. In contrast, in matters of harmonization, decision making procedures are less self-executing, reflecting a respect for cultural diversity. In such matters, the Commission may propose, but the Council must dispose, generally by qualified majority. Treaty of Rome, art 100a.

A. INSTITUTION AND PREMISES

412. The Universal Postal Union is an organization of national *governments* which was founded in 1874. It is headquartered in Berne, Switzerland. Since 1947, it has been recognized as a "specialized agency" of the United Nations.

413. The supreme authority of the UPU is the Congress, a body that consists of plenipotentiary representatives of member countries.[183] The Congress meets every five years to revise and agree upon various "acts," that is agreements accepted in accordance with the rules of the Constitution. The last congress, the twentieth, was held in November 1989 in Washington, D.C.

414. The UPU's basic charter is the Constitution, which is itself an "act" of the Union.[184] The Constitution is a permanent multilateral treaty subscribed to and ratified by member countries.[185] The Constitution is implemented by the General Regulations, also an "act" of the Union.

415. International letter post service is regulated by two further acts: the Universal Postal Convention and the Detailed Regulations of the Convention.[186] This two part structure was adopted by the original congress in 1874 and was supposed to separate permanent provisions, to be revised by governmental congresses every three years, from transient provisions that could be revised as necessary by agreement among the post offices. In fact, the distinction between permanent and transitory provisions has never been applied consistently, and both documents have been revised together at each UPU congress.[187]

416. The rules of the UPU Convention appear to be legally binding on member

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[183]1984 UPU Const art 14. The acts and decisions adopted by the UPU's 1984 Hamburg Congress may be found in the well annotated *Acts of the Universal Postal Union*, vols. 1-3 (1985), prepared by the UPU International Bureau. Documents of the 1989 Washington Congress, including "Draft Acts of the 1989 Washington Congress," may be found in a series of several hundred working documents distributed at the congress. Many of these working documents have appended studies, reports, and memoranda prepared by the UPU's Executive Council and Consultative Council on Postal Studies in 1988 and 1989. Except as otherwise noted, in this paper references to the *text* of UPU acts will be the 1989 version, effective 1 January 1991 (e.g., "1989 Conv art 23"). References to *annotations* will be the UPU's 1985 annotated version of the 1984 acts (e.g. "1984 Conv art 23 n 1"). Reference to the UPU's *Constitution* will also be the 1985 UPU book since the Constitution is not readopted by each congress (e.g., "1984 Const."). References to other UPU documents will, where possible, be given to the series of working documents of the 1989 congress with further reference, using the UPU's numbering system, to the original source of the document if appropriate (e.g. "CE 1988/C4" means "1988 Executive Council Committee 4"). Following UPU practice, the following abbreviations will be used for the basic acts: Const (Constitution); Gen Reg (General Regulations); Conv (Convention); Det Reg (Detailed Regulations of the Convention).

[184]From the UPU's founding until 1964, institutional and operational provisions were combined in a single document called the Convention. In the Vienna Congress of 1964, the institutional provisions were placed into a separate Constitution.

[185]1984 UPU Const art 1.

[186]In addition to these four basic acts, there are at least seven other UPU acts including the Parcel Posts Agreement, Money Orders Agreement, Subscriptions to Newspapers and Periodicals Agreement, and so forth.

[187]Codding, G.A., Jr., *The Universal Postal Union* at 100 (1964).

countries. According to the Constitution, "The Universal Postal Convention . . . shall embody the rules applicable throughout the international postal service and the provisions concerning the letter-post services. These Acts shall be binding on all member countries."[188] On the other hand, the Constitution also states that the acts of the UPU are not to be read expansively to conflict with national law: "The provisions of the Acts of the Union do not derogate from the legislation of any member country in respect to anything which is not expressly provided for in those Acts." Further, within the Community, the Treaty of Rome takes precedence over all UPU acts, since all current UPU acts became effective subsequent to the Treaty.[189]

417. Although the acts of the UPU attempt to draw a legal distinction between the member countries and their postal administrations, a careful reading of the four major acts indicates how unclear the line is. The Constitution is a permanent treaty that is amended by Additional Protocols. The General Regulations, Convention, and Detailed Regulations are acts of five years' duration, replaced by new acts at each Congress. Three of these acts—an Additional Protocol to the Constitution, the General Regulations, and the Convention—are signed by "plenipotentiaries of the Governments of the member countries of the Union." In contrast, the Convention's Detailed Regulations are signed by "representatives of their respective postal administrations." Despite these formal distinctions, all four acts are in fact signed by the same persons for all countries.

418. The absence of formal clarity may also be seen in the process of formal approval. Until 1964, all UPU acts required ratification by the governments of member countries. Most countries, however, did not do so, and the UPU responded with a remarkable doctrine of "tacit ratification."[190] After adoption of the new Constitution in 1964, only one act, the Constitution itself, must be "ratified by the signatory countries" (although ratification may be required by national law).[191]

419. Approval of the Convention, which must be signed by plenipotentiaries, is to be "governed by the constitutional regulations of each signatory country,"[192] although whether this approval process is any more regular after 1964 than before is unclear. What is clear is that the power to amend the Convention between

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[188] 1984 Const art 22.3. Despite this apparently binding quality, post offices of most Member States agreed to a new terminal dues agreement in 1987 that is inconsistent with the terminal dues provision of the 1984 Convention. The 1989 Convention explicitly adds authority for post offices to revise terminal dues by bilateral agreement. 1989 Conv art 64(3bis).

[189] 1984 Const art 24. Article 234 of the Treaty (giving precedence to treaties prior to the Treaty of Rome) is inapplicable. Case 41/83 *Italian Republic v Commission*, (1985) ECR 873, at paragraph 36. Of course, some of the provisions of the current UPU Convention are similar to provisions in Conventions in existence before the Treaty of Rome, but this is irrelevant because at each congress, UPU members "recover their freedom of action and enter into a fresh commitment." *Ibid*., at paragraph 38.

[190] 1984 Const art 25 n 4.

[191] 1984 Const art 25.

[192] 1984 Const art 25(3).

congresses is vested in the postal administrations, not the governments. Draft amendments are submitted by postal administrations and, once submitted,

> a period of two months shall be allowed to *postal administrations* . . . for consideration of the proposal . . . and for forwarding of their observations, if any, to the [secretariat]. . . . The replies shall be collected by the [UPU secretariat] and communicated to *postal administrations* with an invitation to vote for or against the proposal. . . .[193]

420. Although, like the Convention, the Detailed Regulations of the Convention are binding upon member countries, they are signed only by postal administrations.[194] *In 1989, for the first time, the UPU congress vested legislative authority in the Executive Council to amend the Detailed Regulations between congresses.*[195]

421. The Executive Council, composed of representatives of forty member countries and presently chaired by the United States, manages the affairs of the UPU between congresses.[196] Under the General Regulations, each member of the Executive Council must be a "qualified official of the postal administration" appointed by a postal administration. On this basis, the Executive Council has "*refused diplomats the right to represent their country*."[197]

422. The Executive Council has been charged with implementing the "Washington General Action Plan" which exhorts postal administrations, among other things, "to know the market better and to monitor the competition with a view to increasing the competitive position of postal products" and sets out an overall commercial strategy for post offices.[198] Resolution 88 explicitly charges the Executive Council with continuing its study on ways to suppress "remail" (i.e., international competition between post offices).[199]

423. Another important committee of the UPU is the Consultative Council for Postal Studies (CCPS), a thirty-five member group, presently chaired by the Soviet Union. It is charged with the study of "technical, operational, and economic questions concerning the postal service."[200] At the very first meeting of the new CCPS, the chairman noted that "stress should be laid on the need

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[193] 1984 Const art 29; 1989 Gen Reg art 120-121.

[194] 1984 Const art 22(3).

[195] 1989 Conv art 91.1bis.

[196] 1984 Const art 17. Membership on the Executive Council is allocated by region. The six Western European members appointed by the 1989 Washington Congress are: Belgium, Germany, Italy, Sweden, Switzerland, and the United Kingdom.

[197] 1984 Gen Reg art 102(4) n 12.

[198] 1989 Washington Congress, Resolution C 91 ("Washington General Action Plan") (Doc 78.3)

[199] UPU, 1989 Washington Congress, Decision C 88 ("Remailing") (Doc 78.2). This obliquely worded decision "instructs" the Executive Council to continue its prior work on remailing. The prior work is found in Document 56, which outlined a multifaceted approach towards remailing, including improved postal services, a new terminal dues system, "solidarity" among post offices (such as refusing to deal with private companies), and possible strengthening of market allocation provisions (article 23) of the UPU.

[200] 1984 Const art 18. Postal administrations from Western Europe serving on the 1989 CCPS are: Austria, Belgium, Denmark, France, Germany , Greece, Ireland, Italy, Netherlands, Spain, Switzerland, and the United Kingdom.

to monitor what the competition was doing so as to respond correctly."[201] Over the next five years, the CCPS will conduct a broad range of studies, including:

- Study 711. Commercial studies in the various branches of the Post.
- Study 721. Express Mail Service.
- Study 731. Improvement of the postal system.

424. The secretariat of the UPU, the International Bureau, is headed by a Director General, who is elected by each congress.[202] The Director General's views were summed up in an article in the UPU's official magazine on the eve of the 1989 congress:

> The skies above the valiant battalions of postal troops have been unsettled by the volleys fired against them by the private couriers, intent on blasting them away. Let there be no illusion: these entrepreneurs are so obsessed with profit that they have lost sight of the end result. Perhaps this is in the nature of man. A competitor who has already taken over a large share of the market struggles to the point of exhaustion to add to his riches, to extend his power, aggressively shoving the weaker contender out of his way, in order to control an even greater empire.[203]

425. In addition to the UPU itself, there are several "restricted" postal unions which consist of "member countries or their postal administrations if the legislation of those countries so permits."[204] These restricted unions are, in effect, regional UPU groupings. The oldest is the Postal Union of the Americas and Spain (PUAS) founded in 1911.

426. The restricted union of greatest pertinence to the Community policy on delivery services is the European Conference of Postal and Telecommunications Administrations (CEPT), which came into being in 1959. The CEPT now consists of 26 national postal administrations, including all the post offices of the Community. In recent years, the CEPT has taken a number of initiatives intended to improve the commercial position of the international post offices against private competitors.[205] These include the development of the International Post Corporation, a revised terminal dues agreement,[206] and

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[201]During the 1979-1984 period, the CCPS's work program included study 522 on a common defense against the private international express industry. Study 552 led to a unanimously accepted anti-express industry resolution in the 1984 Hamburg Congress, Resolution C 26.

[202]1984 Const art 20. The current Director General, A.C. Botto de Barros, was reelected to a second five year term by the 1989 Washington Congress.

[203]Migone, F., "Remailing: a challenge for the post," in *Union Postale*, p. 86A (Oct-Dec 1989). See also, UPU, 1989 Washington Congress, Doc 48.1/Add 1 ("Attitude towards the Competition"), memorandum by the Secretary General to the UPU congress urging them to refuse to deal with private delivery companies).

[204]1984 Const art 8.

[205]UPU, 1989 Washington Congress, Doc 81 ("Report on the work of the CEPT").

[206]The so called "CEPT terminal dues agreement" was in fact developed in 1987 outside official CEPT channels between certain individual post offices, some in and some out of the CEPT. It was subsequently more or less adopted by the CEPT. In July 1988, the International Express Carriers Conference filed a formal complaint against this agreement with the European Commission. As of this date (October 1990), the Commission has made no decision on this complaint. The UPU's 1989 Washington Congress adopted a revised terminal dues provision that generally follows the CEPT plan.

improved quality controls for international postal service.

427. The foregoing description of the UPU's institutional arrangements makes clear that the UPU and its affiliated unions are *governmental* institutions with aggressively *commercial* purposes. The last UPU congress went so far as to vest legislative power in the UPU Executive Council, a committee which, by its terms, is limited to postal officials.

B. KEY PROVISIONS

(1) Market allocation

428. Article 23 of the Convention establishes a market allocation under which each national post office is recognized to have a first claim upon mail posted by "senders resident in its territory," the territory of the national state.[207] Paragraph 1 is intended to prevent a party from privately transmitting a letter-post item out of a country and then posting it back into the same country at an international postage rate lower than the domestic postage rate. Paragraph 4 is aimed at mailing an item through a second country for delivery in a third country.[208]

429. Under this scheme, the recognized market of Post Office A includes not only mail physically prepared in country A but also mail "made up" abroad at

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[207] 1989 Conv, art 23 provides:

> 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 addressee 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.

Article 23 is really two separate provisions. Paragraphs 1 to 3 were adopted in 1924 as one long paragraph, and were, for no obvious reason, broken into separate paragraphs in 1979.

[208] Paragraph 4 was adopted in 1979 after considerable disagreement; the vote was 66 for, 30 against, and 20 abstentions. The measure was sponsored by Japan, which argued that it was needed to combat "private postal services that took the most profitable mail and left postal administrations with only the marginal mail." Germany supported the proposal arguing that "the Convention did not deal with competition between administrations." Canada opposed the proposal as interfering with each country's right to permit or prohibit such activities by national legislation. The United Kingdom agreed with Canada and noted further that the proposal was full of imprecisions. UPU, *Documents of the 1979 Rio de Janeiro Congress*, vol. 1, pp. 317-19; vol 2, pt. 2, pp. 11452-53 (1981).

the direction of senders "resident" in country A. In the case of corporate persons, the concept of residency is unclear and left to the perhaps inconsistent conclusions of the various post offices.[209] What is clear is that some Member State post offices have invoked Article 23 to claim a right to all mail prepared by companies legally resident in their national market, even when the mail is physically prepared in another Member State.

430. Enforcement of this market allocation scheme is by direct postal action. Under Article 23.4, an intermediate post office B or a destination post office C may refuse to forward or deliver mail from residents of country A which they post or caused to be posted in large quantities with a post office other than post office A. Under Article 23.1, post office A may refuse to deliver inbound cross border mail if it feels that mail should have been posted in country A in the first place. Such intervention is discretionary, however. Article 23 states only that a UPU member "shall not be bound" to forward or deliver the mail.

431. More generally, Article 23 sets out a basis for post office A to request action by post office B to protect A's allocated market. Since post office A and post office B are business partners in many commercial dealings, post office A has various collateral means of persuading post office B to recognize the common market allocation scheme.

432. Despite superficial similarity, Article 23 is not related to national postal monopoly laws. Article 23 pertains to all "letter-post" items, i.e., letters, printed papers, and small parcels, substantially exceeding the scope of most postal monopolies. More importantly, in each country, enforcement of the postal monopoly is conditioned by appropriate judicial procedures and political checks. Article 23 represents a circumvention of these legal and political procedures, an extra legal means to accomplish a possibly legal end. A legal end can only be pursued by a legal means, that is, by the procedures and powers approved by the legislator.[210]

433. The 1989 Washington congress adopted a technical regulation which will have the practical effect of strengthening Article 23. Detailed Regulation 113(1bis) requires an envelope to bear "only one sender's address."[211]

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[209]Suppose a corporation is incorporated in Germany, has its administrative headquarters in Belgium, and owns a separately incorporated subsidiary in the Netherlands; and suppose this corporation wants to send statements of account from the Dutch subsidiary to customers in all three countries. Where is the company "resident"? There is no consistent postal definition of "residency." Belgium, Germany, and the Netherlands might all claim that the corporation is "resident" in its territory and refuse to forward mail posted in another country.

[210]The practical significance of circumventing the legal procedures established by the legislator were explained in an 1988 report by Committee 4 of the UPU Executive Council. The committee surveyed 62 post offices on remail and noted: "For various reasons, few of the responding administrations are taking effective enforcement actions (against remail) under their postal monopoly laws. A larger number indicate that they take some form of enforcement action under Article 23." UPU, Executive Council, CE 1989/C 4 ("Study on remailing") (March 1988), *reproduced in* "Terminal Dues Roundtable," Annex 3, at 7, paragraph 28 (April 1989).

[211]1989 Det Reg 113(1bis) reads in full: "The envelope or wrapping may bear only one sender's address, which, in the case of bulk postings, must be located in the country of posting of the item."

434. Corporate stationery typically includes a return address imprinted on the envelope. Therefore, if a company in country A uses an express company to tender a large international mailing to foreign post office B, there may be difficulties if a letter is found to be undeliverable. The letter will be returned to the post office in the company's home territory, post office A, rather than to post office B, which received the postage and placed it in the international postal system. While post office A may not complain about returning one or two undeliverable letters unpaid, it will surely, and rightly, complain about large quantities of such letters.

435. To resolve this difficulty, the corporate mailer, or the express carrier tendering the mail, must add a stamp or label to corporate envelopes that indicates that undeliverable mail should be returned to post office B, not post office A. Post office B will return the letters to the express carrier, which must bear the cost of returning them to the original mailer. As long as this stamp or label *clearly* indicates where undeliverable mail should be returned, it should be acceptable to all parties. However, post offices in Member States and elsewhere have often rejected such mail on technical grounds by pointing to national postal regulations requiring "only one" return address. The amendment of the 1989 Convention incorporates this technical impediment to postal competition.

(2) Agreed prices for inward delivery

436. As discussed in Chapter IV, the major cost of postal service arises from the cost of inward or final delivery. Under the UPU Convention, post offices do not negotiate delivery prices with one another or compensate each other based upon their normally applicable tariffs. Instead, post offices agree within the UPU on a common delivery rate for each kilogram of international mail handled by all post offices worldwide.[212]

437. This compensation, the so called "terminal dues" charge, is materially out of line with actual costs and therefore distorts trade. It is described in detail in Chapter IV, above.

(3) Preferential rates for large users

438. The 1989 Convention introduced a new pricing provision, Article 19(12bis), which allows "preferential rates to major users," provided such rates are not "lower than those applied in the internal service to items presenting the same characteristics (category, quantity, handling time, etc.)."[213]

439. This article was introduced by the Executive Council for the purpose of protecting national post offices against competition by other post offices collecting mail via private delivery services (i.e., remail competition). The Executive Council explained the proposed amendment as follows:

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[212] 1989 Conv, art 64.

[213] 1989 Conv, art 19(12bis).

> Large industrial and commercial firms are the customers most accessible to and sought after by the competition. *These customers often complain that the tariff policy applied by the Post is too egalitarian*. . . . It therefore seems necessary to introduce a facility allowing postal administrations to give preferential rates to major users. This measure would contribute to increasing postal service competitiveness *in order to retain or regain its market share* in the letter-post sector which is particularly *threatened by the competition*.[214]

440. More plainly, the Executive Council's study entitled "Remailing," a working document of the 1989 congress, sets out "flexible, varied and swift measures . . . in order to face up to the competition." As part of this strategy, the Council notes:

> In Proposition 3019.11, *the Community [UPU Executive Council] aims expressly to authorize postal administrations to grant preferential rates* to their large mailing customers *so that they can compete better with remail firms* for the most lucrative traffic.[215]

441. The pricing standard embodied in Article 19(12bis)—*domestic* postage rates for large mailers—appears to have little to do with the actual cost of providing *international* postal service. The domestic rates for large mailers may benefit from substantial cross subsidies from smaller mailers held captive by the postal monopoly. Moreover, domestic rates do not include international transportation costs, terminal dues charges, and other UPU charges, which collectively can result in international costs which are substantially above corresponding domestic costs. The commercial impact of this new article will be particularly pronounced in a market served by a relatively low cost post office, such as the U.K. market, because domestic postage rates will be far below actual international postal costs.

442. In summary, in purpose and design, Article 19(12bis) appears substantially inconsistent with the economic principles of normal competition. The use of domestic tariffs to create a legal justification for cross border postage rates appears per se inconsistent with the Treaty of Rome.

(4) Promotion of group boycott

443. Although information is necessarily incomplete, it is clear that the committees and secretariat of the UPU are used to promote a general commercial boycott of private delivery services. For example, on 14 August 1989, the Deputy Director General of the UPU's International Bureau (IB) wrote to all post offices:

> I therefore make the point again that agreeing to "remailing" . . . reflects a superficial analysis of the situation. Its development would seriously

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[214]UPU, 1989 Washington Congress, Proposition 3019.11 (emphasis added).

[215]UPU, 1989 Washington Congress, Doc 56 at 4 ("Remailing: Executive Council report") (emphasis added).

> threaten the foundations of the international postal service by reinforcing an inward-looking, self-centred tendency among administrations. That is why the IB . . . appeals to the vision and solidarity of all members *to put an end to these practices*.
>
> I would also like to draw the administrations' attention to other types of agreement with competitors. . . .*[A]ny agreement or arrangement with competitors*, which are often multinational corporations, *serves to strengthen the competition against other postal administrations*. This is obviously totally at variance with the spirit of the UPU Constitution and the Declaration of Hamburg. . . . Already, *the International Bureau deems it necessary to recommend that all member countries thoroughly consider all aspects of any form of cooperation* with the Post's competitors. . . .[216]

444. At the 1989 UPU congress, the Secretary General reemphasized this theme in a document entitled "Attitude towards the Competition."[217] The gist of this document is to advise extreme caution in establishing commercial relations with private delivery services. Interestingly, the Secretary General cited rumors of a Community green paper on delivery services to support his point:

> *Significantly, the European Community, with its acknowledged liberal outlook, considered it advisable to lay down for the mail service regulations taking account of the need of a "hard core" reserved for the public operator* and defining the area of services open to the competition. [emphasis added]

445. Again, only a few months ago, on 28 June 1990, the Secretary General wrote to all post offices:

> [I]n view of the vital importance of the problem of remailing, which is destabilizing the international service, the Executive Council recently instructed me to issue a further warning. . . . *I am asking you to terminate any relations which your administration may have with remail companies*. . . .[218]

446. The UPU's effort to promote an economic boycott of private delivery services has not been entirely successful. Nonetheless, a 1988 survey by the Executive Council concluded that two thirds of post offices refuse to accept bulk mailings by non-resident mailers in their international mailstream.[219] This represents a substantial measure of success, or, in other words, a substantial distortion of the market.

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[216]UPU, International Bureau, Circular letter 0115(B)1760 (August 1989), 1989 Washington Congress, Doc 48.1/Add 1/Annex 1 (emphasis added).

[217]UPU, 1989 Washington Congress, Doc 48.1/Add 1.

[218]UPU, International Bureau, Circular letter 3390(B)1550 (28 June 1990) (emphasis added). The Director General attached the Washington General Action Plan of the 1989 UPU congress by way of authority for this letter.

[219]UPU, Executive Council, CE 1988/C4 - Doc 9 ("Study on Remailing") (Jul 1989), 1989 Washington Congress, Doc 56, Annex 1, at 3.

(5) Preferential customs procedures

447. As all international delivery services are aware, customs' intervention has a major effect on the cost and quality of service. For many years, the UPU has been working with customs administrations to encourage simplification and harmonization of customs procedures. If applied to all documents and parcels, these desirable improvements could benefit all participants in international commerce. The policy of the UPU, however, has been to seek differential, and favourable, customs treatment for postal traffic.

448. The Convention and its Detailed Regulations accord postal carriers several simple, but commercially significant privileges such as:

- Post offices are generally authorized to present items to customs, bypassing costs and delays incurred in the use of customs brokers.[220]
- Post offices may use extremely simplified customs declarations of worldwide uniformity for items valued up to 300 SDR or more.[221]
- Post offices are exempt from liability for errors in customs declarations.[222]

449. More generally, since 1964, the UPU has participated in a permanent liaison committee with the Customs Cooperation Council called the CCC-UPU Contact Committee. The most important product of this committee has been a special annex, Annex F.4, for postal traffic to the Kyoto Convention, the basic international convention on harmonization and simplification of customs procedures. According to the preamble, "special administrative arrangements are necessary. . . . These are made possible because in virtually all countries the postal services are furnished by public administrations." The terms of the Annex F.4 provide specific operational standards so that

> clearance of postal items shall be carried out as rapidly as possible and Customs control shall be restricted to the minimum necessary to ensure compliance with the laws. . . .[223]

(6) Prices paid to carriers

450. At the level of international air transportation, post offices are essentially large freight forwarders who, like any other shipper, must compensate airlines

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[220]1989 Conv art 37. Although this article indicates that this privilege is subject to national legislation, its inclusion in the UPU Convention ensures favourable consideration in most countries.

[221]1989 Det Reg art 116. The very simple C1 form may be used for items valued up to 300 SDR and is generally accepted by customs administrations as a customs declaration. The slightly more complex C2/CP3 form is used for higher values. At some level of value, most customs administrations require that this form be supplemented by normal customs declarations procedures applicable to non-postal commerce.

[222]1989 Det Reg art 116(7).

[223]Customs Cooperation Council, *International Convention on Simplification and Harmonization of Customs Procedures*, Annex F.4, art 3. This convention, generally known as the "Kyoto Convention," was signed in Kyoto, Japan, in 1973. Annex F.4. was agreed by the requisite number of countries and entered into force on 13 February 1981.

for air transportation services purchased. Indeed, in the case of postal traffic, the quality of service is especially high. In 1948, the UPU secured agreement from the International Air Transport Association (IATA) that letters and cards (LC) mail enjoyed a priority over all other airline traffic except passengers with reserved seats, even if unreserved passengers had to be turned away and cargo unloaded. Printed matter (AO) was granted priority over other cargo.[224]

451. Although a national post office often negotiates air transportation rates with the first air carrier leaving its country, it will generally rely upon foreign post offices to arrange onward air transportation across or within foreign countries. In fact, post offices, just like any other shipper, could negotiate transportation rates to final destinations. The UPU, however, sets a uniform worldwide rate for the forwarding of all mail. This payment is called "air conveyance dues."

452. The current approach to airline compensation was adopted by the 1979 Rio de Janeiro congress. It set a standard rate for the air transportation of all mail, LC and AO, at 0.000568 SDR per kilogram-kilometer. This formula deviates from actual airline costs in fundamental respects:

- aircraft costs are not directly proportional to distance, but more closely related to a fixed takeoff/landing cost plus a per kilometer function that declines with flight length;
- jet aircraft costs vary more with space than weight; and
- airlines incur significant handling and opportunity costs associated with priority treatment.

453. According to IATA, the UPU rate is substantially below cost for short distance flights such as within the European Community. Since 1979, because of expressions of "extreme disappointment" from IATA, the UPU and IATA have been seeking agreement upon a new formula, without success. In the absence of agreement, the 1984 and 1989 UPU congresses have both declined to revise the 1979 formula. In 1985, the UPU rejected a proposal to delete the air conveyance provisions from the Convention, a solution that would have left air transportation rates to the market.[225]

454. As even this cursory review makes clear, the UPU air conveyance dues system substantially distorts the market. Indeed, the UPU concedes as much, at least in the sense that it has expressed concern that private delivery services gain a competitive advantage on some routes by dealing with the airlines in a

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[224]1984 Conv art 78 n 1.

[225]UPU, 1989 Washington Congress, Doc 63 ("Basic airmail conveyance rate"). *See also*, UPU, 1989 Washington Congress, Committee 6 (Airmail): Report of Third Meeting, Congress/C6 - Rep 3. These committee minutes include a statement by IATA reflecting some impatience:

> [W]e see little further use in the continuation of discussions. . . . We thus have no agreement on rates, priority, on obligations between us, or on mutual benefits. Not a bad result after nine years of negotiation. . . .[You] can make your resolutions on airmail at this Congress, but you cannot impose them on the airlines in general. We reserve the right to accept or reject them, according to our commercial interests.

more commercial manner.[226]

3. NATIONAL POSTAL MONOPOLIES

A. THE POSTAL MONOPOLY IN LAW AND IN FACT

455. All Member States have established public delivery services, "post offices," and granted them monopolies over a portion of the services they provide. A translation of pertinent provisions from the national postal laws of the Member States may be found in Appendix B.

456. As described in Chapter II, the antecedents of the postal monopoly laws are rooted in the late Middle Ages. Even when reenacted or revised, the legislative language is often still shaped by legal categories established over many centuries. As a result, monopoly laws are extraordinarily "open textured," to use the term of the renowned English professor of jurisprudence, H.L.A. Hart.[227] While the central aim of a sixteenth century, or nineteenth century, rule may be clear, there is great "uncertainty at the borderline" when applied to a twentieth century factual situation.

457. With postal monopoly laws, interpretative problems are compounded further by the dual role of the post office as both undertaking and governmental body. Legal opinions by postal lawyers are more often a matter of partisan commercial policy than objective legal reasoning. For example, in the mid 1980's, postal lawyers regularly stated publicly that private cross border express services were inconsistent with the national monopoly, while at the same time postal management were advised not to test the law in court for fear of losing on national or Community legal grounds. In this manner, the fuzzy boundaries of the old postal laws were made even fuzzier by broad but unenforced claims by postal lawyers.

458. In view of these complexities, it is unsurprising that there are today significant distinctions between the postal monopoly law as written and the monopoly as applied in daily commerce.

- In some circumstances, the postal monopoly claimed by the postal lawyers may be so broad that the monopoly *in fact* prohibits activities that the original legislation never envisaged.
- In other circumstances, the postal lawyer may argue that the postal monopoly prohibits activities that *in fact* take place everyday in normal

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[226]Consider UPU, International Bureau, Circular letter 3370(B/C)1790 (Sep 1987), Annex ("Study on remailing"), reproduced in Executive Council, "Terminal Dues Roundtable," Annex 3, CE 1988/C4 - Doc 9/Annex 1, at 2 (April 1989) (emphasis added):

> The remail firms' flexibility in obtaining favourable air transportation rates is another major competitive advantage they have over postal administrations. for longer distances they pay *air freight rates which are much lower than UPU air conveyance rates*. For shorter distances, where the *UPU air conveyance rates are comparable to, or even lower than, air freight rates*, they submit their mailings to a postal administration.

[227]H.L.A. Hart, *The Concept of Law*, ch. 7 (Oxford University Press, 1961).

commercial practice with the acceptance of the post office.

459. Policy makers should appreciate this distinction in order to understand the impact of new policies upon existing and future commerce. The real life commercial scope of the postal monopoly law is not what the postal lawyers say it is (nor what the private delivery services say it is), but how it operates in the market.

B. COMPONENTS OF THE MONOPOLY DEFINITION

460. A survey of formal, or official, postal monopoly laws among the Member States indicates four major components to most monopoly definitions:

- activities monopolized;
- items monopolized;
- services monopolized; and
- possibility of a tax option.

(1) Activities monopolized

461. The *activities* included in the monopoly are usually, but not always, stated as "collection, transport, and delivery." Formally, the postal monopolies of some Member States refer only to "transport." In practice, however, there does not appear to be a difference in how the monopoly is perceived by the market.

462. In recent years, the *actual* scope of activities viewed as part of the postal monopoly has altered substantially with changing commercial practices, largely due to the development of "bulk mail" (see Chapter II). Modern companies produce such large quantities of printed or computer generated mail that, in effect, a significant portion of mail is already *collected and sorted by the senders*. This mail is less expensive to handle than individual mail, and many post offices have reduced postage rates accordingly so the sender receives a "delivery only" rate.

463. If reduced rates are allowed to large mailers who aggregate and sort their own mail, economic fairness requires extending the same rate reductions to a smaller company who, by means of an independent contractor or "mailing agent," performs the same preparatory functions for the mail. The practice of providing cost based rate reductions for tenderers of bulk mail is sometimes called "worksharing" by post offices. Plainly, *the work that is "shared"—collection and initial sorting of mail—is no longer monopolized in fact.*

464. Since at least the introduction of the railways in the mid nineteenth century, the transport of mail has not been a true monopoly activity of the post either. Post offices regularly contract with other public and private carriers to transport mail from postal hub to postal hub. While the post office may control the contract designation, it does not in fact provide the service.

465. More recently, for reasons of geographic scale described in Chapter IV, some large mailers find it desirable to transport their mail directly to the regional postal hub or even the local post office that will distribute the mail.

Since transportation is a small cost element (which is repaid to outside contractors in any case), postal revenue is substantially the same regardless of the point of injection into the postal system.

466. In a few Member States, private "*document exchanges*" have also developed. A document exchange is a secure, centralized location in which persons may deposit mail for others and pick up mail deposited for them. The operator of the document exchange may sort mail and place it in the boxes of addressees. Further, the operator may transport mail from one document exchange to another. A document exchange is most feasible for an industry sector in which a large number of documents circulate among a small number of addressees, for example the legal sector or the insurance sector.

467. In this manner, *there has been a natural economic tendency for the activities component of the monopoly to contract towards a monopoly on delivery only*, the activity in which the greatest economies of scale are manifested. This trend is incomplete, however. Few post offices would relish the prospect of, for example, private street collection boxes. Nonetheless, the list of activities that most post offices actually discharge on a monopoly basis, and for which they refuse to consider private alternatives, is basically limited to inward sorting and final delivery.

(2) Items monopolized

468. The *item* component of the formal monopoly definition still reflects the monopoly's first purpose, to control the circulation of ideas. For this reason many monopoly laws refer to the carriage of "letters" (including cards). The original idea of a "letter" was personal, private correspondence,[228] more or less necessarily handwritten. In a similar manner, some postal monopoly laws speak in terms of "letters and other sealed items," the idea apparently being that the authorities were only interested in communications that the sender wanted to keep private.[229]

469. Conversely, most postal monopoly laws permitted the private carriage of newspapers, magazines, books, parcels, and some types of commercial and legal papers.

470. Over the last century, ordinary personal correspondence has become a small fraction of postal traffic. Post offices with a "letter" monopoly reacted by adopting ever more expansive interpretations of the term "letter" so that the term came to include virtually any addressed communication below a certain

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[228]The term "letter" was used by post offices in the nineteenth century to distinguish personal correspondence from "printed papers" and "commercial documents." These categories were codified in the original UPU Convention of 1874. Later, the UPU Convention changed "commercial papers" to a more inclusive category, "small packets."

[229]Notwithstanding the current approach adopted by some postal monopolies or by some post offices, it is believed that the concept of "sealed" refers to "sealed against inspection" not "secured against physical injury." An envelope is not "sealed" if the sender explicitly grants a right of inspection to appropriate authorities (waiving rights of privacy) regardless of how securely it may be fastened to prevent loss or soiling.

size. In some cases, this elongated definition of "letter" has been enacted into law by the legislator. An administratively or legislatively enhanced definition of items covered by the monopoly might be called a "*letter plus*" monopoly.[230]

471. A central problem with "letter plus" monopolies is that they prove too comprehensive. Once a postal lawyer convinces himself that a printed advertisement is a "letter" just like personal correspondence, then he has to distinguish between such advertisements and newspapers, or risk incurring the wrath of the press. Similarly, if a checque is deemed a "letter" when sent from an ordinary person to a bank, how can one allow banks to present cheques to each other without the intervention of the post? In reality, letter plus monopolies tend to use, even if tacitly, some measure of size (e.g. weight) so as to identify the type of item covered by the monopoly.

472. In summary, "letter" monopoly laws have in fact tended to *expand* into "letter plus" monopolies, converging with other more expansively drawn monopoly laws. At the same time, there seems to be a tendency to limit these monopolies by reference to the weight of the type of item transmitted.

(3) Services monopolized

473. The third component of the monopoly definition is *service*. Most postal monopolies have always recognized an exception for especially urgent or private mail handled by special means. For example, mail sent by "servants" of the sender or "special messengers."

474. Similarly, postal monopolies have not been asserted over very urgent local deliveries, such as the delivery of newspapers and cheques.

475. In recent times, this concept has been generalized by more specifically limiting the monopoly to the low cost, medium priority service that has been traditional with the post office since the mid nineteenth century. In actuality, almost all post offices accept that the postal monopoly is confined to traditional postal service and does not include express service. Express services operate publicly and are used in regular commercial practice, even by government departments. Nonetheless, only a few formal postal monopoly laws have been amended to reflect this fact.

(4) Tax option

476. A fourth element in the definition of a postal monopoly is the possibility of a *tax option*. That is, instead of using the post office for transmission of monopoly items, the sender has the option of paying a fee to the post office, in

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[230]On 25 March 1983, the Danish Post Office wrote to DHL stating that:

> *[A]s it is difficult to determine the number of consignments which are actually affected by the monopoly,* the Post Office will at the time being, take no steps in the matter towards you until further notice is given. . . . However, in those cases in which it appears *unmistakably from the exterior of the consignment that this is actual correspondence*, you are requested to see to it that the consignment is stamped according to the tariffs of the Post Office. [emphasis added]

the form of stamps or otherwise, and using a private carrier. In essence, this possibility converts the postal privilege from a true operational monopoly to a tax on private carriage.

C. MONOPOLIES OF THE MEMBER STATES

477. The postal monopolies vary substantially from Member State to Member State, but the monopolies vary less in fact than in law. Thus, for example, only three Member States formally permit private express services, yet in actuality all Member States accept such services, although in different degrees.

478. From the standpoint of future economic policy, formal or theoretical claims of monopoly appear less important than a consideration of those activities which are in fact reserved to the post office by operation of the monopoly law. It therefore seems most useful to consider the actual postal monopolies in terms of a "standard model," even though such an approach involves a degree of subjective judgement.

479. A rough "standard model" of national postal monopoly, excluding intra EC services, is summarized in Table 18. While hardly perfect, it is suggested that such a model may be a useful analytical tool. Some notable exceptions to the standard model are noted below.

Table 18. Standard postal monopoly

Activity	Inward sorting and delivery, together with traditional, "non bulk" collection activities.
Items	"Letter plus," i.e., tangible communications to a specific person or address, except certain specific handwritten or printed items (e.g. legal papers), periodicals, and items exceeding a small, specified size.
Service	Medium priority service monopolized, but express service, defined in some manner, permitted.
Tax option	Not permitted.

480. While most post offices in most Member States appear to permit large mailers to collect and sort their own mail, modifying their rates to yield "delivery only" or "bulk mail" rates, the German Bundespost is a major exception. Although the Bundespost does not physically prevent German mailers from collecting and sorting large mailings, it does not pass on cost savings to the mailers. In addition, in other Member States, it seems that discounts are permitted on a non public basis.

481. In respect to items monopolized, the standard model does not specify an upper size or weight limit because no consensus has emerged. The Dutch use 0.5 kilogram and the French use 1.0 kg (applied to commercial papers only). In actuality, few post offices seem to attempt to monopolize the delivery of written material exceeding 0.5 to 1.0 kilogram in weight.

482. The broadest range of items monopolized is probably provided by the Irish monopoly, which appears to grant a monopoly over virtually any type of item An Post carries. The next most expansive is likely the German monopoly, which seems to connote a more inclusive approach to printed and commercial papers than in other countries. At the other extreme, the Greek monopoly appears to have retained its original focus upon current and personal correspondence. In Belgium, a 1977 court case implied a somewhat more liberal approach towards "business papers" than in other Member States.

483. The standard model portrays traditional postal services as monopolized in all countries and express services as permitted in all countries. Since the acceptance of express services is usually tacit and de facto, no precise definition of express service can be listed. Only three postal monopolies have attempted an explicit legal definition of "express" for national service, and all three (Germany, Netherlands, U.K.) have concluded that a *price* should form the basic boundary line. As a practical matter, the concept of a price test is probably tacitly accepted by other postal monopolies as well; that is, post offices would seek to enforce the monopoly laws against "express" services whose prices became competitive with traditional postal services.

484. The U.K. postal law also includes an explicit exception for document exchanges and for transportation of monopoly items between document exchanges.

485. The standard model does not permit the mailer an option to pay a fee to the post office if a monopolized item is transmitted privately. Nonetheless two Member State postal monopolies allow this possibility: Italy and Denmark.

4. INTERNATIONAL POST CORPORATION

486. Legally, "International Post Corporation U.A." (IPC) is a Dutch corporation which controls two Belgian corporations, Unipost and EMS International Post Corporation (EMS). IPC was founded on 1 January 1989 by 11 Member State post offices (excluding the Dutch post office) and 10 post offices from outside the Community.

487. EMS, the transport arm of IPC, was the first postal company, organized in 1987 as a société coopérative under Belgian law.[231] It is understood that EMS will be transformed into a Belgian stock corporation with all but one of its shares held by IPC. In any event, IPC can control EMS by virtue of substantially common ownership.

488. Unipost, the administrative arm of IPC, was established in 1989 as a Belgian stock corporation, with IPC holding 24 of its 25 shares. The remaining share is held by EMS for reasons of Belgian corporate law.[232]

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[231]EMS-IPC's promoters and first members were the post offices of Belgium, Canada, Denmark, Finland, France, Ireland, Norway, Portugal, Sweden, the United Kingdom and the US.

[232]The Belgian company Unipost was originally, and confusingly, given the same name as the Dutch company, "International Postal Corporation." Its name was changed to Unipost on 28 December 1989.

489. EMS is authorized by its articles to undertake all activities related to the development and operation of a

> *network designed for the handling and efficient transport* of international mail originating from members of the Union Postale Universelle or forwarded by their affiliated organizations.[233]

490. Unipost is broadly authorized by its articles to undertake virtually any "services, standards, or products":

> to undertake, in all countries and either in the name of the corporation or in the name of third persons, *any activities directly or indirectly linked to the study, the development, the promotion and the marketing of any services, standards or products* for the joint use and to the advantage of postal administrations and other organizations, irrespective of whether or not these are affiliated with postal administrations . . .[234]

491. Ultimate control of IPC is vested in a general meeting of the shareholders, in which each post office has a single vote, so no post office controls more than five percent of the votes.

492. Between general meetings, IPC policy is determined by a board of seven directors consisting of the managing director and six directors named by the shareholders. The six directors are chosen by regional allocation. Three directors are chosen by the group of post offices in the area south of Scandinavia and north of the Alps. Another director is chosen by European shareholders south of the Alps. Member State post offices thus appear to control four of the six directors elected by the shareholders. [235]

493. The articles of both IPC and EMS explicitly limit the shareholders to post offices and subsidiaries of post offices.[236] Membership on the board of directors of IPC and EMS is similarly reserved to employees of post offices.[237]

494. In short, IPC appears legally capable of:

- replacing the UPU as the primary means of coordinating international commercial policies of shareholding post offices; and

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[233]EMS articles of association, art 3 (translated from French) (emphasis added).

[234]Unipost, articles of association, art 3 (translation from French) (emphasis added).

[235]IPC, articles of association, art 15 (translated from Dutch).

[236]Art 8 of the by-laws of EMS states:

> 1. Any postal organization of a Member State of the Union Postale Universelle may be considered for admission as a member of the society.
>
> 2. Likewise, it may be considered to admit as a member of the society any other organization whose capital is being held to at least 51% by a postal organization of a Member State of the Union Postal Universelle, which has been charged by that organization to forward and handle international mail, and which, in the judgment of the Board, engages in activities similar to those of its members. . . [translation from French]

Article 9 of IPC's articles is virtually identical.

[237]For examples, article 16 of EMS's bylaws state: "Any administrator (i.e. member of the board, explanation added) must be either an employee or an administrator of a member or of an organization controlled by a member and authorised to use the services of the society. [Translation from French]"

- replacing, or supplementing, the international operations of the shareholding post offices, by providing end to end delivery services across national boundaries in the same manner as private delivery services.

495. In contrast to the UPU, IPC appears to offer:

- a more flexible and quicker procedure for establishing a common commercial policy;
- the possibility of paying for itself by the sale of services to post offices and users; and
- substantially greater insulation from governmental review, since governmental departments cannot be "shareholders" and governmental officials cannot be directors of IPC.

496. By forming the IPC, the member post offices have apparently reinforced the historic allocation of the national delivery markets among the Member State post offices. Competition among post offices is discouraged in the intra EC market in favour of cooperation in operations and marketing activities organized through the IPC.

VI. POLICY

497. The preceding chapters present a number of historical, economic, and legal aspects of the delivery services market. This chapter attempts to synthesize and order these considerations and so identify possible outlines of a Community policy towards the delivery services sector. Extensive cross references to the earlier chapters have been included to assist the reader.

1. REGULATORY SCALE

498. As described, from an economic and operational perspective, the Community delivery services sector is defined and subdivided by the considerations of *time* and *distance*. The time within which an item is to be delivered implies a certain level of operational priority and control, that is a *service level*.[238] The *distance* across which an item is to be delivered implies a certain *geographic scale* to the operations.[239] Given the almost universal importance of time and distance in human affairs, these observations may seem unremarkable, but traditional postal concepts do always coincide with these facts of life.[240]

499. The implications of geographic scale and service levels, and the natural submarkets they imply,[241] appear to form the appropriate starting point for economic aspects of Community policy in this sector. While service levels

[238]Paragraphs 180-185, above.
[239]Paragraphs 186-193, above.
[240]*E.g.*, paragraph 173, above.
[241]Paragraphs 194-196, above.

have received some attention in recent public debates about "express services,"[242] the significance of geographic scale and its relation to service levels has generally been unrecognized.

500. A consideration of the role of geographic scale in delivery operations makes clear that the delivery services sector requires a substantially different approach from other Community infrastructure networks such as air transportation, telecommunications, and energy.

501. The delivery services market as a whole is predominantly local in geographic scale. Most items collected in a particular city are delivered in the same city or neighbouring cities. Only 30 percent of mail leaves relatively tiny Luxembourg; among the Member States as a group, less than 4 percent of items are posted to points outside the national territory.[243]

502. In contrast, airline services are regional by nature. About 50 percent of European airline passengers travel to another country.[244] And the telecommunications industry is unique in that distance is almost immaterial in the provision of services. It is often as easy to "access" a computer, or person, in the next country as in the next building. Further, while both the air transportation and telecommunications sectors require a constantly improving supply of specialized capital equipment, the delivery services sector does not. Hence, economies in the manufacturing industry that could derive from strict harmonization of aviation and telecommunications equipment are not a consideration in a policy on postal and other delivery services.

503. Geographic scale creates distinct operational differences between *local*, *regional*, and *inter regional* delivery services. It is impossible for the same delivery service *activity* to provide the same *service levels* at different *geographic scales* with equal efficiency. Collection, sorting, transport, and delivery routines must be organized according to different schedules depending upon the markets being served.[245]

504. The experiences of private delivery services attest to the correctness of these concepts; different companies have flourished at different geographic scales.[246] Postal studies also document the difficulties of serving the intra EC market as well as the national market.[247] For this reason, large mailers increasingly call for the ability to tender mail at the *inward* sorting centre.[248]

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[242]Paragraphs 83-87, above.

[243]Paragraph 276 (Table 11), above.

[244]International Civil Aviation Organization, *Civil Aviation Statistics of the World 1988*, Tables 2-2, 2-3 (1989) (Europe excluding the USSR). Furthermore, 83 percent of passenger kilometers (a better measure of what an airline is selling) are international.

[245]It is not logically impossible that the same *undertaking* can serve markets of different geographic scale with equal efficiency, but to do so it must establish different delivery service operations appropriately organized for the different scales. While doing two things equally well is not impossible, commercial history suggests that it is difficult.

[246]Paragraphs 188-189, above.

[247]Paragraphs 69-71, 191, above.

[248]Paragraphs 144 (US), 206-207 (UK), above.

505. Attention to underlying realities is required in the legal area as well. The Treaty is based upon a coexistence of Community law and Member State law, where the jurisdictions of the laws of the Member States are defined by their physical boundaries. A "legal scale" is implied by whether a given activity is an international or Community activity. Community activities may be further divided depending upon whether they are Community activities that affect "trade between Member States" or local activities that do not. At some point in the legal scale, the authority of the Community must yield to the Member States' prerogatives in "local" matters.[249]

506. Of course, the economic concept of "geographic scale" and the legal concept of "legal scale" are not perfectly congruent. Member States vary in size so much that one might be deemed an entirely local delivery service market while another may include several local markets. Nonetheless, the concepts are similar in principle and mutually reinforcing.

507. In view of these considerations, and the preeminent role of local markets in the sector as a whole, it is suggested that the central task of a Community policy on delivery services might be described as:

> *the formulation of a regulatory policy for intra Community delivery services that will bind together the Single Market and interconnect sensitively and constructively with the much larger network of local and intra Member State delivery systems.*

508. An appropriate conceptual framework for such a regulatory policy must reconcile the economic and legal dimensions identified above. For this purpose, it is suggested that a policy towards the Community delivery services sector may be viewed most fruitfully in terms of four "regulatory scales."

Table 19. Regulatory scales

International	pertaining to an *outward* shipment sent from a point inside the Community to a point outside the Community or an *inward* shipment sent from a point outside the Community to a point inside the Community
Intra EC	pertaining to a shipment sent from a point in one Member State to a point in another Member State
Intra State	pertaining to a shipment sent from a point in a Member State to a point in the same Member State that is outside the local area of the shipper (including "ABA" shipments)
Local	pertaining to a shipment sent from a point in a Member State to a point in the *same local area* in the same Member State (including "ABA" shipments).

509. For regulatory purposes, the *intra EC* level is distinguished from the *intra State* for several reasons. If a Community delivery services system were to be

[249]Paragraphs 404-410, above.

built from the beginning, it is reasonable to suppose that there would be no difference between Paris-Brest service and Paris-Brussels service.[250] However, under the Treaty of Rome, it is accepted that Community policy must proceed from the existing economic and legal system, rather than an imaginary "state of nature" for delivery services.

510. Currently, the Paris-Brest route is, at least in most respects, within the regulatory jurisdiction of a single Member State government. It is certainly within the operational competence of a single Member State post office. The Paris-Brussels route differs in both respects. In terms of realizing the potential of the Single Market, it is the facilitation of economic, social, and cultural contacts between Paris and Brussels that must be regarded as the special responsibility of Community policy.

511. The following sections address certain legal, economic, and social considerations pertinent to the development of a Community policy towards delivery services at each end of the regulatory scale. It will be helpful, however, to address first the notion of "essential service standards."

2. ESSENTIAL SERVICE STANDARDS

512. "Essential service" has been used to refer to a minimum level of delivery service that an appropriate government authority has decided to ensure for all residents.[251] It was noted that an essential service may be secured by at least three legal means:[252]

- provision of essential service by a governmental delivery service undertaking;
- provision of essential service by a public or private undertaking in accordance with a governmental contract;
- imposition of legal obligations to provide essential service upon one or more public or private undertakings.

513. From the standpoint of *Community* policy, the issue of essential services presents the question of: *What level is the Community able and willing to guarantee as a matter of law?* Since it does not appear to be legally or economically feasible for the Community to organize its own postal undertaking, the legal tools available seem to be (i) legal obligations and, where necessary, (ii) contracts for supplemental service.

514. Both the setting of legal obligations and the awarding of contracts will be facilitated by the announcement of "*essential service standards*," or simple rules that state when the Commission will intervene in the market to enforce the rights of shippers and consumers.

515. As in other aspects of delivery services policy, a Community policy towards essential service standards must strike a balance between respect for

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[250]To recall the example of the French postal Inspector General (paragraph 191, above).
[251]Paragraph 220, above.
[252]Paragraph 221, above.

the role of the Member State governments in primarily local services and fulfilment of the reasonable expectations of those who will live and work in a Single Market. The delicacy of this balance suggests a need generally to proceed carefully with concepts such as "essential service" and "guarantees."

516. The concept of an *essential service standard* should be distinguished from harmonization. Caution in committing the Community to legal guarantees should not suggest a reluctance to press for greater harmonization of Community delivery services, especially postal services, by non compulsory means such as *norms* for acceptable service and *standardization* of operational elements such as postal codes. On the contrary, such measures are suggested below.

3. POLICY IMPLICATIONS

A. INTRA EC MARKET

517. As Chapter IV indicates, the entire intra EC market represents a delivery system approximately equal, in terms of traffic, to the national postal delivery system of Belgium.[253] Within this market, private delivery services handle about 2.4 percent of the traffic, a traffic volume somewhat smaller than the post office of Luxembourg.[254]

(1) Essential service standard

518. The intra EC market can be served, albeit not optimally, by the sum of two local delivery services. Since local delivery services are necessarily the most prevalent in the Community, the most logical solution to defining an essential service standard in the intra EC market is also the most traditional, by stating legal obligations for the providers of essential services in the local markets, the Member State post offices.[255]

519. Each Member State has established an essential service standard by defining the scope of its post office's *obligatory* services. The most straightforward approach to essential service in the intra EC market would be to impose a rule of non discrimination upon both outward and inward providers of local essential service. That is,

> Each intra EC mailer or shipper in Member State A should have a right to obtain outward delivery service in Member State A and inward delivery service in Member State B, from the providers of essential service designated by the Member States, such that the outward and inward services are comparable, in price and service level, to the obligatory services guaranteed to local mailers and shippers by the Member States.

520. The gist of this essential intra EC service standard is that local delivery

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[253]Paragraph 276 (Table 11), above.

[254]Paragraph 269 (Table 9), above.

[255]The Member State post offices are today the only undertakings denominated by Member State governments as providers of essential delivery services. However, the essential service standard suggested in the text is not, in principle, limited to post offices.

services which Member States designate as essential and obligatory[256] must be *non discriminatory* among Community users. That is, each person should have the right to the same outward service at the same price from post office A and the same inward service for the same price from post office B as post offices A and B offer local users. The proposed definition of essential service standards for the intra EC market is similar to a rule of "national treatment."[257]

521. Since post office A and post office B do not normally sell inward and outward services separately, the total charge for intra EC service will be a sum of appropriate fractions of the local postage rates. The level of service and charges in both Member States, by definition, fulfils local standards of essential service, so in general the resulting intra EC service should be satisfactory and reasonably priced.[258]

522. "Economic" rates (obtained by adding fractions of outward and inward postage), if calculated on a strict bilateral basis, will not result in intra EC postage rates that are the same as domestic postage rates or even the same rates to all other Member States.[259] "Economic" rates, however, are only an analytical tool. They do not imply a non uniform intra EC tariff for small mailers any more than does a uniform terminal dues rate.[260]

523. The suggested essential service standard should be viewed as a *legal right* of both large intra EC shippers and Member State post offices, *not as a commercial strait jacket*. That is, a large commercial mailer could insist upon an economically correct calculation of intra EC postage if it were to his advantage. And a Member State post office would have the same right in regard to large commercial mailers who are taking advantage of underpriced intra EC services.

524. Small intra EC mailers should, perhaps, be entitled to a further essential service right: the possibility of paying for intra EC delivery services by means of domestic rate classifications. As explained in Chapter IV, it does not appear unduly burdensome to require that intra EC postage rates be expressed in terms of normally available domestic postage stamps. For most Member State post offices, letters in the first weight step will likely be priced at the same level as domestic services.[261] The post offices of Spain, Greece, and Portugal, however, might charge *two* domestic stamps for intra EC letters from small mailers.[262]

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[256]Essential and obligatory services are the same in principle. See paragraphs 228-232, above.

[257]The definition of "essential service" and the designation of an essential service carrier does not, as those terms are used, indicate whether the market is competitive or not. See paragraph 537, below.

[258]The postage for cross border service would thus consist of about 30 percent of the basic postage rate of outward post office A and 70 percent of the basic postage rate of inward post office B. See paragraphs 201-202, above.

[259]Paragraphs 302-309, above.

[260]Paragraphs 291-301, above.

[261]Paragraphs 308-309, above.

[262]These post offices can also be accorded additional freedom with respect to intra EC postcards to prevent any adverse financial impact. Paragraph 277, above.

525. For administrative simplicity, each Member State post office should be able to draw a non discriminatory line between "large" mailers and "small" mailers, subject to the competition rules.

526. The proposed essential service standard avoids potential distortions of trade between Member States, since each mailer, local or intra EC, will have the right to the same service at the same price from all Member State post offices. Hence, a large mailer, distributing mail on a Community wide basis, will have the right to receive the same treatment regardless of which Member State post office he uses.

527. Such an essential service standard would terminate disputes about terminal dues formulae.[263] For post office B to charge shippers in Member State A a *higher* inward delivery charge would violate the recognized rights of the residents of Member State A. Similarly, for post office B to charge residents of Member State A a *lower* inward delivery charge would violate the recognized rights of the residents of Member State B and, perhaps, post office A as well.

528. A non discriminatory approach to intra EC postal service is not only economically reasonable, it is also apparently required by the competition rules.[264] In particular, for a post office to offer different services or prices to Community mailers, depending upon their residence, seems to be a clear "abuse of dominant position" according to the doctrines of the 1982 *British Telecommunications* case.[265]

529. The *British Telecommunications* case concerned a telex tariff of the British Post Office, later British Telecommunications (BT), that prohibited telex subscribers from accepting telexes from a non U.K. sender and reforwarding via BT to a non U.K. addressee, if the effect was to give to the original telex sender a discount rate compared to that applied by his home telecommunications administration. For example, a telex forwarding company in the U.K. was not supposed to receive a telex from a German sender and resend the telex to an American addressee for a fee such that the overall cost to the German sender was less than the German telecommunications administration would have charged for transmitting the same telex directly to the U.S. Telex forwarding was commercially feasible because some telex rates in some Member States were very high compared to U.K. rates. When discount reforwarding of telexes persisted, BT adopted a second tariff prohibiting all telex reforwarding.[266]

530. The Commission found both tariffs incompatible with the Treaty. The first price maintenance tariff was held to violate Article 86 because:

- it "limited [retelexing] to the prejudice of customers in other EEC

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[263]Paragraphs 287-290, above.

[264]Paragraphs 264-390, above.

[265]Commission Decision 82/861, *British Telecommunications*, 1983 OJ L 360/36, *affirmed*, Case 41/83, *Italy v Commission*, 1985 ECR 873.

[266]The second tariff was urged by the International Telecommunications Union.

Member States"; and

- it "applied dissimilar conditions to equivalent transactions."[267]

531. The second tariff, banning retelexing entirely, was also found to violate Article 86 since it limited the market:

> [The BT tariff] both limits the development of a new market and the use of new technology to the prejudice of relay operators and their customers who are thus prevented from making more efficient use of existing telecommunication systems. *The fact that in so doing the message forwarding agencies are simply exploiting the tariff differentials existing between telex and telephone services provided by the telecommunication authorities is irrelevant* [paragraph 34 (emphasis added)].

532. The *British Telecommunications* case, it is submitted, leaves no doubt that the competition rules require a post office to provide the same service for the same price to all shippers in the Community, regardless of their state of residence. Put another way, each shipper has a right to purchase postal service in each Member State for the same price as local residents, a right that the proposed essential service standard for the intra EC market would clarify and recognize explicitly.

533. It may be noted that the proposed approach to an essential intra EC service standard is broader than one that is tied to the postal monopolies of the Member State. As noted, in many Member States, the post office is obliged to provide delivery for a greater range of items than is included in the monopoly.[268]

534. Should, indeed, the Community go further and guarantee a still higher standard of "essential service" for the intra EC mailer in some markets? In some cases, Community intervention might be considered appropriate, but this would have to be decided by reference to particular circumstances.

535. As we have noted, a uniform rate requirement may imply a lower standard of service to outlying areas.[269] The inventor of the uniform rate concept, Rowland Hill, opposed uniform rates to rural areas.[270] It appears possible that intra EC mailers may find that postal service *to* a rural area is restricted due to policies in the addressee's Member State, policies which the mailer has no ability to affect. At least the mailer *from* a rural area has the possibility to influence outward postal service through the local governmental process. It appears possible that a refusal by a Member State to provide intra EC shippers with essential services to rural areas that the EC are willing to pay for may be

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[267]The Commission noted that, of all telex messages tendered to BT, a dissimilar condition was applied only to international telexes, that is, they must either originate in the U.K. or the U.K. telex forwarding company must charge the foreign sender a minimum price. The Commission also noted that requiring telex forwarding companies to charge a minimum price placed them "at a competitive disadvantage vis à vis the national telecommunications authorities and agencies in other Member States not subject to such restrictions [paragraph 30(ii)]."

[268]Paragraph 232, above.

[269]Paragraphs 222-227, above.

[270]Paragraph 49, above.

inconsistent with the Treaty's guarantees of free movement of goods[271] and services.[272]

536. Article 130a provides a mechanism whereby the Commission could address a situation in which neither the Member State post office nor the private delivery services sector provides a level of service that is sufficient to integrate a least favoured region of a Member State into the Single Market. Under such circumstances, the Commission could take corrective measures by, for example, contracting with a public or private carrier to provide a higher level of intra EC delivery service than otherwise would be provided.[273]

(2) National postal monopolies

537. The foregoing discussion of essential service does not prejudge the issue of market structure. Essential service, and other intra EC service, might be provided in the context of a monopolistic market or a competitive market. Since there is no Community law creating a postal monopoly, the legal and policy issue is the extent to which the Community will recognize outward and inward monopolies vested in Member State post offices by national monopoly laws.

(a) Historical considerations

538. As recounted in Chapter II, national restrictions on intra EC delivery services were introduced by bilateral agreement in the early seventeenth century to control the circulation of foreign ideas.[274] According to this original purpose, it was reasonably necessary to regulate both the outward and inward traffic, since the letters *from* spies are as dangerous as the letters *to* spies.

539. Over the centuries, the rationale for the postal monopoly has shifted from the censorship of international mail to the facilitation of domestic mail.[275] Whereas an inward postal monopoly, standing alone, and an outward postal monopoly, standing alone, may have been reasonable measures to effect censorship, neither appears reasonably or directly related to the facilitation of delivery services within the Community or internationally. Remarkably, there has been little consideration as to how the change in the public policy basis for the national postal monopoly affects the justifiability of a monopoly over outward and inward postal traffic.

(b) Economic considerations

540. As noted, postal collection, sorting, transport, and delivery activities are necessarily organized around the primary need to serve the market at the local

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[271]Paragraphs 335-358, above.

[272]Paragraphs 359-363, above.

[273]Paragraphs 402-403, above. The Community's STAR program adopts a similar approach in the telecommunications sector.

[274]Paragraphs 34-38, above.

[275]Paragraph 241 (cross subsidy of rural services), above.

geographic scale. As a matter of operational logic, local services are not the quickest nor the most efficient means of providing delivery services at a broader geographic scale.[276]

541. It appears that the intra EC market, outward and inward, is a related, but distinctly different, submarket from the "core" business of the national post offices.[277] This conclusion is evidenced by the difficulties that both postal and private carriers experience in achieving equal efficiency at more than one geographic scale with the same delivery service operation.

542. To date, limited competition in the outward delivery market has produced substantial economic benefits for shippers by permitting them to "shop" for the most efficient postal services[278] and to tender mail "downstream" in a manner better coordinated with the final, inward delivery operation (as they are seeking to do in national markets).[279] Limited competition in the inward intra EC market, primarily in the realm of express service, has demonstrated the improvements in service that can be obtained from end to end administration and direct liability to the shipper.[280]

543. As described, *outward* collection and sorting activities account for about 30 percent of the postal "product" and exhibit small or modest economics of scale.[281] With the introduction of large bulk mailings and computerized addressing, many commercial mailers in fact perform their own "collection" and outward sorting before tendering the mail to the post office for final delivery.[282]

544. In regard to *outward* traffic, the *worst case* competitive losses that Member State post offices might experience, on an average, can be estimated to be no greater than from one fifth (net) to one percent (gross) of postal revenue, or the equivalent of several weeks' to a few months' normal growth in postal revenues.[283] Indeed, these figures are likely to be unduly pessimistic by a factor of two or more.

545. In light of such considerations, even some thoughtful postal officials have suggested there is little economic justification for a postal monopoly over *outward* intra EC shipments. The director of corporate planning for the British Post Office commented recently:

> On the *outward side* an international letter has the characteristics of an inland letter addressed to someone at the outward international office of exchange. But we see from the exhibits that it avoids the activities which both generate the most returns to scale and cost the most in absolute terms.

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[276]Paragraphs 186-193, above.
[277]Paragraphs 194-196, above.
[278]Paragraph 282-283 (Table 12), above.
[279]Paragraphs 141 (US), 206-207 (UK), above.
[280]Paragraph 71 (conclusion postal officials), above.
[281]Paragraph 202, above.
[282]Paragraphs 104-109 (history), 143-144 (U.S.), above.
[283]Paragraph 319, above. However, significant variations occur between post offices. See Chapter IV for details.

The case for competition here would therefore seem more compelling.[284]

546. *Inward* sorting and collection account for about 70 percent of postal costs and exhibit a significant degree of scale economies.[285] Postal officials correctly point out the economic justification for an inward monopoly is stronger due to the increased economies of scale and higher amount of postal work.[286] But the presence of strong economies of scale also implies that intra EC delivery specialists will find it more difficult to compete with the post office in final delivery, unless they provide a truly distinct service. By virtue of its size, the economic advantages of the post office are so great that intra EC services are likely to continue to use local postal services for most inward deliveries.

547. Even such natural competitive advantages are ignored, in the case of *inward* competition, the *worst case* competitive losses that can be envisioned for Member States post offices, on average, can be estimated to be no greater than from one (net) to three percent (gross) of postal revenue, or the equivalent of from four months to a year in normal growth in postal revenues.[287] These figures, too, are likely to be unduly pessimistic.

(c) Legal considerations: competition rules

548. In general, under the Treaty, commerce between Member States is intended to be free and competitive unless restrictions based upon national law are justified by particular policies or provisions of the Treaty. As the Commission stated in the *White Paper on Completing the Internal Market*:

> *The Treaty clearly envisaged from the outset the creation of a single integrated internal market free of restrictions* on the movement of goods: the abolition of obstacles to the free movement of persons, services and capital: the institution of a system ensuring that competition in the common market is not distorted: the approximation of laws as required for the proper functioning of the common market.[288]

549. Recalling the distinction between postal monopolies in law and in fact,[289] it may be noted that a thoughtful legal and policy analysis by a prominent postal lawyer has questioned whether national postal monopolies *in fact* affect the intra EC market today.

> *The international market can be considered as an open market that is not monopolized, even partially, to the benefit of one operator*. There has never been an international monopoly but simply an adding together of the

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[284]R. Tabor, "Comment," in *Competition and Innovation in Postal Services* (M. Crew and P. Kleindorfer, eds, to be published late 1990) (emphasis added).

[285]Paragraph 202, above.

[286]Paragraph 203, above.

[287]Paragraph 330, above. However, significant variations occur between post offices. See Chapter IV for details,

[288]COM(85)310, *Completing the Internal Market*, paragraph 4 (1985)(emphasis added).

[289]Paragraphs 455-459, above.

> national monopolies. . . . *The national monopolies no longer cause any effect on international mail*.[290]

550. This observation suggests that the intra EC delivery services market may present the Commission with the opportunity to determine policy without disturbing legal prerogatives which are commercially significant *in fact*. Similarly, endorsement of an intra EC monopoly may create a monopoly *in fact* where none now exists.

551. As developed in Chapter V, it appears that:

- the post office which enjoys a monopoly over a given sector of the intra EC market holds a "dominant position" in that sector;[291]
- an undertaking with a dominant position in one market may not use revenues earned from its dominant position to cross subsidize competition in another market;[292] or cause "recourse to methods different from those which condition normal competition"[293] or otherwise distort "trade between Member States";[294]
- a Member State may not enact nor maintain in force a postal law or other "measure" which is inconsistent with the competition rules, unless justified by the exception in Article 90(2);[295] and
- a Member State may not favour a post office in its competition with private delivery services by "state aids" which distort "trade between Member States."[296]

552. Hence, unless justified by the exception in Article 90(2), it would appear that an outward or inward postal monopoly affecting the intra EC market is inconsistent with the competition rules if it enhances the commercial position of a holder of a monopoly over local delivery services with an additional monopoly over the related submarket of intra EC and international services.[297]

553. To come within the exception envisioned by Article 90(2), a state measure must support the post office in its character as an undertaking "entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly."[298] For the purposes of this paper, it may be assumed that the outward and inward forwarding of intra EC mail is an

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[290] F. Braize, "Les perspectives d'évolution de l'organisation juridique du marché du courrier: de l'ère des objets à l'ère des services?" in *Le courrier dans le marché de la communication*, Bulletin de l'Institut de Recherche D'Etudes et de Prospectives Postales (March 1989) (emphasis added). At the time, Me. Braize was the head of postal law affairs for the French PTT.

[291] Paragraphs 381-382, above.

[292] Paragraph 384, above.

[293] Paragraph 383, above.

[294] Paragraphs 387-390, above.

[295] Paragraphs 391-394, above.

[296] Paragraphs 398-401, above.

[297] Paragraphs 368-371, above. It makes no legal difference whether the holder of the local delivery services monopoly is a public undertaking, such as a post office, or a private undertaking.

[298] Paragraph 395, above.

operation of "general economic interest" "entrusted" to the post office.[299]

554. Article 90(2) then requires a showing that application of the competition rules to the outward and inward postal monopolies would:[300]

- "obstruct the performance in law or in fact, of the particular tasks assigned to" the post office; and
- the derogation will not affect trade "to such an extent as would be contrary to the interests of the Community."

555. The crux of the first question is: Would application of the competition rules *obstruct* the ability of a Member State post office to perform outward or inward postal services or some other service?[301] It must be shown that competition leaves the post office with no other sensible economic, technical or legal way existed to perform the particular tasks performing such services.[302]

556. There appears to be no basis for an affirmative answer to this question. The following historical and economic points may be recalled:

- according to postal studies, post offices have generally provided inferior service to the intra EC and international markets compared to the national markets;[303]
- intra EC and international postal traffic has been falling behind domestic traffic for about fifteen years;[304]
- operational considerations make clear that it is impossible for a local collection and delivery system to give equal attention and efficiency to the servicing of distant markets,[305] especially markets spanning two postal administrations;[306]

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[299]This is not free of doubt. Intra EC mail is a small fraction of mail. However, any person in the Member State *may* send or receive a shipment abroad on any given day, and it may be supposed that a substantial fraction of the entire population sends at least one shipment abroad during the course of a year. Whether a service of broad potential but limited actual usage in any given time period may be considered a service of "general" interest appears open to question. In Case 172/80, *Züchner v Bayerische Vereinsbank*, 1981 ECR 2021, the ECJ rejected the argument that banks which transfer customers' funds from one Member State to another are "operating a service of general economic interest with which they have been entrusted by a measure adopted by the public authorities [paragraph 7]." The transfer of mail to other Member States appears to be of no more "general" nature than the transfer of money. On the other hand, the Court's ruling may have been based upon a lack of "entrustment" rather than the generality of the service.

It is also unclear whether the outward or inward transmission of intra EC mail might qualify as a "revenue producing monopoly." Neither intra EC postal operations per se, nor the post office as a whole, produces a significant amount of revenue for the Member State; at most, the effect of the postal monopoly is to permit a uniformity of prices that would not otherwise exist.

[300]Paragraph 295, above.

[301]It shall also be assumed the "particular tasks" assigned to post office include the outward and inward forwarding of intra EC mail. As noted in Chapter V, in most Member States, the post office is authorized to collect, transport, and deliver the mail within the Member State and between the Member State and places outside the Member State.

[302]Paragraph 397, above.

[303]Paragraph 69, above.

[304]Paragraph 68, above.

[305]Paragraphs 186-193, above.

[306]Paragraphs 71, 191, above.

- international traffic is so small compared to national traffic[307] that (with the possible exception of certain tourist services)[308] the overall scope and quality of local operations is not materially affected by international traffic, inward or outward;
- the financial impact of competition in the intra EC market would be relatively small and would not render postal service in the same market "technically infeasible";[309]
- as postal officials concede,[310] the actual effect of limited competition to date has been to improve service, lower prices, and stimulate post offices to introduce new services.

557. In short, application of the competition rules will not only not *obstruct* the capability of post offices to provide intra EC delivery services, it will more likely lead to *improvements* in their capabilities to perform this "particular task." Nor could competition in the intra EC and international markets possibly make it "technically infeasible" for the post office to service the national postal market.

558. Even if the postal monopoly passed this first test of Article 90(2), which it surely cannot, it would also have to pass the second test: that an exception from the competition rules does affect trade "to such an extent as would be contrary to the interests of the Community." To interpret this vague, rarely defined phrase, it is helpful to stand back and consider what is at stake in the concept of an outward or inward intra EC postal monopoly.

559. A buyer of intra EC services is, in reality, purchasing a service that will result in the delivery of a shipment to an address in another Member State. He is typically not purchasing a "half service" of forwarding to the foreign post office. A shipper not only wants to deal with a delivery service that is designed to meet his needs, he wants to deal with *someone* who is capable of performing the service and is responsible, indeed financially liable, for its successful completion.

560. From the shipper's point of view, to establish an *outward* postal monopoly is to give the Member State post office a commercial monopoly over not merely the forwarding of items out of the country, but over the entire service, from collection to delivery. This is what the shipper really pays for and this is what the outward post office has control over, since it is the outward post office that determines how and when and to whom the shipment will be tendered in the other Member State for inward delivery.

561. Although the outward postal monopolist controls the sale of the end to end delivery service, it is the inward post office, rather than the outward post office, that actually performs most of the service. The outward post office has

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[307]Paragraph 276 (Table 11), above.
[308]Paragraph 277, above.
[309]Paragraphs 310-341, above.
[310]Paragraph 383 (Table 12), above.

no authority, contractual or otherwise, to determine the quality of the inward postal service. Nor does the outward post office bear any legal responsibility for completion of the inward delivery service. Yet, *two thirds or more of what the shipper is actually purchasing* is the inward delivery service in the other Member State.[311]

562. An *outward* intra EC postal monopoly is thus, it is submitted, especially illogical and inconsistent with the interests of the Community in facilitating trade between Member States.

563. The fundamental effect of an *inward* postal monopoly, moreover, is much the same; that is, to deny the intra EC shipper a *locally available* delivery service that:

- provides administrative control from end to end across the borders of local delivery systems;
- organizes collection, transport, and delivery functions integrated according the operational logic of regional rather than local operations;
- remains morally and legally responsible for final delivery in another Member State.

564. The inherent operational and administrative considerations that prevent two efficient local delivery services, postal or private, from providing equally efficient services in the intra EC market have been detailed. *In essence, both postal and private delivery services are responding to this phenomenon by developing a "second tier" of delivery services that is specifically adapted to the intra EC geographic scale and supplements delivery services provided in the local markets.*

565. Is the evolution of a second tier of intra EC delivery services, competing for the business of "Single Market shippers" in "the interests of the Community"? In view of the substantial improvements in both postal and private delivery services that have already resulted from the limited competition that has taken place, there would appear to be no doubt *it is in the "interests of the Community" to permit, indeed to encourage, the continued evolution of a second tier of specialized intra EC delivery services.*

566. Consequently, *it appears that inward and outward national monopolies in favour of national post offices are inconsistent with the competition rules and cannot be justified by the provisions of Article 90(2).*

(d) Legal considerations: free movement of goods

567. In addition to the competition rules, restrictions on outward intra EC delivery services would *also* have to pass muster under the Treaty's strict provisions protecting free trade in goods.

568. As described in Chapter II, a key element of the intra EC market of the future is expected to be the direct marketing of goods and services. Postal and private delivery services both recognize the direct link between direct

[311] Paragraph 202, above.

marketing and the quality and availability of intra EC document delivery services,[312] especially for items such as solicitations, customer orders, statements of account, invoices, and invoice payments (some already denominated in ECU's).[313]

569. Direct marketing documents are often "bulk mailings" for which traditional intra EC postal services were poorly suited. As postal studies document, postal services for bulk mailings are improving only under the pressure of the limited competition to date.[314] Similarly, international business reply services, although pioneered by some Member State post offices in 1986, are being refined by the active competition between various international delivery services.[315]

570. It is submitted this history makes clear:

- intra EC direct marketing of goods has, to a significant degree, been restricted by the lower quality of postal delivery services offered in the intra EC market compared to the national markets;
- intra EC direct marketing of goods has been stimulated by recent competition between various public and private delivery services (including competition between post offices); and
- intra EC direct marketing of goods will be important to the economic and social realization of a Single Market.

571. Although restrictions on the free movement of goods may be justified by "imperative requirements" of a Member State,[316] it is submitted that no such requirements could justify restrictions or impediments to the intra EC direct marketing of *all* types of goods.

572. *Consequently, it appears that outward and inward national monopolies in favour of national post offices in respect to the transmission of documents and goods pertinent to the intra EC direct marketing of goods are inconsistent with the free movement of goods guaranteed by the Treaty of Rome.*

(e) Legal considerations: free movement of services

573. Generally, considerations raised with respect to the direct marketing of goods apply equally to the direct marketing of services such as travel, educational, employment, computer services, tailoring, and other services. These depend upon high quality, end to end, delivery of various types of documents and goods (although the "goods" associated with "services" tend

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[312]Paragraphs 112-114, above. In a *Financial Times* survey on international direct marketing, Michael Sutherland, chairman of the European Direct Marketing Association (EDMA) saw the "dawnings" of a Euroconsumer. In the same survey, Services Postaux Europeans (SPS) estimated that "Growth in the volume of goods sold by addressed direct mail (in twelve European countries) averaged about 6 percent annually." Almost 11.2 billion items were dispatched in this way in 1988. The conclusion of the survey was that the market had the potential to grow even faster in the years ahead. *Financial Times*, Survey (18 Apr 1990).

[313]Paragraphs 115-120, above.

[314]Paragraphs 103-111, above.

[315]Paragraphs 117-119, above.

[316]Paragraph 358, above.

to have to an informational purpose, such as books, photographs, computer diskettes, and samples).

574. While restrictions may be placed upon the direct marketing of individual types of services for "compelling reasons,"[317] this would not justify a general restriction on delivery of documents and goods associated with the direct marketing of all types of services.

575. In addition, delivery services themselves present certain considerations not found in respect to other intra EC services. In the usual case, a service is physically performed in Member State A and offered to persons residing in Member State B, Member State C, etc. Intra EC delivery services, however, are not provided in this manner. The essence of a delivery service is that it connects a resident of any Member State to a resident of any other Member State. A delivery service is selling a network, not a localized service.

576. Put simply, if a shipper prefers to deal with one delivery service for all intra EC shipments (as many do), he will be discouraged from using a private delivery service for any destination if inward postal monopolies in one or two countries deprive the private service of "Community wide" coverage.

577. An *outward* monopoly in one or two large Member States would also inhibit delivery service on a Community wide basis. In addition to preventing a delivery company headquartered in one Member State from performing a collection service in another Member State, an outward monopoly will diminish the number of items available for inward delivery in each of the other Member States. Given economies of scale in inward delivery (postal or private), an outward monopoly in one Member State raises the unit cost of inward delivery operation in all other Member States.

578. *Consequently, it appears that*

- *outward and inward monopolies in favour of national post offices in respect to the delivery of documents and goods employed by undertakings engaged in the international direct marketing services are inconsistent with the free movement of services guaranteed by the Treaty of Rome; and*
- *an outward or inward monopoly in favour of a national post office is inconsistent with the free movement of intra EC delivery services throughout the EC.*

(3) Relations between post offices

579. As described in Chapter V, commercial agreements between post offices in the intra EC market have traditionally been governed by the principles of the Universal Postal Union.[318] Within the Community, however, it appears clear

[317]Paragraph 363, above.

[318]Paragraph 411 et seq, above. In discussing the international market, below, a number of inconsistencies between the Universal Postal Convention and the Treaty are discussed. These observations apply in the intra EC market, as well, insofar as the UPU continues to govern inter postal relations.

that relations between the post offices, like relations between other undertakings, must be consistent with the principles of the Treaty of Rome.

580. A Member State post office is, in essence, a local delivery service, some of whose customers also require international service. Each Member State post office, no less than any other undertaking, may arrange for the out of state services in whatever manner it chooses. In so doing, a Member State post office may choose to deal with its traditional trading partners, the other Member State post offices. Indeed, post offices may form a "cooperative" to serve the intra EC market and adopt whatever agreements could be adopted by a similar cooperative of private undertakings (like freight forwarders).[319]

581. It would also appear reasonable that Member State governments, as owners, may participate in the management of a postal "cooperative." However, the principle of a "a clear separation of regulatory functions from operational functions"[320] would appear to imply that, within the context of a postal cooperative, Member State governments should not:

- participate in commercial decisions unless they have a direct managerial role;
- adopt, or agree to adopt, "state measures" which discriminate between the postal cooperative and other intra EC delivery services or otherwise distort trade between Member States; nor
- grant aid or other resources to the postal cooperative which would distort trade between Member States.

582. In light of the history of governmental intervention in postal affairs, and postal use of governmental powers, it is suggested that the Community should clarify the conditions under which Member State governments may participate in inter postal relations at the intra EC level.[321]

(4) International Post Corporation

583. As described, the International Post Corporation is a private corporation established by Member State and non Member State post offices in 1989.[322] IPC provides transportation services between post offices for express mail service and other consulting and coordination services.

584. The IPC is in no respect an agency of a Member State government. While it is unclear whether the establishment of the IPC by the Member State post offices was approved, or mandated, by Member State governments, plainly no Member State post office holds more than a minor fraction of the shares and

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[319]Paragraphs 92-94, above.

[320]EC Commission, *Green Paper on the Development of the Common Market for Telecommunications Services and Equipment*, at 4.3.2 (3) (26 May 1987).

[321]The Community could reasonably discourage Member State governments from participating in the management of postal activities in the intra EC market (without prejudice to their participation in the management of postal activities in local markets). The intra EC market is not of major commercial significance for the Member State post offices.

[322]Paragraphs 95-102, 486-496, above.

of the voting authority of the IPC. In law and in practical reality, the IPC is an independent undertaking operating outside the regulatory control of the Member States.

585. The IPC is authorized by its articles to engage in virtually any business. It would not be commercially unreasonable for the IPC to engage in the collection, transport, and inward delivery of mail in the intra EC market. Indeed, legal and policy questions presented by the IPC may be usefully crystallized by asking: *What issues would be posed if the same post offices had jointly purchased an existing private delivery service?*

586. The principal legal issue which would be posed by such a purchase is the risk of illegal state aids.[323] Post offices, as administrators of public assets, and the IPC should generally sell each other services at normal commercial prices. Enforcing such a provision will, of course, require complete transparency of IPC's accounts.

587. A related difficulty is one of official favoritism that could result from the close relationships between the IPC, the post offices, and the national governments. The UPU, for example, is a governmental organization which bars virtually all members of the public from attending meetings. The IPC, however, was permitted to send observers to the recent UPU congress and to the first meeting of the Executive Council (May 1990). Indeed, it may be surmised that the IPC will also be invited to participate in such UPU functions as the contact committee between the Customs Cooperation Council and the Universal Postal Union.

588. In short, it is submitted that *relations between the International Post Corporation and the Member State post offices should be open and transparent and that these relations should be monitored carefully by the Commission.*

(5) Summary of intra EC policy

589. The intra EC market has been discussed at length because it is centrally important to achievement of the Single Market. It may be helpful to recapitulate briefly:

- from an economic perspective, the intra EC market may, for operational reasons, be viewed as a submarket that is related to, but very much smaller than, the core local delivery services of the Member State post offices;
- over the last decade, there seems to be emerging a competitive "second tier" of specialist intra EC delivery services and activities, postal and private, that have substantially improved the services and prices available to Community mailers and shippers;
- in the absence of special circumstances, such as envisioned in Article 90(2), the Treaty appears to mandate a policy of permitting the continued evolution of this "second tier" of services, a policy which in

[323]Paragraphs 398-401, above.

any case is in the best interests of the Community; and

- the historical involvement of Member State governments in inter postal affairs, and the obvious possibilities of official favouritism posed by the IPC suggest the need for clear guidelines in the intra EC market to implement the principle of separation of commercial and regulatory functions.

B. LOCAL MARKET

590. The concept of a "local delivery market" was defined generally to include an area which can be traversed by small trucks reasonably quickly, without disrupting sorting routines.[324] A local market may be imagined as including, roughly, a city and neighboring towns and areas. This definition is deliberately elastic, to be refined as may be warranted by further factual investigation.

591. Although specific figures are unknown, it seems likely that the local market collectively accounts for the majority, perhaps two thirds or more, of total delivery services traffic. For postal services, a figure of 70 to 90 percent appears plausible.[325]

(1) Essential service standard

592. As with the intra EC market, the first issue that must be addressed is: In local delivery service markets, what level of service is the Community able and willing to guarantee as a matter of law, either by (i) legal obligations or (ii) contracts for supplemental service?

593. Local services of all types vary from local market to local market within the Community. Differences in local services may reflect differences in the needs of society, or the tools available, as much as an absence of common standards of service.

594. The same may be said for variations in the *same* local market over time. A common complaint is that, "Postal service is not as good as it was decades ago." In the modern city, as compared to its predecessor, telephones are less expensive and more widely available, traffic congestion has increased, labour rates and attitudes have changed, and the mixture of items delivered by post has altered. Even if letter delivery service is not as quick or reliable as it was years ago, it may be, on the whole, better suited to the needs of society than "in the good old days."

595. While the local nature of most delivery services renders them different from airline and telecommunications systems, it makes them similar to local public transportation services: taxis, buses, and underground. These too vary from place to place and time to time. Differences in "people delivery services" may appear more reasonable and natural because they are experienced from the inside (so to speak), but they spring from much the same causes as differences in other delivery systems.

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[324]Paragraph 192, above.
[325]Paragraph 346, above.

596. These observations suggest the practical difficulties of developing a firm legal essential service standard for local delivery markets and committing the Community to guaranteeing it.

597. Elementary economic considerations also raise questions. Within a local market area, the users of a delivery service, postal or private, are primarily the local businesses. Eighty percent of postal deliveries are initiated by businesses.[326] They pay for the delivery services and largely determine the services by their patronage. To a degree, even a postal monopoly is subject to customers "voting with their feet." Messages can be telephoned. Advertisements can be switched to magazines. Invoices can be hand delivered. Moreover, a public undertaking like the post office is also controlled through political channels.

598. *If* a local market is obtaining, and paying for, a particular level of essential delivery services, the desirability of the Community setting a different essential service standard for *local* delivery services is not apparent. As we have noted, the trend in some current postal reforms appears to be in the opposite direction, towards greater local autonomy.[327] Indeed, even the Community's legal authority to set standards for local services is unclear.[328]

599. In each Member State, the government has established a minimum essential service standard by defining a level of obligatory services for the national post office. Absent contrary evidence, it appears most reasonable to accept this as the standard of essential service for the purposes of the Community as well.

600. More generally, the last two decades have witnessed an extremely rapid evolution of postal and delivery service policy.[329] A too rigid approach to the local delivery services markets at this time could entangle the Community in regulatory policies which may prove clearly inappropriate in a few years and yet be extremely difficult to reverse. In this rapidly evolving field, a cautious approach towards *legal commitments* in regard to local markets appears the wisest policy.

(2) Market structure

601. Given the size of the local markets collectively, it is obvious that a substantial change in market structure, in particular an increase in competition, could vitally affect the finances of Member State post offices. The local market

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[326]Paragraph 197, above.

[327]Paragraph 206 (UK MUA proposal), above.

[328]Paragraph 407, above.

[329]Consider, for example, the following developments, among others, that have taken place since 1969: the evolution of the commercial post office (paragraphs 61-65, above); the development of the private express industry (paragraphs 72-94, above); the establishment of the International Post Corporation (paragraphs 95-102, above); the development of the U.S. Postal Rate Commission (paragraphs 133-149); and the development of the theory of contestable markets (paragraphs 250-264, above), which has quickly become the primary theoretical basis for the monopoly.

is not a relatively small submarket which the post offices serve poorly, but the post offices' core market.

602. New economic theories on the appropriate market structure of postal markets have been developed. These have generated considerable debate and further research, but no consensus.[330] In addition, market developments in the United States[331] and New Zealand[332] (both of which are more "rural" than the Community) appear to merit further study for possible applicability to the Community. The American approach, for example, seems to have resulted in dramatic increases in inward delivery operations in the local markets, especially when compared with Member State postal systems.[333] The New Zealand experiment has produced unanticipated innovations in postal delivery services, although it may be too early to assess the final social costs.

603. In light of such considerations, it is submitted that the Community should consider limiting intervention in the market structure of delivery services in the local market to policies *that have already been proven economically feasible and non disruptive in the local markets of at least one or two Member States*. This approach, in turn, suggests the wisdom of *encouraging Member States to experiment with different solutions to local market structure* rather than encouraging harmonization for its own sake.

604. Within the framework of this approach, two concepts that have proved workable in the local markets of one or more Member States and might be considered for Community wide application are:

- an upper limit to the postal monopoly of about five times the postage charge for the lowest weight step;[334] and
- an exception from the postal monopoly for local "document exchanges."[335]

605. The possibility of ABA remail competition is often viewed by postal officials as an issue of market structure and monopoly.[336] If charges ("terminal dues") between post offices are set at economically correct levels,[337] as they must be under the Treaty,[338] then ABA remail is tantamount to appropriate bulk discounts to large domestic mailers, as well as other EC mailers.[339] This appears to be desirable for post offices,[340] and should be permitted.

606. For reasons of geographic scale, ABA direct delivery appears commercially infeasible in local markets located wholly within a large Member

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[330]Paragraphs 250-264, above.
[331]Paragraphs 124-149, above.
[332]Paragraphs 150-169, above.
[333]Paragraph 126 (Figure 3), above.
[334]Paragraphs 475 and 483, above.
[335]Paragraphs 466 and 484, above.
[336]Paragraphs 428-435 (UPU art 23), above.
[337]Paragraphs 285-304 (UPU terminal dues and economic charges), above.
[338]Paragraphs 381-386 (abuse of dominant position), above.
[339]Paragraph 336-341, above.
[340]Paragraphs 142-144 (documented success in the U.S.), above.

State and a reasonable distance from the border. If a local market is adjacent to a Member State border (as in a small Member State which is a wholly local market), a cautious approach towards disruption of local markets would indicate the need to restrain ABA direct delivery competition as a matter of policy.[341]

(3) Harmonization

607. Apart from legal commitments regarding essential service and fundamental market structure, where caution and experimentation seem best, there also appear to be substantial areas in which Community mailers and shippers would benefit from greater harmonization of local delivery services operations, especially postal operations. These pertain to the possibility of interconnection between different delivery services, postal and private, in a manner roughly similar to the "open network" concepts in the telecommunications field.

608. Harmonization of delivery services might include consideration of such provisions as the following:

- postal delivery codes;
- weight steps, or other basic categories such as priority categories,[342] bulk discount categories, and even size categories;[343]
- restrictions on physical dimensions;
- customs and VAT administration;
- certain accounting and statistical categories; and
- security restrictions.

C. INTRA STATE MARKET

609. The "intra State" market has been defined as the market for delivery services *between* local delivery service areas but *within a single Member State*. As a practical matter, this market might be specified as delivery services between points more than a certain number of kilometers apart. Accordingly, *the intra State market will only be found in certain larger Member States*.

610. Economically, the intra State market lies between the local market and the intra EC market.

- it is likely to be larger than the intra EC market but substantially smaller than the local market for the national post office, accounting for perhaps one quarter of its traffic.[344]
- due to geographic scale considerations,[345] the intra State market is likely less well served by the post office than the local market.

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[341]Paragraphs 342-350 (ABA direct delivery), above.

[342]Paragraph 177, above.

[343]Paragraph 153 (New Zealand), above.

[344]Postal exports as a percentage of the total decrease as the size of a postal territory increases. See paragraph 319 (Table 15), above.

[345]Paragraphs 186-193, above.

- due to end to end control by a single postal administration,[346] the intra State market is likely better served than the intra EC market.

611. Legally, the intra State market is more likely than the local market to affect trade between Member States and therefore come within the jurisdiction of the Community.[347] However, unlike the intra EC market, the intra State market is ultimately controllable through the national political process.

612. In contrast to the local market, the intra State market is one in which ABA direct delivery competition appears operationally feasible for post offices and private delivery services based outside the Member State.[348] Thus, Community level competition offers the possibility of "levelling up" delivery services in the intra State market in much the same manner that parallel imports can harmonize domestic and Community trade in goods.

613. In short, the intra State market appears to be susceptible to policy considerations raised in regard to both the intra EC market and the local market. The mixed character of the intra State market, it is submitted, suggests the need for a *flexible* approach. By way of example, the Commission might consider one, or both, of two policies towards the basic issues of essential service standards and market structure.

614. The first option could be to:

- permit ABA direct delivery competition by private delivery service and by post offices in other Member States, but
- provide a transition period by permitting large Member States to tax ABA services at rates that decline year by year.[349]

615. The second option could be to:

- set essential service standards for specific intra State markets; and
- permit ABA direct delivery competition by private delivery services and post offices in other Member States whenever service falls below essential service levels for longer than a given time period.[350]

616. Either approach (or both together) would permit the Commission to use flexible, pro competitive tools to encourage a substantial "levelling up" of national postal services without jeopardizing the commercial core of the business of a Member State post office, the local markets. Either approach would permit the Commission sufficient flexibility to adapt to an ever increasing level of economic integration in the Single Market, without revising its basic policy.[351]

617. As discussed above in regard to the local market, ABA remail, often

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[346]Paragraphs 69-71 (reasons for poor international service, 191 (difficulties in cross border operations), and 209-216 (importance of end to end control), above.

[347]Paragraphs 387-390 (trade between Member States) and 404-410 (legal scale).

[348]Paragraphs 342-350, above.

[349]The tax might begin at a level that permits the Member State post office to recoup all economies of scale achieved in the inward delivery operation. Paragraph 203, above.

[350]In such markets, ABA service would have to be permitted for at least a commercially reasonable period of time to justify the costs of establishing the service.

[351]Paragraph 389 (effect of increased integration on Community jurisdiction), above.

(although mistakenly in our view) considered as a market structure issue, appears to be equivalent to an unobjectionable bulk discount for domestic mail and should be permitted.

D. INTERNATIONAL MARKET

618. The "international" delivery services market may be defined as the market for delivery service between a point in the Community and a point outside the Community. By analogy to the United States, this market likely includes about 0.5 to 1 percent of the traffic in the total delivery services market.[352]

619. The considerations of economics and law discussed in respect to the intra EC market apply with still greater force in the international market. These considerations strongly indicate the appropriateness of free movement as the basis for Community policy in the international market.

620. The international market is, of course, different from the intra EC market in that the Community itself may not determine the final regulatory regime. It may only adopt a philosophy and negotiating position for discussion with other countries.

621. For more than a century, the Universal Postal Union has been the multilateral forum in which nations have negotiated and renegotiated the major regulatory regime applicable to the international delivery services market.[353] However, the Treaty of Rome and the Universal Postal Union[354] appear to represent radically different, and incompatible, concepts of economic relations between states. The Treaty is built upon a goal of economically undistorted commerce while the UPU is premised upon governmental intervention without regard to actual economic costs.

622. Specifically, the UPU Convention adopted in December 1989 appears to include a number of specific agreements between the post offices of the Member States or the Member States themselves that would affect the international market (and intra EC market, if applied) in a manner inconsistent with the policies of the Treaty. These include provisions that have as their object or effect:

- allocation of outward markets to the national post offices;[355]
- restriction of the inscription of the sender's address in a manner designed to hinder the posting of items abroad; [356]
- fixing by agreement of non cost based charges for inward delivery services with the object of restricting competition;[357]
- fixing by agreement of non cost based charges for services purchased

[352]Paragraph 126, above.
[353]Paragraphs 55-60, above.
[354]Paragraphs 412-426 (institutional premises of UPU), above.
[355]Paragraphs 428-435 (UPU Conv art 23), above.
[356]Paragraphs 434-435 (UPU Conv Det Reg art 113(1bis), above.
[357]Paragraphs 287-290, 436-437 (UPU Conv arts. 61, 64), above.

from airlines;[358]

- authorization of preferential, non cost based, charges for selective customers;[359]
- encouragement of discriminatory customs regulations;[360]
- restriction on inward delivery into France of printed papers with business reply cards addressed to a French address;[361]
- discouragement of commercially desirable relations with private delivery services.[362]

623. None of these provisions appears consistent with the approach of Article 3 of the Treaty or the evolution of a Single Market.[363] Not one of them would be permitted if engaged in by the private delivery services.

624. More generally, it may be recalled that, in the context of the Green Paper on Telecommunications, the Commission stated firmly:

> *Clear separation of regulatory functions from commercial functions*. This is a fundamental pre-condition for the establishment of a competitive market and the participation of the Telecommunications Administrations in this market. In a more competitive environment, the Telecommunications Administrations cannot continue to be both regulator and market participant, i.e., referee and player.[364]

625. In contrast, although the UPU is cloaked in the powers of government,[365] its purpose is to support one group of undertakings, the post offices, without regard for the functioning of the international delivery system *as a whole*.[366] In many cases, support for post offices translates into policies whose object is to restrict other international delivery services and, therefore, the overall market. Moreover the UPU continues to inhibit a degree of competition *between post offices* that modern technology has made possible at the international level.[367]

626. The decision making procedures adopted by the UPU at the 1989 Congress confront the Treaty directly. For the first time the 1989 Congress delegated what are in effect *legislative* powers to the UPU's Executive Council. The Executive Council is authorized to amend the Detailed Regulations of the Convention,[368] regulations which are purportedly binding

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[358]Paragraphs 450-454 (UPU Conv art 83), above.

[359]Paragraphs 438-442 (Conv art 19(12bis)).

[360]Paragraphs 447-449 (UPU Conv Det Reg art 116), above.

[361]UPU Conv Final Protocol, Art XXVter. Note that the French position specifically attacks the approach of private delivery services toward international business reply cards while leaving the postal approach untouched. See paragraphs 117-118, above.

[362]Paragraphs 443-448 (1989 UPU Resolution C91), above.

[363]Paragraphs 404-405, above.

[364]EC Commission, *Green Paper on the Development of the Common Market for Telecommunications Services and Equipment*, at 4.3.2 (3) (26 May 1987) (emphasis by Commission).

[365]Paragraph 417, above.

[366]*E.g.*, paragraph 424 (remarks of UPU Director General), above.

[367]*E.g.*, paragraph 445 (June 1990 letter from UPU asking post offices not to compete via remail procedures), above.

[368]Paragraph 420, above.

on UPU member countries.[369] Yet, according to another UPU regulation, membership in the Executive Council is limited to postal officials.[370] *The delegation of international legislative authority to a UPU council restricted to postal officials cannot, it is submitted, be consistent with the Treaty of Rome.*

627. By negative implication, these UPU provisions, refracted through the prism of the Treaty of Rome, suggest the outlines of a coherent and positive Community policy towards international delivery services.

628. *First*, the Community should state clearly that relations between post offices (and other delivery services) *within* the Community is a matter of Community law and policy, not UPU law and policy.

629. *Second*, the Community should take a more active role in the regulatory aspects of the UPU insofar as they affect the international delivery services market of the Community, including participation in meetings of official bodies of the UPU.

630. *Third*, the Community should develop a strategy for encouraging and facilitating the separation of regulatory and commercial functions in the international market and within the UPU:

- regulatory matters should be embodied in a legally binding international Convention negotiated by the member governments; and
- commercial matters should be embodied in Detailed Regulations, which may be freely negotiated and revised by post offices, subject only to the regulatory supervision.

631. It is suggested that the development of a sound Community regulatory policy with respect to its own Member State post offices and, in particular, with respect to the International Post Corporation will together constitute a start towards a reform strategy for the UPU itself. As a prominent official of a Member State post office has written:

> Placing postal administrations on a sound commercial relationship with one another and modernizing the role of the Universal Postal Union implies *viewing the Acts of the UPU in a new light.* If postal administrations are to be trading partners, *the Convention and Agreements need to be enabling documents* providing the basis for a sound inter-administration commercial relationship. *These could remain the inter-governmental treaties.* Detailed procedures . . . and all aspects of *routine inter-administration relations could have the form of easy-to-use, commonsense, manuals, replacing the Detailed Regulations*. Unnecessary restrictions, prohibitions and complications would be eliminated.[371]

632. *Fourth*, policies designed to assist in the development of postal services and delivery services in underdeveloped countries should be considered

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[369]Paragraph 416, above.

[370]Paragraph 421, above.

[371]D.G. Foot, "The Acts of the UPU: A New Perspective," in *Union Postale*, p. 66-67A (1989). Mr. Foot is head of the territorial, transport, and international relations division of the British Post Office.

separately from commercial policies and should be considered in consultation with appropriate international delivery services and international organizations.

633. Such an approach, it is submitted, is:

- more consistent with the original organizational scheme of the UPU;[372]
- better adapted to the commercial needs of the Member State post offices; and
- better suited to the short and long term interests of the Community.

634. In summary, it is submitted, that the *Community should consider adopting a policy with respect to the international market and the Universal Postal Union that*

- *asserts the primacy of Community policy within the Community; and*
- *takes a constructive approach towards the long term reform of the UPU in a manner consistent with postal policy developments in the Community and the principles of the Treaty.*

3. COMMUNITY REGULATION

635. The foregoing analysis has, at several points, identified the need for effective and knowledgeable application of difficult legal and economic principles to a Community delivery services market. These tasks include the following, among others:

- to define appropriate, market based data categories and develop a better data base for future policy decisions;
- to define and supervise a proposed right of each intra EC shipper to non discriminatory access to "essential services standards" in the local market (presumably provided by postal monopolies);
- to define and supervise the prohibition against the use of "state aids" to Member State post offices and the IPC that might distort competition between Member States;
- to encourage mutual recognition between Member States of successful experiments in the liberalisation of both the intra State markets and the local markets;
- to identify and develop strategies for harmonizing certain aspects of delivery services, especially postal services, in the local markets;
- to define and supervise the flexible application of an "essential service standard" and competition standard in the Member State regional market;
- to develop an appropriate Community policy towards the Universal Postal Union.

636. In Chapter III, the concept and mission of the U.S. Postal Rate Commission were described briefly. It is *not* suggested that such an institutional arrangement is appropriate for the Community. It is suggested that the experiences of the Postal Rate Commission in developing appropriate data

[372]Paragraph 415, above.

bases, allocating common postal costs, and weighing various public interest considerations *may* be fruitfully considered in the evolution of a Community delivery services policy.

637. Regardless of the particular institutional forms, it is submitted that a review of the Community delivery services sector indicates a continuing need for expert and impartial application of certain regulatory principles. This need arises because of the intrinsic difficulty of the underlying economic issues and because of the need to insure fair treatment (i) between all users of the delivery services system and (ii) between postal and private delivery services.

638. Hence, it is submitted that *a Community policy towards delivery services should consider the best ways to provide for expert and impartial regulation of certain aspects of the Community delivery services sector*.

VII. SUMMARY

IMPORTANCE OF THE GREEN PAPER

639. One hundred fifty years ago, the British government reformed the post office along lines suggested by a former school teacher, Rowland Hill. The genius of Hill's plan was that it was grounded firmly in underlying economic realities, undeterred by traditional assumptions or short term political concerns. From this single stroke of sound policy resulted a long, and largely unforeseeable, stream of public benefits, not merely for England but for the entire world.

640. The delivery services system is today no less important to the European Community than the post office was to England in 1840, nor are the prospective gains from reform less promising. There are ample objective reasons to hope that appropriate policies may lead to major increases in economic and social exchanges throughout the Community, but most especially at the intra Community level. To secure these public benefits, as part of its program to complete the establishment of a Single Market, the Commission is preparing a Green Paper on postal and private delivery services.

641. As in Hill's day, if the improvements are great, they will be greater than can be imagined. But the general result of a better delivery system is predictable. It will, like the telecommunications system, diminish further the importance of distance and location. Those who live and work in the major cities—just as those who lived in central London in 1840—enjoy access to the largest available markets for buying goods and selling their services. The chief beneficiaries of a better delivery system will be those who do not live in the major cities, but who will find it easier to participate in the economic and social life of the Community.

642. The purpose of our discussion paper is to contribute to the Commission's inquiry by identifying the important historical, economic, and legal realities, which are the necessary foundations for a policy that will realise this potential.

THE BROAD PICTURE

643. The overall pattern that emerges from our analysis is one of increasing diversity and specialization. At the local level (roughly, cities and neighbouring cities), Member State post offices predominate, with participation by private delivery services that varies from Member State to Member State. At the intra Community level (trade between Member States), Member State post offices still handle more than 95 percent of the traffic, but a significant degree of de facto competition over the past two decades has given birth to a second tier of postal, private, and sometimes joint postal and private, delivery service operations. This development has already produced substantial improvements for intra Community (and international) mailers and shippers.

644. The explanation for the emergence of delivery services specially adapted to intra Community operations lies not, we believe, in postal mismanagement or technical tricks by private couriers but in operational considerations which make it difficult or impossible for a single delivery service operation, postal or private, to serve a local market and a distant market with equal efficiency.

645. The principles embodied in the Treaty of Rome, as well as the Community's interest in binding together the Single Market, argue strongly for encouraging continued evolution of this second tier of intra Community services by recognizing an unrestricted right of "*free movement of delivery services*" in the intra Community market.

646. Given the fact that postal traffic is overwhelmingly local and national in character (about 96 percent), such a policy will have no significant effect upon the scope of services presently offered by Member State post offices, and hence it will have no effect upon the "universality" of postal service available to the Community as a whole. Nor will such a policy have any financial consequences for Member State post offices that could materially affect the range of public services they are today providing in the several Member States.

647. At the local and state levels, the principles embodied in the Treaty, as well as a regard for recent history, argue strongly for a degree of deference towards policy initiatives by the Member States. The last two decades in the delivery services sector have witnessed a remarkable series of operational, policy, and theoretical developments, both in the Community and around the world. Encouraging uniformity and harmonization among Member State post offices in technical areas is highly desirable. But in fundamental issues such as monopoly and market structure, the Community should consider treading more carefully, promoting broad adoption of successful local policy experiments, rather than a rigid harmonization that would end all experimentation.

648. Domestic services between distinctly different areas wholly within a single Member State and external services between the Community and the rest of the world, call for flexible policies. For domestic non local service, Community policy must be adaptable to changes in the level of integration within the Single Market. For external services, the Community can establish

a position, but final policy depends upon negotiations with others.

649. The following sections summarize the historical, foreign, economic, and legal considerations underlying this broad picture.

HISTORY

650. Modern universal postal service was born in the mid nineteenth century as a result of economically correct, cost based reforms advocated by Rowland Hill. Modern universal postal service and uniform postage rates were not dependent upon the existence of a postal monopoly. Hill did not support the postal monopoly, which had been introduced three centuries earlier as a national security measure unrelated to public service.

651. The last two decades have witnessed basic changes in the delivery services sector including:

- the development of a more commercially oriented concept of the post office;
- a decline in the role of the international post while national postal systems have prospered;
- the evolution of private express and delivery services from diverse beginnings into global systems encompassing companies of diverse nationalities;
- the development of a new type of mail, "bulk mail"; and
- the evolution of direct marketing as a major conduit of commerce.

OTHER COUNTRIES

652. United States policy towards the delivery services sector is distinguished by its reliance upon the U.S. Postal Rate Commission, an impartial expert commission that reviews postal rates and practices for fairness to various classes of mailers and to competitors. The overall effect of this expert commission has been to encourage the U.S. post office to focus its attention upon the services in which it retains the greatest operational advantages, final delivery services. Whether or not as a result, in the United States:

- postal rates are less expensive than in Europe generally and the U.S. post office handles three times as many items per person as Community post offices;
- postal traffic grew 46 percent from 1981 to 1988, compared to 22 percent for Member State post offices; and
- excellent and highly competitive private express and parcel delivery services are available to every address in the country.

653. New Zealand has recently embarked upon a bold experiment in privatisation and deregulation of postal services that has provoked a wide ranging debate within the international postal community. As a result of a sharp increase in competition, the New Zealand post office has reconsidered the actual demand for "postal" services and modified its products dramatically, in ways that at least prompt challenging questions about the proper role of the

post office.

ECONOMICS

654. The natural parameters of any delivery service, postal or private, are the *time* and *distance* of transmission. Differences in time of delivery translate into different *service levels* (express, first class, etc.). Differences in distance imply different operations organized around different *geographic scales* (local, regional, or inter regional). A particular delivery service operation, postal or private, that is efficient at one service level or geographic scale is necessarily less efficient at another service level or geographic scale.

655. The core activity of a delivery service, especially postal delivery service, is truly the final ("inward") delivery of items. Final delivery accounts for about 70 percent of the cost of the postal "product" and a still larger fraction of its "profits."

656. A national post office is essentially a "local" delivery service operation. "Local" refers to a geographic scale of operations, an area within which items can be easily transported in a relatively short time without disrupting collection, sorting, and delivery operations.

657. Since they are inherently local services, post offices are not well equipped to provide service to distant markets with equal efficiency. Postal studies document the historically poor quality of such services.

658. Two, somewhat inconsistent, economic theories are today advanced to justify the postal monopoly. The first holds that postal services to rural areas would be discontinued in the absence of a monopoly over non rural services. Upon close examination, this theory does not appear to withstand scrutiny. The second theory derives from recent economic investigations into "contestable markets." So far, no firm consensus among economists has emerged regarding all the implications of this theory for the postal monopoly.

659. Private delivery services handle about 0.3 percent of national traffic and about 2.4 percent of intra Community and international traffic. The relatively greater success of private delivery services in the intra Community and international markets appears to be due to their specialization in regional scale operations and their ability to maintain end to end control across the boundaries of postal territories.

660. Competition between postal and private services in the intra Community and international markets has stimulated substantial service improvements from both types of operators. In 1989, twenty one major post offices (eleven from Member States) established a private, inter postal agency, International Post Corporation, to coordinate future postal services.

661. In sum, both postal and private services appear to be evolving a "second tier" of services, which specializes in intra Community and international operations.

662. Uniformity of *terminal dues* (charges post offices assess each other for delivery of mail) is *unrelated* to uniformity of postage rates from one Member

State to other Member States. It appears to be commercially reasonable for Member State post offices to charge domestic postage for intra Community letters weighing up to 20 grams (except for the post offices of Portugal, Spain, and Greece which may require higher charges because of their relatively low internal postal rates).

663. Intra Community and international markets account for only about 3.6 percent of postal traffic. "Worst case" calculations show that competition in these markets, regardless of whether items are given to the destination post office or delivered by private carrier, will not materially affect the financial integrity of post offices, provided terminal dues are calculated correctly. *For this reason, increased competition at the intra Community level will not jeopardize the public services now provided by Member State post offices within the national markets.*

664. If letters from Member State A are posted with post office B for postal transmission back to addressees in Member State A ("ABA remail"), the result is economically equivalent to a reasonable discount for domestic bulk mailings. ABA remail is very unlikely to harm post office A (again, provided terminal dues are correctly calculated). On the other hand, ABA *direct delivery* services, which provide private inward deliveries back into Member State A, might materially affect post office A in two circumstances: (i) long distance markets within a large Member State, and (ii) small Member States.

LAW

665. The legal framework of the Community requires Member States and their post offices to refrain from actions that will impede the free, and freely competitive, movement of goods and services in the intra Community market (i.e., between Member States), unless it can be shown that such competition will render it technically impossible for a post office to perform its assigned tasks. However, in primarily local markets, the coexistence of Community law and Member State laws recognized by the Treaty must also be taken fully into account.

666. The traditional regulatory framework for inter postal relations is the Universal Postal Union. An analysis of key UPU provisions, however, reveals a basic philosophical inconsistency with the Community law.

667. Over time, application of national postal monopoly laws has evolved away from a literal application of legislative terms that are often ancient and imprecise. The postal monopolies *as applied* do not vary greatly between Member States and may conveniently be viewed in terms of a "standard model." In fact, post offices maintain a claim of monopoly over a very broad range of documents (broader than "letters"), but usually do not object to private express services nor to private collection and preparation of large mailings.

668. The International Post Corporation is a private law agency which, according to its charter, can largely supersede the coordinating role of UPU and engage directly in all types of commercial activities related to international

delivery services. It is controlled by post offices and yet is outside the direct regulatory authority of any national government. By its nature, the IPC gives rise to the possibility of distortions of trade and official favouritism. Clear guidelines from the Commission providing for transparent, arms length relations between IPC and its constituent post offices are called for.

POLICY

669. These economic considerations (geographic scale and service levels) and legal considerations (relationship between Community law and Member State law) are related. In combination, they suggest the desirability of considering Community regulatory policy within a framework of four markets:

- intra Community (between Member States);
- local (an area within which items can be easily and quickly transported without disrupting collection, sorting, and delivery operations);
- intra State (non local, within a single Member State);
- international (between the Community and the rest of the world).

670. A basic level of delivery services is essential to modern society, and Community policy may guarantee the availability of essential service in appropriate circumstance. Standards guaranteed by Community law may be usefully expressed in terms of "essential service standards." An essential service standard can be defined and enforced by the Community by means of legal obligations imposed upon delivery services, postal or private, and by contracts for services not otherwise provided.

671. In the intra Community market, it is suggested that:

- the Community should consider an essential service standard which recognises a right of all intra Community mailers and shippers (i) to have access, on a non discriminatory basis, to delivery services which a Member State has determined to be essential for its own residents and (ii) to have access to such higher levels of service as may be designated by the Community to protect the availability of intra Community service to specific areas, including least-favoured regions;
- it is inconsistent with the Treaty of Rome to impose a national postal monopoly on *outward* delivery services, or a national postal monopoly on *inward* delivery services, and thereby to restrict the free movement of delivery services, postal or private, in the intra Community market, or to distort competition by means of direct or indirect state aids or cross subsidies derived from public services, or by any other artificial means; and
- in regard to relations between post offices, and to the activities of the International Post Corporation, the Community should establish guidelines to implement the principle of separation of commercial and regulatory functions.

672. In the local market, it is suggested that the Community should:

- accept Member States' definitions of "obligatory services" to define

essential service standards;

- encourage Member States to experiment with different solutions to market structure, but refrain from intervening in local market structure except where new concepts have been proven to be non disruptive in one or more Member States;
- consider permitting restrictions upon ABA direct delivery competition (but not ABA remail), particularly in regard to a post office of a small Member State whose territory lies entirely within a single local delivery service market; and
- take the lead in encouraging harmonization among delivery services in a number of operational and technical areas.

673. The intra State market, the market for delivery services between different local delivery service areas within a single Member State, is an economic and legal hybrid of the local and intra Community cases. By definition, intra State markets will only be found in larger Member States. It is suggested that the Community consider one or both of the follo wing flexible policies:

- permit ABA direct delivery in such markets, but allow Member States, during a transition period, to tax such services according to a declining schedule of rates; and/or
- set essential service standards for such markets and permit ABA direct delivery competition where postal services fall below such levels.

674. In the international market, it is suggested that the Community adopt a policy stance with respect to the Universal Postal Union (and similar organisations) in which the Community should:

- state clearly that relations between post offices (and other delivery services) *within* the Community is a matter of Community law and policy, not UPU law and policy;
- take a more active role in the regulatory aspects of the UPU insofar as they affect the international delivery services market of the Community, including participation in meetings of all official bodies of the UPU;
- develop a strategy for encouraging and facilitating the separation of regulatory and commercial functions in the international market and within the UPU; and
- consider policies designed to assist in the development of postal services and delivery services in developing countries separately from commercial policies; they should be considered in consultation with all appropriate international delivery services and international organizations.

675. A review of legal and economic issues presented by the delivery services industry suggests that there will be a continuing need for expert and impartial regulation of the industry. While an approach such as the U.S. Postal Rate Commission may be inappropriate in the Community, the Community should consider an appropriate solution to the intrinsic regulatory problems presented

by an industry which includes both public and pri vate undertakings.

CONCLUSION

676. We emphasize again that the foregoing has been prepared as a "discussion paper" only, not as a catalog of certitudes or demands. We have tried, at each point, to not only to present ideas but also to expose our reasoning and sources, so that others may assist in correcting oversights.

677. In closing, we would, with the greatest respect, recall to the Commission the closing words of Rowland Hill's 1837 pamphlet on postal polic y reform:

> *Let the Government then, take the matter in hand; let them subject these proposals to the severest scrutiny, availing themselves of the information possessed by able men who constitute the present Commission of Inquiry; let them proceed with boldness which the present state of [affairs] justifies and requires, and they will add another claim—not inferior to any they now possess, nor one which will pass unregarded—to the gratitude and affection of the people.*

21

EEO Comment on Postal Green Paper (1992)

OVERVIEW

The European Express Organisation includes within its membership most of the major Community level "private operators," to use the term of the *Postal Green Paper*. We believe the *Postal Green Paper* is an important and commendable analysis of the Community delivery services sector, and we generally agree with its overall approach. For those familiar with the complexities of the *Postal Green Paper*, we present a short overview of our position.

WHAT WE LIKE —

- Liberalisation of cross border delivery services, both outward and inward.
- Liberalisation of domestic preparation, delivery, and document exchange services where, according to the experience of a substantial portion of the Community, liberalisation has proved consistent with affordable universal service.
- Community participation at the Universal Postal Union and other intergovernmental organisations.
- Establishment of impartial regulators to monitor the quality and pricing of reserved services.
- Equal access to reserved services at cost based prices.
- Acceptance of the principle that reserved service may not cross subsidize non reserved services.

European Express Organisation, "Comments of the European Express Organisation on the Postal Green Paper" (Nov 1992) (submitted to European Commission). Appendix omitted.

WHAT WE DO NOT LIKE —

- Insufficient analysis of the economics underlying the reserved service concept, including a notable failure to consult leading independent economists.
- Insufficient analysis of EC law, particularly a failure to consider the principle of the least restrictive alternative.
- Failure to clarify the relationship between regulation and reserved services.
- Possibility of subsidising universal service from the revenues of reserved services.

WHAT WE WOULD LIKE ADDED —

- A Community definition of universal service that distinguishes clearly between the need to assure against undue isolation of the "secondary distribution" area of the Community (rural and remote places) and the need to assure against inefficient or unresponsive reserved services in the "primary distribution" area (cities and towns).
- A program for further study that includes not only senior governmental officials but also postal and private operators, users, consumers, and leading independent economists.
- A clear and unequivocal principle that all non reserved services, postal and private, must be treated identically under all non postal laws, including customs, VAT, etc.
- An explicit statement of the rights of mailers to ascertain the quality of reserved services on a comparative, Community wide basis, and right of redress for service failures.

1. INTRODUCTION

1 In June 1992, the European Commission published the *Green Paper on the Development of the Single Market for Postal Services* (*Postal Green Paper* or "PGP") which set out, for the purposes of discussion, an analysis of the European Community's delivery services sector and possible public policies for the future.[1] The Commission has requested comments from the Member States and the public by the end of the year.

2 The European Express Organisation (EEO) is a trade association of private delivery services operating in the Community. The EEO is based in Brussels at Avenue L. Gribaumont 1, 1150 Bruxelles (telephone 32/2/772 15 23). The membership of the EEO is given in Appendix A.

3 The EEO is the largest Community level association of private operators providing substantial delivery services at the intra Community level. In addition, our various members provide a significant, but unknown, fraction of

[1]COM(91) 476 final (catalog number CB-CO-92-263-EN-C).

private delivery services at the national and local levels in the Community.

4 The EEO has previously submitted to the Commission preliminary comments on the *Postal Green Paper*. The present document represents a more detailed view, which draws upon further reflection and a consideration of views and advice expressed by many others, including other members of the express industry, colleagues in the postal administrations, members of users associations, and civil servants in the Member States and European Commission. We gratefully acknowledge the assistance and advice of all, but, of course, these comments remain the responsibility of the European Express Organisation.

5 In the *Postal Green Paper*, the Commission has undertaken a comprehensive survey of the delivery services sector of the Community. This is an intrinsically difficult subject. The sector is poorly defined in the economic literature, and there is little intellectual consensus on appropriate policies to further the public interest. At the same time some of the largest social and political interests in the Community are vitally affected. To make matters worse for the policy maker, the last two decades have seen dramatic changes in the nature of delivery services and the demands of users. Despite these formidable difficulties, the *Postal Green Paper* has assembled a vast collection of facts, observations, and proposals, ultimately synthesized into ten recommendations. Overall, the *Postal Green Paper* is an important and commendable contribution towards a sound policy in a sector little attended to and often misunderstood.

6 Our comments are divided into four sections. Following this introduction, we summarize our understanding of the key points in the *Postal Green Paper* in part 2. In part 3, we provide a summary of our views. Part 4 presents detailed comments.

7 A brief explanation of notational conventions used in this paper is necessary. Unless otherwise indicated, *section* references are to sections of the *Postal Green Paper*, indicated thus: § (chapter)-(section).(subsection). For example, § 4-4 refers to section 4 of chapter 4, beginning on page 74 of the English edition of the *Postal Green Paper*. § 4-4.1 refers to chapter 4, section 4, subsection 1, entitled "Letters" and beginning on page 75. Matter in section 4 prior to subsection 1 will be referred to as subsection 0, *a convention not used in the PGP*. Thus, § 4-4.0 refers to the text that begins and ends on page 74 of the English version. This is to be distinguished from "§ 4-4" which refers to the whole of section 4 of chapter 4, including all subsections, pages 74 through 78 in the English version. The Executive Summary chapter will be referred to as "ES"; annexes will be referred by the Annex number (e.g., "A1" for Annex 1).

8 Unless otherwise indicated, paragraph numbers, for example "¶ 9," are cross references to paragraphs of these Comments.

9 Finally, in quoted text, emphasis *indicated by italics* has been added by us. Emphasis <u>indicated by underscoring</u> reproduces emphasis in the original

text.

2. OVERVIEW OF GREEN PAPER

10 In our view, what emerges from a careful study of the *Postal Green Paper* is a simple and coherent policy framework that is at once prudent and progressive. It is based logically upon three major elements: a survey of the facts, a consideration of the traditional national postal monopolies structure, and a view as to the appropriate role of Community policy in light of the EC Treaty.

2.1 SALIENT FACTS

11 Most of the *Postal Green Paper* consists of a careful description of the delivery services market and how it operates. Chapter 2 describes the postal administrations. Chapters 4 and 5, supplemented by various Annexes, analyse the commercial, operational, and economic facets of the industry. Overall, the *Postal Green Paper* implies that sound policy must, above all, be based upon a clear understanding of the facts of the marketplace. We agree completely.

12 For us, four factual findings seem particularly pertinent to policy considerations:

- The delivery services sector is overwhelmingly a business service. Eighty percent of mail is sent by businesses, and another 10 percent is mail sent to businesses by individuals. Only 10 percent of mail is exchanged between individuals. § 4-3.3. The availability and affordability of personal letter services pose distinctly different issues from the availability and affordability of business services purchased for commercial purposes.
- Employment accounts for about 70 percent of postal costs. § 6-3.1. Hence, to the extent that postal tariffs are cost based, they must reflect differences in labour rates throughout the Community.
- *Postal* delivery services are primarily local in nature. Almost 60 percent of the mail is delivered to an address in the same city or an adjacent locality. § A3-9.4. For the average Member State, only about 3.6 percent of the mail is sent out of the Member State; for the Community as a whole, only about 1.5 percent of mail is exported.[2] Therefore, cross border issues involve substantially different considerations from domestic postal issues.
- Postal service in the cross border market is significantly inferior to postal service in the local and national markets. § 4-7.2. This suggests that it may not be possible for the same organisations to provide

[2] § A2-4 (table 6) estimates cross border mail comprises 7 percent of Community mail. However, we believe that this figure results from incorrectly counting cross border mail twice, once as inbound mail and once as outbound mail. We believe 3.6 percent is the correct figure. See ¶ 174, below.

optimal service in both local and cross border markets.

13 Overall, what emerges from the *Postal Green Paper* is a picture of a sector that is neither monolithic nor static. The *Postal Green Paper* concentrates upon the postal administrations, since they are the largest delivery organisations, carry the great majority of all traffic, and earn about 57 percent of total revenue. However, the postal administrations are not equally preeminent in all aspects of the sector. Their core function is the collection and delivery of local documents. Other services are built upon this operational base. Higher (express) and lower (second class) priority services are offered, using the same collection systems, office capacity, and so forth. Similarly, parcel services have been incorporated into the system. Local letter delivery operations are linked to form national systems and cross border systems.

14 Because of economies of scale in the final delivery of mail, it is difficult or impossible to compete with an efficient postal administration in its core function. However, outside this core area, a postal administration may not be as efficient as a private (or public) operator that focuses upon a related service as its core function. In various Member States, specialist private services have arisen for express services, newspaper delivery, parcel delivery, document exchanges, and mail preparation activities.[3] Cross border remail and "direct delivery"[4] appear to represent the beginnings of the development of specialist cross border mail systems.

15 In short, different types of organisations predominate in different aspects of the industry, and the same organisations offer more than one type of service. These systems overlap, in geographic scale and scope of service. They complement each other, providing a range of services that no single organisation or type of organisation could provide. Collectively, they constitute the Community delivery services system.

2.2 REGULATORY HERITAGE: 12 NATIONAL POSTAL MONOPOLIES

16 Chapter 2 and Annex 4 are devoted to the second major ingredient in the *Postal Green Paper*'s analysis: the regulatory environment. The central regulatory issue is: what position should Community policy take with respect to the 12 national postal monopolies?

17 Obviously, the natural economic evolution of the delivery services sector has been artificially shaped by the persistence of these sixteenth-century legal monopolies. Although historically unrelated to the development of universal postal service in the mid-nineteenth century, the postal monopolies are today defended by many postal administrations on the ground that they are necessary

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[3]We do not collect data on the revenues earned by our members. However, the *Postal Green Paper*'s estimate of 20 billion ECU as the revenues earned by Community private operators, § 4-4.0, appears to us to be substantially too high.

[4]By "direct delivery" we mean the physical delivery of letters to the addressee by the private operator, as opposed to "remail", which occurs when the private operator tenders the mail to a postal administration for final delivery.

to maintain service to all addresses in the national territory. A postal monopoly over urban services, argue some postal officials, is needed to provide revenues to finance rural services. Other postal officials argue that a monopoly permits the optimization of economies of scale and scope in a manner that would not be sustainable under competitive conditions.

18 The *Postal Green Paper* reviews these economic justifications for the monopoly in chapter 5. Section 5-2 addresses the economic proposition that a monopoly is required to support universal service at *affordable* postage rates. Section 5-6 discusses the idea that a monopoly is needed to maintain a *uniform* postage rate (*péréquation tarifaire*). The *Postal Green Paper*'s limited review of economic theory is not presented as definitive. In fact, the *Postal Green Paper* identifies no solid factual or theoretical basis for a postal monopoly. Nor does it undertake a survey of leading economic thought in this area. Indeed, we submit, if the Community could start with a *tabula rasa*, virtually all leading independent economists would counsel against adopting a legal postal monopoly as a means of accomplishing public policy goals; instead, they would advocate other, more efficient policy means, such as subsidy or contracts.

19 Aside from economic theory, the *Postal Green Paper* surveys the scope of legal monopolies and various indices of the price and quality of postal service in the Member States. The data do not suggest a clear, positive relationship between the scope of a legal monopoly and the quality of service provided.[5]

2.3 PROBLEMS IDENTIFIED

20 Rather than relying upon extensive economic and legal analysis, the *Postal Green Paper*'s basic approach is to identify practical inadequacies in the Community's delivery system. Three particular problems are identified:

- Postal administrations provide inadequate cross border service (ES-3.3), a situation exacerbated by a lack of harmonisation among postal administrations (ES-3.1).
- Some areas of the Community get better postal service than others, placing those with lesser service levels at a relative commercial and social disadvantage (ES-3.2, ES-3.4).
- In some areas of the Community, the scope of services reserved for the postal administration is larger than required to ensure universal service, and this regulatory excess distorts the Community economy. (ES-3.5).

21 The *Postal Green Paper* also implicitly identifies a fourth problem: the unresponsiveness of at least some postal administrations to the needs of users, especially in the provision of reserved services. This problem is implied by a number of observations and proposed recommendations, such as calls for public posting of tariffs (§ 9-5.5), more accurate monitoring of the quality of postal services (§ 9-8.1), and greater postal responsiveness to customer

[5]See discussion of the principle of proportionality, ¶¶ 126-136, below.

complaints (§ 9-8.8).

22 It should be obvious that there is a common thread to these four problem areas: each reflects a different aspect of the heritage of national postal monopolies. While the monopolies are not the only reason for differences in services among Member States, it is reasonable to assume that rigid segmentation of the market has prevented the homogenisation that an open competitive market fosters. If the scope of a postal monopoly is excessive, this is, of course, directly related to the existence of the monopoly in the first place. Less directly, but no less effectively, the national monopoly structure has also restrained the development of regional, cross border operations; for the national postal monopolist, cross border service is only a byproduct of national service. Similarly, it takes no imagination to recognize the connection between monopoly status and a lack of customer responsi veness.

2.4 ROLE OF COMMUNITY POLICY

23 In addition to facts and monopoly laws, a particular view as to the policy role of the Community in relation to the Member States is also reflected in the *Postal Green Paper*. The Commission tacitly assumes that the Community, like the Member States, should assure that all citizens are provided a basic level of postal service, a service felt necessary for civilized life. If postal service is overpriced or inadequate in a part of the Community, this represents a failure of the Community government as well as a breakdown in the national government.

24 In § 3-6, the *Postal Green Paper* surveys the legal tools at the Community's disposal. It notes that the EC Treaty mandates a generally liberal philosophy towards trade between Member States. Under the Single European Act, the Community is also charged with harmonising state measures which affect "the establishment or functioning of the common market." Article 100a(1). On the other hand, the Member States retain the right to organise property ownership within their territories as they see fit. In administration, the Community is guided by a general "principle of subsidiarity," i.e., that governmental decisions should be taken at the lowest level consistent with the proper functioning of the Community.

2.5 RATIONALE OF THE GREEN PAPER

25 The *Postal Green Paper* seeks a synthesis of these factual, legal, and policy elements into a coherent Community policy towards the delivery services sector. Chapter 7 identifies existing problems. Chapter 8 discusses possible policies. Chapter 9 distills these into a series of ten recommendations. The *Postal Green Paper* does not, however, provide a clear thread that ties the identified problems to the specific recommendations. It seems useful, however, to set out our understanding of this rationale, for our comments are based upon this understanding.

26 It seems to us that the essential rationale of the *Postal Green Paper* might

be summarized as follows. The *Postal Green Paper* recommends that the Community assume an obligation to use Community powers to assure the provision of a basic level of delivery service. The service should be available to all Community citizens for delivery to substantially all addresses in the Community. This service is to be described in a Community definition of "universal service." § 9-1.1.

27 If universal service is provided in all Member States, then it is provided throughout the Community. To assure universal service throughout the Community, the Community will rely in the first instance upon the Member States to assure universal service in their respective territories. The Member States, in turn, have sought to assure universal service by the establishment of certain reserved services for their postal administrations. The *Postal Green Paper* calls for a Community definition for reserved services based upon price and weight. The *Postal Green Paper* also proposes the inclusion or exclusion of various specific services.

28 To prevent the abuse or excessive use of reserved services, the *Postal Green Paper* recommends that reserved services should be regulated by certain principles, which might be summarized as follows:

- A Member State should not grant a greater scope of reserved services than appears plausibly necessary to assure the provision of universal service. This is referred to as the "principle of proportionality."
- A Member State should carefully monitor, and publicly disclose, the costs and quality of reserved services and other services required to be provided universally.
- A Member State should ensure that a reserved service is accessible to all Community citizens on an equal, non discriminatory basis (although this principle should not fully apply to other postal administrations).
- A Member State should ensure that a reserved service is not used to distort competition in the non reserved sector of delivery services (although a reserved service can cross subsidise a universal service).

29 In cross border (intra Community and international) commerce, the *Postal Green Paper* recommends liberalisation of all delivery services. Postal administrations would be required to deal with each other, and private operators, along normal commercial lines, without resort to traditional non market solutions such as terminal dues agreements and Article 25 of the Universal Postal Convention. At the same time, postal administrations would be free to price cross border services at cost related levels.

30 The *Postal Green Paper* proposes adaptation periods, of unspecified length, should be considered in reforming the scope of the reserved area. More generally, the *Postal Green Paper* recommends that an impartial regulatory authority at the Member State level should enforce all of the foregoing principles. If a Member State fails to provide an assured universal service of acceptable quality, the *Postal Green Paper* implies that the Community will take further unspecified action to meet its obligation to assure affordable

universal service.

31 At the international level, the *Postal Green Paper* further recommends that the Community should participate directly in intergovernmental organisations to advocate incorporation of Community principles into international agreements. Where existing international obligations give rise to the possibility of circumventing Community policies, the Community would act, or permit Member States to act, to prevent abuse.

3. SUMMARY OF COMMENTS

32 We believe the *Postal Green Paper* is an important and commendable step forward in the development of governmental policy towards the delivery services sector. We agree and strongly support the overall approach and rationale of the *Postal Green Paper*.

3.1 UNIVERSAL SERVICE

33 The *Postal Green Paper* begins by recommending that the Community adopt a definition of universal service. The implications of this call are unclear because the *Postal Green Paper* uses the term "universal service" ambiguously. We understand, however, that such a definition would commit the Community to assure that a minimum level of delivery services, postal or private, will be available to all Community citizens for delivery to all Community addresses. While we support a Community definition of universal service, we believe that the details, left vague in the *Postal Green Paper*, must be worked out with care. A definition should not expose the Community to openended financial obligations. It should focus clearly upon the needs of Community citizens. A universal service should also take a neutral position in regard to reserved services; that is, it should be possible for a Member State to ensure "universal service" by means of either a reserved or a liberal approach towards its delivery services sector.

34 The foundation of a universal service definition should be, we suggest, Article 20 of the Universal Postal Convention and the obligation under the EC Treaty to give "national treatment" to intra Community shipments. Applying these legal concepts, the Community may assure that all letters, printed papers, and small packets weighing up to 2 kilograms will be delivered to every address in the Community.

35 In setting specific price and service standards, the Community should recognize important policy distinctions between the *primary distribution* area, cities and towns, and the *secondary distribution* area, rural and remote places. In the primary distribution area, Community policy must guard against inadequate or unresponsive service by reserved services. In secondary areas, Community policy should act to remedy weaknesses in a competitive delivery services market. For secondary distribution areas, the Community should consider price and service guarantees designed to ensure that, for basic letter service, no address will be unduly isolated relative to the primary distribution

area.[6]

36 On the other hand, in the primary distribution area, Community price and service standards should be derived by estimating what the competitive market would provide and holding reserved services to similar performance levels. In the primary distribution area, the universal service definition should thus serve as a *threshold* standard. If a reserved service persistently fails to attain this minimum standard, the Community should require an end to the reserv ation.

37 It should be noted that *Postal Green Paper* speaks of assuring *affordable* universal service, not of protecting the "unitary tariff." We agree. The unitary tariff was a useful, cost based reform introduced into postal practice in 1840. If cost structures have changed, postage rates should be adapted accordingly, rather than be shackled by traditional solutions. *Affordability*, not uniformity of price, identifies the proper social concern of the Community as far as individual mailers are concerned.

3.2 RESERVED SERVICES

38 We submit that a Community approach towards reserved services should be crafted from three basic principles inherent in the EC Treaty: the principle of the least restrictive alternative, the principle of proportionality, and the principle of subsidiarity. The *Postal Green Paper*'s analysis does not, we believe, sufficiently consider the first and third principles.

39 Applying these three principles, we agree with the *Postal Green Paper*'s recommendation of liberalisation of the cross border market. Recent arguments by some postal administrations that inward cross border delivery services should be reserved have no merit.

40 In the domestic markets, we submit that the *Postal Green Paper* has not identified sufficient economic evidence that would justify any level of reserved service consistent with the principle of the least restrictive alternative. Nonetheless, by applying the principle of subsidiarity and the principle of proportionality, we agree with the bottom line conclusion of the *Postal Green Paper* that Member States should be permitted to reserve certain services they deem necessary to the provision of affordable universal postal service within their respective territories. We also agree with the *Postal Green Paper* that Member States should not be permitted to reserve services in excess of that plausibly related to this social objective.

41 The basic rule for the domestic reserved area, we believe, should be that no Member State may reserve a service which, according to experience in a substantial portion of the Community, appears unnecessary to sustain affordable universal postal service. On this basis, we submit the reserved area need not include the carriage of "letters" which either (i) weigh more than 500

[6]The distinction between primary and secondary distribution areas is a conceptual device broadly borrowed from Rowland Hill. It is, we suggest, helpful for *clarifying* the specific objectives of Community policy. See ¶¶ 83-85, below.

grams or (ii) are charged more than five times the basic postage rate for the lowest weight step (or more than certain alternative indices). The price limit effectively serves as a Community definition for non reserved "express" services. Nor, we believe, is it necessary to include in the reserved area non letters such as printed papers or parcels of any size, nor specialised services such as document exchanges and mail preparation services. Where a postal administration uses a "content neutral" two-tiered postal classification scheme, we suggest that the reserved area should be limited to one class of mail, either first or second. Under this general approach, we suggest that the Community await further experimentation with the liberalisation of direct mail by the Member States before adopting a Community wide solution, but we also suggest that, as a practical matter, such forbearance is unlikely to impair the program of liberalisation of direct mail envisioned by the *Postal Green Paper*.[7]

42 We do not believe any adaptation period is appropriate for liberalisation of cross border services, with the possible exception of a few Member States for whom the cross border market is an extraordinarily large fraction of their total activity. On the other hand, we agree that adaptation periods may be appropriate in the application of Community wide limits to national reserved services. Adaptation periods should be decided by the Commission on a case by case basis. They should be permitted only on an exceptional basis, only where supported by demonstrated facts, and only for the shortest period necessary to accomplish clearly defined public objectives. A definite date should be fixed for the conclusion of all adaptation periods.

43 While we agree with the establishment of a Senior Officials Group on Posts (SOGP) for further study of the scope of the reserved area, we feel strongly that the group should include experts from postal and private operators, representatives of large users and consumers, and independent economic experts. We believe that the scope of this working party should be expanded to include not only reserved services but also all non postal laws that affect postal and private operators differently. Most urgently, imminent and unequal changes in the VAT laws require review *before 1 January 1993*.

3.3 REGULATION

44 We agree with the *Postal Green Paper*'s call for regulation of the access, prices, and quality of *reserved services*. Overall, reserved services should be completely non discriminatory, cost based (and unbundled), and transparent. We cannot agree with the suggestion that postal administrations may accord access rights to other postal administrations that are different from those accorded to similarly situated intra Community mailers and private operators. As a technical matter, we also suggest that the cost standard for postal services should not be "average cost" but, roughly stated, long term marginal costs plus a reasonable share of fixed costs.

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[7] See ¶ 173, below.

45 In general, extraordinary regulatory controls over reserved services should not be extended to non reserved postal services. On the other hand, non reserved services of postal administrations should abide by the same laws pertaining to competition, business organisation, fair trade practices, taxation, customs, etc. that apply to private operators. Services that are not "reserved" should not, we believe strongly, benefit from any other "special or exclusive rights" or "state aids." In particular, there is no justification for permitting reserved services to cross subsidize non reserved, universal services.

46 In addition, we suggest that improvement of reserved services will come not only from regulatory standards but, perhaps even more, from giving users expanded rights to ascertain the costs and quality of services provided, the comparative costs and quality of reserved services provided by other postal administrations, and rights of redress, including monetary compensation, in cases of service failure. Such a *mailer's bill of rights* is, in fact, quite similar to new arrangements agreed between some postal administrations, for the delivery of each others' mail.

3.4 REGULATORS

47 A crucial element of the program set forth in the *Postal Green Paper* is the role of the regulator. The *Postal Green Paper* proposes that Member States establish impartial regulatory bodies to ensure that the regulatory principles are observed in each Member State. We support this approach. However, we urge the Community to ensure the impartiality of regulators by specifying standards of impartiality and basic rules of procedure, drawn from judicial and administrative precedents.

48 We also suggest the role of the regulator needs to be carefully distinguished from the roles of the legislator, the Member State as owner, and the courts.

49 While the primary jurisdiction of the regulator will involve the reserved services, we believe that the regulator must have "ancillary jurisdiction" over certain non reserved services. Where a postal administration produces both reserved and non reserved services with common facilities, the regulator must have authority over both services in order to allocate costs and revenues between the two. The regulator must also be able to impose sufficient record keeping requirements on private operators, and perhaps large users, so as to protect reforms to reserved services, terminal dues, and other aspects of postal policy proposed in the *Postal Green Paper*.

50 At the level of international regulation, we agree completely with the *Postal Green Paper*'s recommendation that the Community should become more involved in the activities of inter governmental bodies such as the Universal Postal Union. Within these circles, the Community should advocate a number of reforms consistent with the *Postal Green Paper* philosophy, including repeal of Article 25 of the Universal Postal Convention in its entirety.

4. DETAILED COMMENTS

51 The following detailed comments are grouped into ten sections, corresponding to the ten recommendations of the *Postal Green Paper*, chapter 9.

4.1 COMMUNITY DEFINITION OF "UNIVERSAL SERVICE"

4.1.1 Confusion over the term "universal service"

52 In its detailed overview of postal services in Annex 2, the *Postal Green Paper* uses the term "universal service" as follows:

> Universal service refers to the access by which every citizen or organisation may post items into the public postal service; it also refers to the ability of the postal service to gain access to all addresses in the Community in order to deliver postal items. [§ A2.4]

Operationally, the ability to deliver implies the ability to collect, whether via retail offices, collection boxes, or at the point of delivery. Hence, in simple terms, "universal service" is here used in its ordinary sense, referring to a delivery service that delivers to every address in a given geographic area.

53 In the Glossary, however, the *Postal Green Paper* defines "universal service" as a specialized term of art:

> The *obligatory/mandatory* provision of postal services throughout the territory to which the obligation applies. This implies accessibility to collections by which mail being sent can be input into the mail network as well as delivery to every address in the territory. *It also implies affordable prices and good quality of service*.
>
> *Although other operations may provide services throughout the territory, the phrase "universal service" refers in the Green Paper only to those operations which have to provide universally as a regulatory obligation.* [*sic*]

Defined in this manner, "universal service" means something quite different from the ordinary import of the words.

54 The discussion of the final recommendations of the *Postal Green Paper*, found in chapter 9, begins by stating:

> The key social requirement for postal services is the maintenance of the universal service. *Universal service without any conditions about price can be provided in the competitive (non-reserved) sector*. But, *in order for the service to be at a price affordable to all, it is necessary to have sufficient economic returns to scale*. These can only be achieved through the granting of some special and exclusive rights—hence the need for reserved services. . . .
>
> 1.1 *A reference definition should be decided for universal service throughout the Community*. This definition will need to take into account the Community's social and economic requirements. . . . A Member State

> would still be able to extend the definition to be applied to its own territory, in line with its legitimate public interests.
>
> 1.2 *In order to ensure universal service at a price affordable to all*, a set of reserved services must be established. The list of services that could be included in this set of reserved services should be established at Community level. [§ 9-1.0-§ 9-1.2]

55 In this passage, the *Postal Green Paper* is clearly using the term "universal service" in *both* senses. In the first italicized sentence, the term "universal service" means a delivery service of a certain geographic scope, i.e., one that serves all addresses in a given area. In recommendations § 9-1.1 and § 9-1.2, the *Postal Green Paper* uses the term "universal service" in the other sense, as shorthand for "a delivery service available to all addresses within a given geographic area and ensured by governmental authority to be more affordable than would otherwise be provided by the competitive market." Thus, when recommendation § 9-1.1 calls for a definition of "universal service" to be decided at Community level, it is calling for the delineation of a Community mandate in some sense; it is not merely calling for agreement on what sort of services should be provided to all addresses in the Community.[8]

56 The *Postal Green Paper*'s dual use of the term "universal service" is unfortunately confusing. The use of a specialized, non obvious definition for "universal service" is particularly perplexing. In our comments, "universal service" means simply "service to all addresses." We shall use "assured universal service" to refer to a universal service which is "obligatory/mandatory." We prefer "assured" to "mandatory" because "assured" focuses on the role of Community policy in the lives of citizens. "Mandatory" and "obligatory," on the other hand, focus on the effect of Community policy on postal administrations. When we refer to affordable or good quality universal service, we add these modifiers explicitly.

4.1.2 Why a Community definition of universal service?

57 The *Postal Green Paper*'s first recommendation states that a definition for "universal service" should be agreed. § 9-1.1. While calling for a definition of assured universal service, the *Postal Green Paper* is unclear about who is assuring what. It seems, however, that the *Postal Green Paper* envisions that the *Community* would take on legal obligations of an undefined nature. These obligations would act as a guarantee or assurance upon which citizens could rely. In this manner, the Community would give legal assurances that a minimum level of delivery service will be provided at rates that are, at least in some cases, more "affordable" than would otherwise be provided by the

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[8]Despite these difficulties, it should be noted that the concept of "universal service" is a distinct improvement over the concept of "basic service." The concept of "basic service"—together with its companion, "value added service"—bedeviled the telecommunications policy debate to the end. In the early days of the *Postal Green Paper* discussions, the notion of "basic service" threatened to befog postal policy as well.

competitive market. A call for Community agreement on a definition of "universal service" does not make clear that the *Postal Green Paper* has assumed, without explanation, that there is a need for Community intervention in the delivery services sector.

58 In our view, this unstated recommendation to intervene in the delivery services sector should be set out clearly and considered carefully in light of the magnitude of potential liabilities that might be incurred. After all, the Community delivery services sector involves annual revenues of about 46 billion ECU, of which the postal administrations' share is 26 billion ECU. § 4-4. What legal and economic obligations will the Community incur by virtue of a definition of assured universal service? If assured universal service is not provided in a Member State, what will the Community do? Will the Community be obligated to remedy the situation? How can the Community remedy inadequate delivery service? Will it permit other postal administrations and private operators to compete in the local and national markets, effectively abolishing the reserved service in a Member State? Will the Community be required to subsidize a Member State postal administration? Could the Community be required to develop its own "backup" postal capability, perhaps through a contracting program?

59 Given the finiteness of public resources, it is necessary to weigh public obligations against public needs. The *Postal Green Paper* identifies certain deficiencies in the Community delivery system: interoperability problems between postal administrations caused by a lack of operational harmonisation, variations in the quality of service among national postal administrations, and market distortions caused by excessive national postal monopolies. Will a Community definition solve the particular problems identified? Do these observations really add up to a need for a Community definition of assured universal service? Or do they suggest more specific, and less intrusive remedies such as improvements in cross border service levels and corrective Community pressure where, on occasion, a postal administration may abuse its commercial position by failing to respond to customer needs?

60 It is our feeling that the *Postal Green Paper* is not sufficiently clear about the *raison d'être* of a Community universal service definition. Left unclear, cynics might suggest that the definition of universal service is merely a smoke screen for allowing the persistence of unjustifiable postal monopolies. This charge, in turn, obscures the overall purposes of the *Postal Green Paper* itself. Such an interpretation of the universal service concept, in our opinion, fails to do justice either to the intentions of the Commission or to the motives of many of our postal colleagues.

61 On the other hand, the idea of a Community definition of universal service may also be viewed in a manner that is oriented towards users and the public generally. One might summarize this view of a universal service definition as follows:

> While delivery services are primarily local and national in scope, they collectively form an interconnected and complementary system of services which are vital to the economic and social cohesion of the Community. Each Community citizen has a clear interest in the ability to communicate, in both personal and business matters, with every portion of the Community. If the quality of the delivery services sector in any Member State falls below basic minimum standards or if any portion of the Community is unduly isolated from the primary delivery services network, then the life of the Community as a whole is diminished, not simply the life of a given Member State.
>
> To promote and protect a basic level of affordable, universal delivery service throughout the Community, the Commission is proposing to define a series of criteria which the Community will require to be met by the delivery services sector as a whole. Given the predominantly local and national scope of most delivery services, it is expected that, at the national level, the Member States will act to ensure that these criteria are met, whether by the use of reserved services or by the use of competition and direct supplementary measures, as they deem appropriate. At the intra Community and international levels, the Community will require a liberal approach that is consistent with the free movement of goods and services and the Community's reliance upon the Member States as guarantors of the national delivery systems.

62 While this formulation may not reflect the views of the Commission perfectly correctly, we suggest that some such statement would help to relate the universal service definition to other issues raised by the *Postal Green Paper*. In the above statement, for example, we have tried to clarify several points in a manner that seems to us implied by the *Postal Green Paper* read as a whole.

63 *First*, the universal service definition represents a *Community assurance*, to all Community citizens, as to the quality and responsiveness of the overall delivery services system. If standards are not met, the Community will intervene, whether by way of consultation, appropriate funding, or legal action. A universal service definition is a policy standard which may imply financial and legal consequences. Hence, the role of the universal service definition will be to set *threshold* standards of service that *must* be achieved to avoid Community intervention, rather than to establish *optimal* targets that *should* ideally be achieved. This is the difference between regulating the system (the job of the government) and managing it (the job of postal officials).

64 *Second*, our suggested statement makes clear that the universal service definition prescribes, in the main, a set of obligations which the Community will expect the *Member State* to assume. All Member States will be expected to ensure a basic level of delivery services and to enforce appropriate rules of interconnection. Together these will provide an assured universal service for the whole territory of the Community. This bedrock, in turn, will permit the Community to insist upon a wholly liberal solution at the cross border level.

65 *Third*, the definition of universal service should be *user based* and *commercially neutral*. The "universal service" should not be viewed as a schedule of desirable delivery services to be achieved by one group of (postal) operators at the expense of another group of (private) operators. Universal service is a minimum standard of service which the Community is ensuring for the benefit of the users and Community citizens generally.[9]

66 *Fourth*, in terms of Community policy, the universal service definition is *independent of the reserved service concept*. A Member State may assure universal service in any manner it deems appropriate, within overall guidelines set by the Community. That is, a Member State can provide universal service by reserving certain services for its postal administration and obligating the postal administration to provide a set of universally available services. Alternatively, a Member State can provide a completely liberal delivery services sector and directly contract for services which must be provided under the universal service definition but which are not provided by the competitive market. A combination of the two approaches is also conceivable. In this manner, the concept of a universal service should be neutral in respect to the postal monopoly, even though a postal monopoly *may* be used by a Member State to finance universal service in accordance with the principle of proportionality.

67 Within such a conceptual framework, we shall try, in the next section, to flesh out the basic elements of a Community universal service definition.

4.1.3 Affordability and the unitary tariff

68 It should be noted that the first recommendation of the *Postal Green Paper*, § 9-1, explicitly defines the concept of universal service in terms of *affordability*, i.e., a service "at a price affordable to all." The *Postal Green Paper* elaborates on the concept of affordability in chapter 5 as follows:

> The fundamental point is that universal service should be provided at prices *affordable* to all—that each citizen or organisation should have access to postal service *at prices which he can readily afford* for his main postal

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[9] § 9-10.3.5 notes that

> private operators may find the appeal of their express services gradually being eroded by the likely diminution of the service differential between the service performance of their products and that of the ordinary letter mail. This may happen in relation to both their domestic services and, perhaps particularly, their cross border services. In the case of the latter, the quality of ordinary letter services should improve considerably as a result of the measurements proposed in the Green Paper.

It is true, of course, that postal operators may improve and gain traffic at the expense of private operators. It is equally true that the private operators may improve and expand their services at the expense of postal operators. Comparing the Community and U.S. markets, we suspect that liberalisation will most likely lead to a general increase in the quality of services overall and an expansion of the market, to the benefit of both groups of operators (but not necessarily for everyone in each group). Our point is that, so long as the Community enjoys a range of good quality universal services, *Community policy should be indifferent regarding the identity of which services are provided by which operators.*

> communications needs. (Usually, this is represented as a single tariff covering the whole of the territory concerned.) [§ 5-2]

69 It seems to us that, by its nature, *affordability* is a standard which should be applied only to personal mail. Businesses and other organisations, which originate about 80 percent of letters, purchase delivery services like any other good or service necessary for production. There is no apparent public polic y reason why a businessman should not pay the proper cost of any input service, and many sound economic reasons why he should. [10]

70 How would one administer a standard of affordability? Virtually any price is probably unaffordable to the very poorest individuals. On the other hand, for almost all individuals, the fraction of income expended on postal services is small, so that there is wide latitude in the range of postage rates that could be considered "affordable." Postage rates already vary substantially among Member States, yet all Member States presumably today provide "affordable" postal services. How could the Commission determine when a Member State postal administration is no longer providing sufficiently "affordable" postal service? It seems to us that the price established by a competitive solution in the major cities and towns must, *ipso facto*, be considered affordable. Any other approach would result in the Community arbitrarily imposing a price standard on an unwilling market. This conclusion leads us below to suggest that affordability should be defined in relation to the "going rate" in the primary distribution area. [11]

71 In the above quoted passage, the *Postal Green Paper* notes that some postal administrations assure affordability of universal postal service by adopting a *unitary tariff*, i.e., a postage rate that is uniform throughout the territory of a Member State. While this is correct, there is no apparent reason why the unitary tariff concept should rise to the level of a Community principle. As discussed below, the unitary tariff was introduced by Rowland Hill in the U.K. in 1840 as a *cost based* economic reform. [12] If further analysis or changing costs implies that postage rates should now be restructured into a two or three tiered system (as in one Member State), Rowland Hill would have been the first to advocate such a reform. Why, then, should the Community restrain postal administrations from adjusting their prices as costs change? Arbitrary, non economic pricing principles will only diminish the viability and competitiveness of the postal system. Affordability, or *maximum price limits*, provides a much more flexible and understandable basis for public controls on postal pricing. A sensible pricing reform of the past should not be transformed into a straitjacket for postal administrations of the future.

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[10] There may be public policy reasons why certain types of businesses should be directly subsidized. One might imagine, for example, that scholarly publications should be more easily available to the public than ordinary publications. But such considerations cannot be applied to business generally.

[11] See ¶¶ 86-92, below.

[12] See ¶ 83, below.

72 Similarly, some commentators have suggested that Community postal policy should, in effect, guarantee the lowest possible average unit costs, by using a legal monopoly to maximize "economies of scale and scope." For us, this goal is largely a mirage. The possibility of maximising economies of scale and scope depends upon the satisfaction of esoteric mathematical criteria that cannot be factually determined with any certainty. Theory aside, it is clear that a monopoly tends to lessen some costs, by avoiding duplication (e.g., two sets of delivery carriers) and to increase other costs by lessening incentives for efficiency and innovation. It is impossible for the policy maker, or anyone else, to tell definitively which effect is greater. The affordability test avoids this unresolvable technical dilemma. It is not a critical policy issue whether the short or long run costs are absolutely the very lowest theoretically possible, provided that all individuals have access to reasonably affordable postage rates.

73 In summary, defining a governmental commitment in regard to delivery services in terms of maximum price limits appears to be an important improvement upon the concepts of uniformity of price or maximisation of economies of scale and scope. As a standard, affordability looks to the ability of the average individual to gain access to the universal delivery system. This is, indeed, what should be the central social concern of Community delivery services policy.

4.1.4 Elements of a universal service definition

a) Assurance of cross border service

74 Today, the Community has universal postal service because (i) each Member State postal administration provides universal service and (ii) the Universal Postal Convention requires each administration to provide every other administration with a certain level of delivery service of cross border mail. The Universal Postal Union refers to this obligatory linking of national services as forming the "single postal territory." This concept, it seems to us, is similar to the concept of a *Community* level definition of universal service. The key article of the Universal Postal Convention is Article 20. It requires all administrations to deliver letters, printed papers, and small packets up to 2 kilograms in weight.[13] The UPU Convention does not require delivery to all addresses, nor does it specify a particular quality of service. Nonetheless, UPU Article 20 seems to be the reasonable and prudent starting point for a Community definition of universal service.

75 In addition, it is clear that a Community definition of universal service must include a further condition for service within the Community. Intra

[13] § 8-6.2, citing Article 20 of the 1989 UPU Convention. This article provides that books and pamphlets weighing up to 5 kilograms should also be delivered. In this paper, we shall refer to this as a 2 kilogram rule, without also recalling each time the additional provision for books and pamphlets weighing up to 5 kilograms.

Community mailers should be able to obtain the same delivery services for the same prices as national mailers. That is, for example, a British or German mailer should pay the French postal administration the same amount for final delivery of his letter in Paris as does the French mailer for delivery of a similar letter in Paris.[14] In this manner, in any particular Member State, the price and quality of services available to the Community will be ensured by the political and commercial power of the local mailers. We see no reason why this rule of "national treatment" of intra Community mail should not apply to all operators, postal and private.

b) Assurance of delivery to all addresses

76 The *Postal Green Paper* notes that "all Member States have assured universal service [§ 7-2.2.1]," and all Member States have defined mandatory assured universal service requirements for their postal administrations (§ 3-3.1). That is, disregarding considerations of price and service, all letters, printed papers, and small packets up to two kilograms are in fact delivered to all addresses within each Member State. The Community should, we suggest, reinforce this universality of service with its own legal requirement that Member States must continue to assure that at least one delivery service will be available to all addresses within their territories.[15] Such an assurance could be provided without undue financial risk to the Community. Indeed, it seems likely that a virtually universal service would be provided by the competitive market without Member State intervention.

c) Price/service standards in general

77 The *Postal Green Paper* goes on to state an obligation to provide some level of delivery service is insufficient without also setting a standard for the level of service to be provided.

> *It is insufficient simply to state that universal service must be provided. The quality of the universal service must also be stipulated*, using whatever criteria of quality are appropriate. [§ 8-14.0]

78 In the same section, the *Postal Green Paper* notes that the service standards should be *minimum* or *threshold* standards, possibly with

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[14]This may, or may not, imply that the British mailer will pay a different postage rate depending upon whether he posts his letter to a high postage rate country, such as Germany, or a low postage rate country, such as Spain. For further discussion of this issue, see ¶ 244 *et seq*, below.

[15]A Community obligation to assure delivery to "all addresses" should not be truly absolute, any more than it is now for the Member States' postal administrations. Writing of French postal law, a lawyer for the PTT Ministry explained, "this obligation is not absolute in the sense that the mail should consequently be distributed to the peak of Mont Blanc if someone decided to choose this location as a domicile. The Administration is not held to the impossible regarding distribution." F. Braize, "Les perspectives d'évolution de l'organisation juridique du marché du courrier: de l'ère des objets à l'ère des services?," in *Le courrier dans le marché de la communication: Bulletin de l'IREPP* (Institut de recherche d'études et de prospective postales, Paris), 1989, no. 3 (March) at 150-183.

geographically defined variations:

> There should be *minimum* Community service standards to be applied within each Member State. (*There might be scope for regional flexibility within Member States, reflecting variations between urban concentrations or rural areas.*) It should be emphasised that these standards would be the *threshold levels for acceptable performance only*. [§ 8-14.1]

79 The recommendations in the *Postal Green Paper*, however, proceed in a somewhat different vein. As already noted, the preamble to recommendation § 9-1 notes that the competitive market would likely provide universal service, but concludes that a competitive universal service would not be provided at rates "affordable to all." Recommendation § 9-6 deals in detail with the regulation of tariffs, yet omits a standard of affordability. Rather, it states that rates should be based on costs, excepting geographical cross subsidies which would be permitted where a Member State decides to require a unitary tariff for a class of delivery services. Recommendation § 9-6 also omits any reference to economic efficiency.

80 Recommendation § 9-8 concerns service levels for the universal service. In particular, recommendation § 9-8.4 says that,

> *The service performance standards should be stretching*, but achievable. They will be based on the Community definition of universal service.

In our view, the choice of words in recommendation § 9-8.4 is unfortunate. To our (perhaps too sensitive) ears, it suggests a blurring of the distinction between *managing* the delivery services sector and *governing* it. For the Community to set "stretching" standards evokes the image of the Community entering the competitive arena as the manager of one portion of the delivery services sector. The *public* task, as we understand it, is not so much to spur postal officials but to place a bottom line limit on the quality that can be tolerated from reserved services.

81 Although we agree with much contained in these observations and recommendations, they do not, we believe, add up to a coherent approach to defining a universal service. For example, we agree with the *Postal Green Paper* that a universal service standard is meaningless without reference to an expected quality of service. On the other hand, it is obvious that a quality of service standard also means little without reference to price. A good quality service for 0.25 ECU per letter might be a poor quality service for 0.50 per letter. Then, too, the word "affordability" conveys an important idea, but it does not, standing alone, provide a sufficient standard for judging prices. Similarly, while we agree that prices should be related to costs, costs in turn must logically be related to efficiency. A universal service might be cost based and still be overpriced because the costs are unreasonably high. Again, while we agree with the observation that geographic variations should be taken into account in some manner, we fail to see how the *Postal Green Paper*'s recommendations do so.

82 It is plainly infeasible to set enforceable Community wide standards for all of these interrelated criteria. The best approach, it seems to us, is to begin with a more carefully focused delineation of the Community's objectives in adopting a universal service definition. In this task, it is illuminating to recall the original concept of universal postal service, as developed in the 1830's by the great English postal reformer, Rowland Hill.

83 In his analysis, Hill divided the postal system into two types of areas: the "primary distribution" area, consisting of the cities and towns, and the "secondary distribution" system, comprised of the smallest towns and rural areas. Hill advocated uniform postage rates within the primary distribution area because he found no significant difference in transportation costs between local and long distance service. Postage to the secondary distribution area, he concluded, should vary according to cost, but he favoured keeping the postage rate as low as possible by pricing service to the secondary distribution area at marginal costs.[16]

84 Hill's distinction between primary and secondary distribution areas was not incorporated into the final postal law because of opposition by the British Post Office. During Parliament's inquiry into Hill's proposals, Hill himself was followed by two witnesses from the British Post Office. The first said he did not understand the distinction between primary and secondary distribution, and the second testified that he understood it and saw no advantages. Faced with postal opposition, Hill decided the concept was too technical to explain in addition to his other ideas. Writing a century later (1939), Professor R.H. Coase commented:

> *There is indeed good reason to deplore the abandonment of the distinction between primary and secondary distribution*. It . . . might have led to a rational discussion of price policy and its relation to costs. As it is, the magic word "uniformity" has been substituted for thought.[17]

85 Like Professor Coase, we believe that Hill's distinction between primary and secondary distribution remains useful as a way of thinking about postal policy. The advantage of this distinction in the current context is to permit a simplification of the technical analysis by highlighting differences in the nature of the Community's fundamental objectives in extending "universal service" to the two areas.

d) Assurance against isolation of the secondary distribution area

86 In the secondary distribution area, the core concern of the Community is, we submit, *isolation* from the main delivery services system. That is, in Hill's terminology, the level of service in the secondary distribution area should not

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[16]Rowland Hill, "Post Office Reform" (1837).

[17]"Rowland Hill and the Penny Post," *Economica* , 423, 435 (Nov 1939). In 1991, Professor Coase was awarded the Nobel prize for economics for his work on the relationships between firms, industries, markets, and law.

fall too far below that available in the primary distribution area. The concept of a secondary distribution area, indeed, is not dissimilar to Article 130a of the EC Treaty, added by the Single European Act, which enjoins the Community to reduce "*disparities* between the various regions and the backwardness of the least-favoured regions."

87 Seen in this way, it appears that the standards of undue isolation may be expressed in terms of prices and services *relative* to those available in the primary distribution system. That is, for example, Community policy might state that:

- citizens in the secondary distribution area shall have access to at least one delivery service that, for a given class of items, is priced not more than X percent more than comparable services generally available in the primary distribution area; *and*
- the delivery service available should provide for collection and delivery at least Y times per week; *and*
- achieve delivery of 90 percent of items in a time period that is no more than Z hours longer than comparable delivery services generally available within the primary distribution area; *where*
- X, Y, and Z are set by the Commission, after consultation with the national regulator, so as to ensure a basic level of delivery services to all places in the secondary distribution area without undue or unreasonable isolation from the main body of the national and Community delivery systems.

88 Setting standards for the secondary distribution area relative to the primary distribution area has the virtue of focusing clearly upon the social concept of remoteness or isolation without attempting a too rigid "one size fits all" approach to the Member States. Isolation from the primary distribution area may well be considered somewhat differently in, say, Greece as opposed to Germany. Moreover, a relative approach has the further advantage of requiring that improvements in the secondary distribution system keep pace with improvements in the primary distribution area.

89 This approach to isolation also takes a practical, and we believe reasonable, approach to the concept of "affordability" advanced in the *Postal Green Paper*. A postal tariff is defined as "affordable" if it is not more than a given percentage above the primary distribution tariff. This approach permits continuance of the unitary tariff concept, but does not mandate it. Rather, the notion of affordability is derived from the idea of isolation.

90 Despite flexibility, it is in the secondary distribution area where the Community's price and service standards will prescriptively advance beyond the normal market solution. In this sense, they may appropriately be called "stretching." The precise definition of the "secondary distribution" area is not critical to the usefulness of this approach and could be left to the national regulator, within guidelines fixed by the Commission. It seems likely that "rural" would probably assume the same meaning in postal policy as in other

policy areas.

91 It should be noted that a Community assurance against undue isolation of the secondary distribution area is compatible with either a reserved or a liberal system. If a Member State opts for a reserved service system, service to the secondary distribution area would be a mandatory obligation of the reserved service and losses would be underwritten by a "geographical cross subsidy."[18] If a Member State chooses a liberal system, then the assurance against undue isolation would oblige the Member State to contract for appropriate services, with either the postal administration or private operators.

92 It seems to us that an assurance against undue isolation may be drawn in narrower terms than the 2 kilogram rule employed as a standard for actual delivery. Individual mail is generally limited to letters of 50 grams or less. Businesses, it seems to us, should be able to pay the actual cost of delivery to all parts of the Community, especially if the 50 gram traffic pays for the bulk of the fixed costs in establishing a rural delivery network. Hence, a Community assurance against undue isolation might be limited to letters and other sealed envelopes of 50 grams. It should be born in mind that the *Community* itself bears ultimate responsibility for its legal assurances. If a Member State cannot or will not arrange for an appropriate level of service to secondary areas, it may be necessary for the Community itself to contract for such service.

e) Assurance of efficiency and responsiveness in the primary distribution area

93 The appropriate basis of a Community definition of universal service in the primary distribution area may be clarified by considering non reserved services. If a postal administration provides a non reserved service on a competitive basis, it should be permitted to adjust services and prices to competition (subject to restraints on cross subsidy). Suppose, for example, that printed papers are outside the reserved area but within the universal service area. Suppose a private operator demonstrates that there is a market for an inexpensive service that delivers to each address twice per week. The postal administration, it seems to us, should be able to respond to this competition without being restricted by *a priori* service standards.

94 More fundamentally, suppose a Member State completely liberalizes its delivery services market—i.e., abolishes the postal monopoly, sells the administration to private investors, and repeals laws distinguishing between postal and private operators. Should not a completely liberalised postal administration be permitted to operate in the same manner as any other

[18]For the reasons stated at ¶ 132, below, we believe that the magnitude of a geographical cross subsidy is likely to be small compared to total postal revenues. In any case, a geographical subsidy should be confined to reserved services and transparent. See ¶¶ 149-152, ¶¶ 239-241, below.

operator? The logic of the *Postal Green Paper* implies a clear "yes."[19] What, then, would be the effect of a Community universal service definition in a totally liberalised primary distribution area? Would it require all operators, postal and private, to exceed price and service norms developed competitively in response to user needs? The answer must be "no."

95 In the primary distribution area, it would not be appropriate to adopt a universal service definition that is different or stricter than the service that would be provided in a completely liberalised environment. By hypothesis, in a primary distribution area, competition will provide users with services they want at prices they are willing to pay. For the Community to provide legal assurances that it will improve or alter the competitive solution in the primary distribution area would be to assume an enormous financial and legal obligation without any clear public interest basis.

Table 1. Universal service in primary and secondary distribution areas

	Primary distribution area	*Secondary distribution area*
Geographic area	Cities and towns	Rural and remote areas
Objective	Assure against defects in reserved services	Assure against defects in competitive services
Conceptual basis of standards	Estimate of competitive solution	Isolation relative to services in primary distribution area
Nature of definition	Descriptive	Prescriptive
Regulatory role of price/service standards	Threshold or minimum	Stretching
Ultimate Community responsibility	Liberalisation of reserved service	Community contracting or subsidy

96 Generally, in the primary distribution area, unlike the secondary distribution area, the Community's basic presumption should be that a functioning competitive delivery services market will satisfy a Community definition of universal service. Whereas the main concern of public policy in the secondary distribution area is isolation, in the primary distribution area the main public concerns are efficiency and responsiveness to user needs. These are matters naturally addressed by a competitive market, but sometimes poorly addressed by a reserved service. Put simply, in the secondary distribution area the problem is possible defects in the competitive market; in the primary distribution area, the problem is possible defects in a reserved service. These

[19]Of course, this is not merely a rhetorical issue. Community policy must take into account the completely liberalised solutions adopted in some EFTA states and the increasing possibility that similar solutions will be adopted in certain Member States. This is not to say that the Community policy should require such steps in a Member State, only that it must allow for the possibility.

differences are summarized in Table 1.

97 In the primary distribution area, the Community definition of universal service will act not so much as "stretching" standards, but as "*minimum*" or "*threshold*" criteria below which a reserved service will not be allowed to fall. How should these criteria be set? The Community may not simply choose an arbitrarily high level of service. Higher levels of service imply higher prices. A Member State may reasonably choose to assure a lower level of universal service for a lower price. In fact, increasing levels of industrialisation usually lead to lower, not higher, levels of governmentally assured postal service. This has been the long term trend in the twentieth century. With the introduction of the telephone and fax, postal service has become less necessary as a conduit of urgent messages. The standard for public postal service has properly shifted from speed to reliability in recent decades. Among the Member States, the price/standard of universal service that is correctly tuned to the needs of users may differ significantly.[20]

98 In all Member States, however, the postal service should be *economically efficient* and *responsive to user demand*. In setting threshold price/service standards, it may thus be seen that the Commission should, in effect, estimate *the price/service solution that the competitive market would sustain*, rather than simply picking an arbitrary level of service.[21] It may be noted that this approach to a definition of universal service in the primary distribution area corresponds to our interpretation of the central mission of the regulators which the *Postal Green Paper* proposes for each Member State. In effect, the role of the regulators will be to impose upon a reserved service disciplines that would normally be supplied by the competitive market. Threshold standards and regulatory goals are thus seen to be complementary efforts towards the same objective. Recognising that the standards for universal service in the primary distribution area should reflect an estimate of the naturally competitive solution is useful in several respects.

99 *First*, it provides a rationale for a degree of flexibility in the universal service standards for different Member States, without yielding on the principle of a Community wide standard for good service. If one compares the postal services in the several Member States (and considers, as well, variations in the level of private delivery services), we suspect that one would calculate somewhat different standards for the universal service that is attainable and

[20]It might be objected that there is a theoretical possibility that the users in a portion of the Community may desire extremely poor postal service at inefficiently high postal rates. Under such circumstances, a competitive solution would result in a service which is unacceptable by the standards of the rest of the Community. The principle of subsidiarity might then be read as suggesting that the Community should accept the right of the citizens of a Member State to have poor postal service. We believe that such a conflict between the Community's need for basic universal service and the subsidiarity principle is unrealistic. There is no evidence to suggest that citizens in any part of the Community want unacceptably poor postal service.

[21]After allowing, perhaps, for the lowered expectations induced by a history of substandard postal service.

suited to the needs of the users in the several Member States. We doubt, however, that the differences will be so great as the differences actually found among the services of postal administrations today. The basic markets and infrastructures in the major metropolitan areas of the Community do not vary so much. But they do vary, and it seems to us desirable to avoid an overly rigid concept of universal service.

100 *Second*, adopting the competitive solution as the yardstick for universal service in the primary distribution area yields a clear limit on the ultimate liability of the Community. The obligation undertaken by the Community will be to ensure a reserved service is as efficient and responsive as the competitive market. If other measures fail, this obligation may be discharged by requiring complete liberalisation of the national market, rather than by other, more costly remedies.

101 *Third*, explicit identification of the competitive standard underlying the universal service definition for the primary distribution area places the entire approach on a firm legal basis. In recent case law, the European Court of Justice has held that, under the competition rules, it would be an "abuse of dominant position" for an undertaking to hold a monopoly over a service which it is unable to provide satisfactorily. The abuse lies in "limiting production, markets, technical development to the prejudice of consumers." EC Treaty, Article 86(b). The Advocate General explicitly noted that the standard for satisfactory performance should be "the system of free competition envisaged by the Treaty."[22]

102 Although competition is the appropriate theoretical standard for the primary distribution area, this leaves open the question of the scope of services to which the standard should be applied. In all Member States, universal postal services have assumed a basically similar form, even though delivery times and prices differ. It seems to us that, after universality (already guaranteed by the assurance of universal delivery), the next most critical characteristic of basic universal service is *reliability*. Following the targets of most postal administrations (§ 9-7.1 (table 12)), we would suggest a reliable delivery service is one that delivers items with, on average, a *90 percent* completion record.

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[22] *Höfner and Elser v Macrotron*, GmbH, Case C-41/90, 23 April 1991 (unpublished). The case involved a German monopoly over employment services. Over the years, the federal employment office, the Bundesanstalt, was able to provide employment for only 28 percent of the executive vacancies presented to it. Advocate General Jacobs' opinion looks to the competitive market as the standard for satisfactory performance by a service monopolist:

> There is nothing in the file to suggest that [the Bundesanstalt] has not endeavoured to the best of its ability to satisfy the demand for assistance in the recruitment of executives. . . . None the less, the combined effect of the German legislation and the Bundesanstalt's failure to satisfy demand is that the consumer (i.e. the employer in search of executives or the executive in search of employment) is not receiving the sort of service which he is entitled to expect *and which he almost certainly would receive if the sector in question were subject to the system of free competition envisaged by the Treaty.* [¶ 45]

103 Universal service, reliably completed—but within what time period? We would not advocate a fixed Community wide standard, such as J+1, for the time period within which 90 percent of deliveries must be completed.[23] As we have argued, the appropriate time period may vary with the needs of the locale and the postage rate charged. In determining the appropriate time period for each Member State or region, the important points are that:

- time period targets and price limits must be set in consultation with users; and
- the time period targets and price limits must reasonably reflect the level of efficiency that could be expected from a competitive market.

These are specific factual issues in which the judgement of the national regulator should be consulted.

104 Finally, it seems to us that the 50 gram letter service is probably an adequate skeleton to support the quality of the universal service as a whole. It seems probable that almost all important *personal* communications fall within the 50 gram limit. Moreover, it hardly seems likely that a postal administration will provide a satisfactory service for 50 gram items and fail to provide a satisfactory service for 100 gram or 500 gram items.

105 Under this approach, the definition of universal service for the primary distribution area might take a form such as the following:

- citizens in the primary distribution area shall have access to at least one universal delivery service that provides delivery of at least 90 percent of all letters and sealed envelopes weighing up to 50 grams within X days after posting; *and*
- for a postage rate no more than Y ECU; *where*
- X and Y are set by the Commission, after consultation with the national regulator, so as to reflect the services that would likely be available from a competitive market.

106 It may be objected, of course, that such an approach will permit a degree of variation among the Member States that would not be permitted by a Community wide standard such as "J+1." We do not believe, however, that a substantial degree of variation will emerge within the primary distribution area of the Community. It may be noted that today all postal administrations have similar targets for J+1 delivery. § 9-7.1 (table 12). These targets were presumably set with the needs of users and the practical conditions of the market in mind. We suspect, indeed, that most of the variations in existing targets are derived from different delivery expectations in the secondary distribution area rather than in the primary distribution area. In refining a universal service definition for the primary distribution area, what is needed is simply a reconsideration of these rather similar delivery targets in light of

[23]In postal parlance, it is customary to refer to delivery times in terms of the number of non-holiday days after posting. The day of posting is referred to as "J" (or "day" in French, *jour*). The first day after posting is "J+1," the second day after posting is "J+2," and so on.

competition as the reference point and the role of these standards as *minimum* conditions that must be attained (on an end to end measurement basis). [24]

f) Intra Community universal service

107 The foregoing approach also helps to clarify the appropriate standards for intra Community universal service. The *Postal Green Paper* envisions a complete liberalisation of the intra Community market. The competitive standard for service in the primary distribution area suggests that this decision, per se, should assure a legally satisfactory universal service for intra Community service within the primary distribution area (e.g., between major cities). Hence, there is no reason to define a separate universal service standard for cross border service in the primary distribution area.

108 Even in a liberalised intra Community market, however, cross border service will also be provided by the exchange of mail between reserved postal service providers or reserved services acting as distributors of cross border mail for private operators ("remail"). To assure the quality of cross border universal service provided, in whole or in part, by national reserved services, should the Community adopt separate standards of universal service for intra Community mail? In our view, it would be inappropriate to set price/service standards for the outward collection or inward delivery of intra Community mail that differ from national universal service standards. The collection or delivery of cross border mail requires identical handling as national mail. Intra Community standards that vary from national standards would introduce an unacceptable element of discrimination for or against intra Community mail.[25]

109 Where intra Community service originates or ends in the secondary distribution area, appropriate standards will already have been established by the assurance, at the Member State level, against isolation of the secondary distribution area. If the issue of isolation is assured at the Member State level, the issue will automatically be resolved at the intra Community level as well. All citizens will have access to the primary distribution area in their Member States and the primary distribution areas in the Member States will be linked by the liberalised cross border service.

110 Hence, if the intra Community market is liberalised and if each postal administration can demonstrate that intra Community mail is collected, or delivered, with the same service as national mail, it seems to us that an intra

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[24]We suggest that X should be set in terms of days and hours, not days alone. In addition, the Commission might place other conditions on the universal service, although most of these seem to us implied by the basic standard we have suggested. For example, the number of collections and deliveries per week will largely be determined by the average delivery time. If items can be "posted" with the delivery carrier, then the distribution of collection boxes and postal counters will be determined by the need to relieve the burden on carriers.

[25]Nor does it appear reasonable to set end to end standards for cross border service since the power of the national regulator will be limited to measuring and enforcing standards upon its national postal administration; it would be unreasonable to hold a postal administration responsible for failure by another administration.

Community universal service will thereby be guaranteed, complete with appropriate guidelines regarding service and price.

4.1.5 Summary

111 In the foregoing, we have attempted to identify the basic elements of a feasible and flexible Community definition of universal service that is soundly grounded in Community law and consistent with the overall approach of the *Postal Green Paper*. The main points of this definition are:

- All letters, printed papers, and small packets up to 2 kilograms will be assured delivery on a Community wide basis, and within each Member State.
- Intra Community items will be provided the same service as national items, whether by postal or private operators.
- All letters, printed papers, and small packets up to 2 kilograms will be assured delivery to all addresses within the Community.
- For service to, from, or within the Community's "secondary distribution" area (outside the cities and towns), collection and delivery of items up to 50 grams shall be provided, whether by postal or private operators, according to price and service standards that assure against undue isolation from the services generally available in the primary distribution area.
- For services wholly within the Community's primary distribution area, delivery services shall be provided, if reserved, according to price and service standards that assure users a level of service that is reasonably similar, in terms of efficiency and responsiveness, to that which would likely be available in a competitive market.

4.2 COMMUNITY POLICY ON RESERVED SERVICES

4.2.1 Basic principles

112 The *Postal Green Paper* recommends that "In order to ensure universal service at a price affordable to all, *a set of reserved services must be established. The list of services that could be included in this set of reserved service should be established at the Community level*." § 9-1.2.

113 According to traditional legislative practice, a reserved service is "established" by a criminal law, under the terms of which a private operator may be imprisoned, fined, or enjoined if he offers the public a better delivery service than the postal administration. In a democracy, the sanction of criminal law is used sparingly and restrained by the interposition of judicial procedure. Before blessing criminal sanctions by incorporation into *Community* policy, a clear statement of social need and legal authority is necessary. This necessity is rendered greater still by the fact that any reserved service restricts the very "free movement of goods, persons, services, and capital" which the EC Treaty was created to protect. Article 8a. Despite these fundamental considerations,

the *Postal Green Paper* does *not* deal clearly and explicitly with the legal issues presented by a Community policy which entails the use of anticompetitive, criminal sanctions.

114 Speaking generally, Community policy in an area such as delivery services must strike a balance between four somewhat inconsistent constitutional goals: free movement of goods and services, harmonisation of the laws, deference to the rights of Member States, and protection of individual liberties. These goals are reflected and reconciled in various provisions of the EC Treaty. Reconciliation takes the form of constitutional "rules of thumb" such as the principle of the least restrictive alternative, the principle of proportionality, and the principle of subsidiarity. Given the gravity of criminal sanctions, it seems to us that any concept of reserved services must be carefully tested against such constitutional principles. A perfect resolution of all legal issues is not to be expected, but the issues are important and should be exposed. In this respect, the following comments are intended to be illustrative rather than definitive.

a) Principle of the least restrictive alternative

115 In discussing applicable principles of the EC Treaty, the *Postal Green Paper* notes two conditions which must be satisfied before a restriction on the free movement of goods and services can be accepted.

> Two basic principles of the Treaty of Rome are that there should be no restrictions on the trade of goods between Member States (Article 30) and that the objective is that there should be freedom to provide services within the Community (Article 59). . . . [I]n certain circumstances and for reasons of public interest of a non-economic nature, Member States may grant special or exclusive rights. . . . *Such exceptions . . . could be permitted only if two further conditions are met*. First, it should be demonstrated that *the same objectives could not be met by less restrictive means*. Secondly, the scope of the special or exclusive rights must be *as small as is needed to achieve the objectives (this being known as the principle of proportionality)*. [§ 3-6.1]

While the second condition is referred to as the "principle of proportionality," the *Postal Green Paper* does not give a label to the first condition noted. It might similarly be referred to as the "*principle of the least restrictive alternative*."

116 The *Postal Green Paper* continues by noting that, in addition to complying with the "free movement" provisions of the EC Treaty, all delivery services, postal or private, must respect the norms of the "competition rules," Articles 85 to 92. The competition rules generally require operators and Member States to refrain from actions which would distort trade "between Member States." Article 90(2) establishes a limited exception under which a Member State may reserve certain services for its postal administration. The exception is available, however, only if application of the liberal rules of the

Treaty would "obstruct the performance in law or in fact" of particular tasks assigned to the postal administration. "To obstruct the performance" has been interpreted narrowly to mean that the postal administration must have "*no other technically feasible and economically attainable means of accomplishing their tasks*."[26] Thus, a reservation cannot be justified merely by the fact that competition may subject a postal administration to a possible loss of money or business. Furthermore, even where it can be shown that competition will "obstruct" a postal administration from performing a particular task, a reservation of services would still not be acceptable if it affects trade "to such an extent as would be contrary to the interests of the Community." In short, the competition rules strongly reinforce the Treaty provisions requiring free movement of goods and services and the principle of the least restrictive alternative.

117 How does the *Postal Green Paper* take into account the principle of the least restrictive alternative? In chapter 5, the *Postal Green Paper* discusses the economics of a universal postal service and the relationship between a reserved service and a universal service. The *Postal Green Paper* notes that a "cost-plus"[27] or competitive delivery service might not offer service to small localities on an affordable basis. At this point, the *Postal Green Paper* notes:

> *It could perhaps be argued that this problem could be overcome by central subsidies. But it would need to be considered whether this approach would cause more problems than it solved*. What would be the problems associated with trying to define the areas that justified such a subsidy, and then to calculate what the subsidy should be, what policing would be needed to prevent the unfair manipulation of the subsidies particularly with regard to competitive services? Presumably, the decision would vary from year to year; they would also vary from Member State to Member State. [§ 5-2]

118 This appears to be the only passage in the *Postal Green Paper* that examines the possibility of alternative funding mechanisms that are less restrictive than a reservation of services. Unlike the principle of proportionality, the principle of the least restrictive alternative is not discussed either in the analysis of possible options (chapter 8) nor in the final recommendations (chapter 9). The quoted passage hardly appears to be sufficient from either a legal or economic perspective. In essence, the *Postal Green Paper* raises questions that should logically be addressed, and then fails to address them.

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[26]See the opinion of Advocate General Da Cruz Vilaca in Case 30/87, *Bodson v Pompes Funèbres des Régions Libérées*, 1988 ECR 2479 at paragraph 86. *See generally*, Vaughan, *Law of the European Communities*, paragraph 19.112 ("no other technically feasible and economically attainable means of"); Bellamy and Child, *Common Market Law of Competition*, paragraph 13.021.

[27]At some points, the *Postal Green Paper* refers to the prices available in a competitive market by the rather unclear term "cost-plus", presumably because competitive prices must be set to reflect the cost of production plus the cost of capital, whether in the form of ownership rights or interest obligations.

119 More generally, it is remarkable that the *Postal Green Paper* fails to survey or summarize the views of leading economic professors. Surely this minimal step should have been taken to ascertain whether there are feasible alternatives to reserved services as a means of assuring affordable universal service.

120 The skimpy analysis of alternative policies in the *Postal Green Paper* may be compared with a recent study in Australia by an governmental commission. The Australian commission concluded that contracting for rural delivery was a feasible means of ensuring universal service at an affordable price and would likely enhance the quality of postal services generally. The Australian commission recommended long term contracts with Australia Post because it considered contracts with multiple private operators would be difficult to administer.

> Except for the objective of providing access at a uniform charge for standard letters, *all of the Government's social objectives would be met under this option. It would also be possible to meet the alternative option of an affordable maximum charge*, as the current uniform charge of 45 cents could become the maximum which Australia Post charged to send a letter anywhere in Australia; people would not have to pay more than this unless they chose to do so. *The Commission considers this option (Option 2) is both feasible and would provide major benefits from the increased competition faced by Australia Post*; for example, ongoing pressure would be placed on it to reduce costs and improve service quality and choice.[28]

121 Australia is, of course, very different from the Community, and policy recommendations cannot be assumed to be directly transferable. Yet, at first glance, the task of assuring affordable universal postal service would seem at least as difficult and socially desirable in Australia as in the Community. The Australian commission was not legally bound to consider the least restrictive alternative, yet it adopted such an approach as a matter of sound public policy. We believe that the *Postal Green Paper* should have done likewise.

122 It is interesting to observe that the Australian commission, like the *Postal Green Paper*,[29] concluded that the public goal should be defined in terms of the *affordability*, rather than the *uniformity*, of postal tariffs. Indeed, the *Postal Green Paper* explicitly rejects the view that a unitary tariff per se can justify the establishment of a reserved service.

> One of the benefits of the granting of exclusive rights is that it can enable the reserved service provider to continue to offer a single unitary tariff (*péréquation tarifaire*). However, *this is not itself a justification for establishing a set of reserved services.* [§ 8-3.2]

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[28]Industry Commission, *Mail, Courier, and Parcel Services* (Draft report, 23 July 1992) at 186-87. It may also be noted that the U.S. Postal Service serves the most rural areas of United States by contracting with private operators. This casts some doubt on the Commission's conclusion that a program of contracts with private operators would be too difficult to administer.

[29]For a discussion of the affordability standard in the *Postal Green Paper*, see ¶ 68 *et seq*, above.

123 Even under the limitation of a *péréquation tarifaire*, however, it is unclear that a reserved service is the least restrictive alternative necessary to maintain the affordability of universal service to the secondary distribution area. Careful analysis by some experts in postal economics suggests that, even without monopoly protection, a postal administration would generally continue to offer a single tariff for nation wide letter services.[30] We do not know of any evidence to support the contrary proposition expressed by the *Postal Green Paper* that, "the . . . result of a cost-plus approach for small localities is that the price for some areas would increase very significantly." § 5-5.2.

124 Even if, with proper accounting, it could be concluded that a postal administration with a unitary tariff loses money in rural service, there is no clear reason why the loss must be paid by means of cross subsidy hidden within the accounts of a postal monopolist. The same money could be paid directly to the postal operator (or private operator) from another source of funds. The source could be general taxes. Alternatively, it could be a special tax on all delivery services, postal and private, in the primary distribution area. At bottom, the postal monopoly is a mechanism for raising money to pay for certain public policies. Any other source of revenue would serve as well, and almost any other source of revenue would be less restrictive than a nation wide monopoly over a class of delivery services, the great majority of which would be produced competitively if permitted.

125 In summary, to pass muster under the EC Treaty, a reserved service must satisfy the principle of the least restrictive alternative as well as the principle of proportionality. The *Postal Green Paper*'s list of unanswered questions, as well as recent work by the Australian government, clearly point the way for further analysis. So far, at least, it must be concluded that the *Postal Green Paper* has not demonstrated that any level of reserved service is consistent with the principle of the least restrictive alternative.

b) Principle of proportionality

126 As noted, the *Postal Green Paper* derives a "principle of proportionality," like the principle of the least restrictive alternative, from the EC Treaty's commitment to the free movement of goods and services. The principle of proportionality is set out in Recommendation § 9-1.3, "*the size of this set of reserved services should be no larger than is needed to secure the universal service obligations*." A more extensive discussion occurs in chapter 8, which states:

> the regulator and/or the national government of each Member State is obliged (by the Treaty of Rome and, generally, by the national legislation)

[30] M. Crew and P. Kleindorfer, editors, *Competition and Innovation in Postal Service*, p. 70 (Norwell, Massachusetts: Kluwer Academic Publishers, 1991). This book reports a conference in honour of Rowland Hill, held at Coton House, the U.K. Post Office Management College, on 22-25 July 1990, and sponsored by the British Post Office. Economists for the British Post Office noted: "the arguments for not having a `rural tariff' are strong on purely economic grounds."

> to define a reserved service area *directly proportional to the objectives* which justified the establishing of reserved services. (This *principle of proportionality* effectively calls for the greatest level of competition consistent with the achievement of the objectives set). [§ 8-4].

127 Chapter 8, in turn, depends upon the economic analysis in chapter 5, as follows:

> *To ensure this affordability, sufficient volumes and revenues need to be guaranteed to the operator providing the universal service.* The lower unit costs thus achieved can be translated into an affordable price.
>
> *The reason for this protection is that, while a postal administration can gain increasing returns to scale with greater volumes (for domestic mail, but much less for cross border mail . . .), it is not a natural monopoly*. Without protection, competitors would be able to concentrate on the low-cost, profitable areas, leaving postal administrations only with the rump. . . .
>
> . . . postal administrations could react by offering cost-plus prices for services in each locality. However, because of the need to have a tariff understandable to all potential users, the postal administration would not be able to easily stipulate the different tariffs that would apply. It would therefore want to have at least sub-regional tariffs covering several towns, as well as some rural areas. Since this would still lead to some averaging of prices, competitors could still enter and cream-skim the most profitable services.
>
> The other result of a cost-plus approach for small localities is that *the price for some areas would increase very significantly. If this happened, the objective of universal affordability would not be achieved.* . . . [§ 5-2]

128 While this passage suggests an economic relationship between universal service and reserved service based on a need to protect "returns to scale," it does not purport to be a rigorous economic exposition; indeed, the *Postal Green Paper* itself calls for further study. Recommendation § 9-2.9. Here again, we must point out that the *Postal Green Paper* was prepared without consulting independent economists. Even as a preliminary economic description, we doubt that the quoted passage would be confirmed by independent economists. Even more than the principle of the least restrictive alternative, the principle of proportionality calls for a careful and scientific examination of economic relationships. This has not been undertaken. So far, the principle of proportionality must be regarded as a reasonable *a priori* principle, but one with no demonstrated applicability to postal policy. Pending such an analysis, we would offer three observations in regard to the principle of proportionality.129 *First*, it should be noted that postal data reported in the *Postal Green Paper* hardly supports the proposition that there is a positive relationship between the scope of reserved service and the price or quality of universal service. Table 2 compares, for each Member State, the scope of the reserved service and several indices of postal service. Rather than suggesting that affordable, good quality universal service is positively enhanced by a monopoly, this table seems to suggest that the most likely effects of a postal

monopoly are higher prices, poorer service, and excessive levels of management. We hasten to add that such pessimistic conclusions are certainly proven by this table. Many other explanations of variations can be imagined. Our point is only that a positive relationship between reserved service and universal service is very much unproven.

Table 2. Monopoly level and indices of postal service

Monopoly level	Tariff index	J+1 delivery	Managers (% staff)	Profit /loss
High				
Ireland	178%	85%	58%	-1%
Italy	175%	17%	33%	-40%
Germany	141%	90%	41%	-17%
France	97%	76%	46%	-7%
Portugal	97%	80%	40%	-27%
Greece	94%	44%	34%	-23%
Medium				
Belgium	97%	76%	39%	-48%
Spain	59%	56%	28%	-44%
Low				
Denmark	156%	97%	58%	-4%
Netherlands	97%	96%	18%	+3%
U.K.	81%	76%	20%	+3%
Luxembourg	75%	99%	20%	-7%

Sources: PGP §§ 4-7.1 (tables 12, 13), 4-8.1 (table 15), 5-6 (table 3), 6-3.3 (table 3), A4.3 (table 1).
Notes: "Monopoly level" reflects interpretation of § A4.3 (table 1) and perceived *de facto* monopoly.
"Tariff index" is 0-20 gr letter or first class tariff (Spain, intercity; UK, 0-60 gr) adjusted for purchasing power (by PGP), expressed as percent of EC average rate.
"Managers" include "managers" and "administrative staff"; definitions may differ among postal administrations.

130 *Second*, a decrease in the scope of reserved services does not imply a proportionate decrease in postal volumes. We do not for a moment believe that a postal administration will automatically lose 20 percent of its volume if 20 percent is newly excluded from the reserved area. In a competitive situation, a postal administration is favoured with economies of scale, expertise, and strong market presence. Consider the implications of Table 3. As may be seen, postal administrations in the Member States retain much the same level of printed paper traffic (relative to the monopolized letter traffic) regardless of whether printed papers are within the reserved area or not.

131 *Third*, an order of magnitude approach to the principle of proportionality suggests that a relatively significant, but still limited, loss of postal traffic—say, 25 percent or less—is unlikely to jeopardize the availability of *affordable* universal service. The *Postal Green Paper* estimates the basic charge per letter is 0.32 ECU. For simplicity, assume that this equals the

average revenue per monopoly item.[31] If a postal administration loses traffic, revenue will decline correspondingly. Some costs decline as well, but two types of costs do not. First, losses incurred in "rural" service will not change since (it is assumed) no competitor will provide rural service. Second, some postal costs are "fixed" and do not vary with volume. As a result, lower postal volumes mean higher average costs and, hence, higher postage rates. Let us try to estimate the effect of each factor separately.

Table 3. Effect of liberalizing printed papers

	Printed papers as percent of total mail	
	1988	1989
Monopoly over printed papers		
Belgium	61%	59%
Germany	50%	NA
Greece	25%	24%
France	39%	42%
Spain	NA	19%
Average (weighted)	45%	39%
No monopoly over printed papers		
Denmark	32%	37%
Italy	45%	44%
Luxembourg	23%	24%
Netherlands	50%	NA
Portugal	26%	26%
Average (weighted)	44%	42%

Sources: PGP § A4-3 (table 1): UPU, Statistiques (1988, 1989).
Notes: No data for Ireland, U.K. (unallocated to LC and AO).

132 The *Postal Green Paper* suggests the postage rate on each monopoly item is "marked up" a little extra to "cross subsidy" losses incurred in rural service. If the number of monopoly items decreases and total losses on rural service remain the same, then the amount of rural markup per monopoly item will increase. Although the *Postal Green Paper* makes no estimate of the extent of this rural loss,[32] a recent study of postal service in the United States suggests that the actual loss (marginal cost less marginal revenue) on rural deliveries amounts to about 0.5 percent of total postal revenues.[33] Of course, there are differences

[31]A rough approximation, but good enough for purposes of illustration. See § 5-6.0 (table 5).

[32]The *Postal Green Paper* states that one postal administration estimates the total cost of the most expensive letter is ten times the average cost. § 5-6.1. Without any indication what fraction of mail is affected by these high costs and whether this administration is typical, there is no conclusion that can be drawn from this observation.

[33]R.H. Cohen, W.W. Ferguson, and S.S. Xenakis, "Rural Delivery and the Universal Service Obligation: A Quantitative Investigation" in M. Crew and P. Kleindorfer, editors, *Regulation and the Evolving Nature of Postal and Delivery Services* (Norwell, Massachusetts: Kluwer Academic Publishers, *to be published*, late 1992).

between postal service in the United States and the Community, so this figure is not directly transferable to the Community. Nonetheless, let us assume arbitrarily that the percentage of rural losses in the Community is *10 times* as high as in the United States, or about 5 percent of total postal revenues. This represents a markup per monopoly item of about 0.016 ECU. If the postal volume were reduced by the incredible factor of *50 percent*, the same level of rural losses would still imply a rural markup of only about 0.032 ECU per item. In short, marginal losses incurred in rural services appear to be so small that modest changes in postal volumes will result in virtually no change in postage rates.

Table 4. Effect of lower volumes on postage rates

Percent volume decline	Fixed cost per item	Fixed to total costs	Variable cost per item	Average postage rate
0%	0.128	40%	0.192	0.320
10%	0.142	43%	0.192	0.334
20%	0.160	45%	0.192	0.352
30%	0.183	49%	0.192	0.375
40%	0.213	53%	0.192	0.405
50%	0.256	57%	0.192	0.448

Note: PGP § 4.7 (table 12) gives the average basic letter postage rate for all Member States as 0.32 ECU. If 40 percent of this represents fixed costs, then the average postal rate will vary with changes in volume according the formula, (40% x 0.32) + (60% x 0.32) / (1 - P%), where P is the percent decline in volume.

133 A substantial level of fixed costs in postal operations is a more significant matter, but only somewhat more significant. The *Postal Green Paper* offers no data on economies of scale, but let us assume that overall marginal costs are roughly 60 percent of total costs.[34] Let us also assume that each letter contributes an equal amount of "profit" towards fixed costs.[35] Using these assumptions, Table 4 calculates the effect of changes in total volume on average postage rates. A reduction of 10 percent in volume may be seen, for example, to increase the price of the average letter from 0.32 to 0.33 ECU. A loss of 20 percent of traffic will increase the average monopoly item price 0.03 ECU to 0.35 ECU. Considering that postage rates in four of the twelve Member States (after adjusting for purchasing power) are over 0.45 ECU, increases of such magnitude hardly appear to threaten the *affordability* of

[34]This figure is suggested by British postal officials. In reasonable agreement, the U.S. Postal Rate Commission classifies 67 percent of costs as variable.

[35]Postal officials will suggest that some letters, notably city to city and business to business, are more profitable than others, i.e., contribute more than the average amount towards fixed costs. This is the "cream" they are most likely to lose to competition. Without data, this claim is difficult to quantify. It should be quantified and our rough calculations improved accordingly. Preliminarily, however, we would suggest that increasing use of bulk rates for large postal businesses as well as the competitive pressure from fax and other alternatives is reducing this "cream" significantly, even within the reserved services.

postage rates.

134 Furthermore, the minor effect of relatively small changes in postal volumes on postal rates must be considered in light of the data summarized in Table 2, e.g., variations in price/service levels and management levels. Intuitively, it seems likely that, at least over relatively small changes in volume, improvements in overall cost efficiency will more than offset any loss in economies of scale.

135 These remarks are by no means intended to take the place of a proper quantitative analysis. They are intended only to offer a quantitative "feel" for how the principle of proportionality might be applied. It seems to us, however, that such considerations strongly support the limited liberalisation program advanced in the *Postal Green Paper*.

136 In summary, the *Postal Green Paper* has properly identified the principle of proportionality as a necessary condition that must be met by a Community definition of reserved postal service. The *Postal Green Paper* has not, however, been able to identify a specific *positive* relationship between the scope of reserved service and the price or quality of universal service. Yet, assuming the existence of a positive relationship, a few simple considerations suggest that liberalisation of a significant, but limited, portion of postal traffic will pose no threat to affordable universal service.

c) Principle of subsidiarity

137 A basic principle implicit in the Community constitutional structure is that governmental actions should be taken at the lowest level consistent with the sound administration of the Community. This is called the "principle of subsidiarity." Although mentioned or implicit in several discussions or recommendations, the *Postal Green Paper* does not explore the implications of the principle of subsidiarity for a Community polic y on reserved services.

138 This omission is unfortunate since a key fact that emerges from the *Postal Green Paper*'s survey of the industry is that the delivery service sector is primarily local and national in scale. About 57 percent of mail is collected and delivered to an address in the same city or an adjacent locality. § A3-9.4. For the average Member State, only about 3.6 percent of the mail is sent out of the Member State; for the Community as a whole, only about 1.5 percent of mail is exported.[36] Private delivery operations as well appears to be concentrated at local and national levels. § 4-5.1. Not only are delivery services predominantly local and national in scale, it is clear that the quality or price of service in one Member State does not affect the quality or price of service in another Member State. This separation of national markets in the delivery services sector

[36] § A2-4 (table 6) estimates cross border mail comprises 7 percent of Community mail. However, we believe that this figure results from incorrectly counting cross border mail twice, once as inbound mail and once as outbound mail. We believe 3.6 percent is the correct figure. See ¶ 174, below.

contrasts, for example, with telematics services, in which the Community market as a whole is instantly and equally accessible from every location in the Community.

139 Of course, the Community has a direct interest in *cross border* (intra Community and international) delivery services. Cross border delivery services form a prominent strand in the infrastructure that binds the Community into a Single Market. A more general Community interest is also evident. Postal and other delivery services are so important to the functioning of the economy that the quality of national delivery services affects the overall structure and possibilities of commerce in the Community as a whole.

140 The relationships between cross border and national delivery services also deserves consideration. As noted in the discussion of universal service, cross border service often results from an interconnection of national delivery services, whether postal or private. In such cases, the quality of cross border service is determined by the quality of the national services, *and not the other way around*. The reason is that cross border traffic, if it is not transmitted by a specialist cross border service, will constitute only a relatively minor part of the total traffic of a national delivery service. In the future it may be hoped that intra Community commerce will increase as a fraction of total commerce. Nonetheless, there is no realistic possibility that intra Community commerce will become more important to national delivery services than local and national commerce. Put simply, in economic terms, the *Community* interest in good postal delivery in London will never exceed the *British* interest.

141 These reflections suggest, we believe, some general parameters for Community policy. So long as the principle of subsidiarity has any currency, in the delivery services sector, Community policy will have to depend upon, in some measure, the policies of the Member States. There is no obvious reason why a Member State should not exercise its own discretion as to whether a bit more or a bit less of national resources should be expended on the delivery services infrastructure, as opposed to other aspects of the national economy. The *Community* interest would appear to lie less in the particulars of the delivery services market in each Member State and more in general considerations. For example, no delivery services sector in any Member State should be permitted to deteriorate to the point that Community "access" to the Member State is impaired. Similarly, a reserved services approach adopted in a Member State should not grow so expansive as to distort the pattern of competition within the Community as a whole. Nor should the reserved service concept in a given Member State restrict the right of Community shippers outside the Member State to arrange for the collection or delivery of all intra Community shipments in the manner they choose.

142 The principle of subsidiarity thus implies an irreducible level of variability in delivery service policy among the Member States. A corollary implication is that only delivery services that are likely to achieve complete harmonisation throughout the Community are those provided by cross border specialists.

143 These notions in fact appear to be largely consistent with the approach of the *Postal Green Paper*. However, we believe that an explicit consideration of the principle of subsidiarity makes it possible to refine some of the *Postal Green Paper*'s recommendations. In particular, the principle of subsidiarity would seem to support a limited degree of Community deference to the reservation, or liberalisation, of local and national postal services by the Member States. In general terms, the Community could accede to a Member State reservation provided that it does not prevent the achievement of a minimum quality of delivery services in the Member State or distort the structure of trade in the Community as a whole. In no case, however, should the Community accept limitations on the development of cross border delivery services, whether postal or private, for these are likely to be the only truly harmonized Community delivery services.

4.2.2 General approach to reserved services

144 The foregoing observations guide our views as to Community policy on the establishment of reserved services. First, we submit the Community should not positively endorse any level of reserved services, since so far no level of reserved services has been shown to be consistent with the principle of the least restrictive alternative.

145 Second, under the principle of subsidiarity, the Community's interests are plainly paramount in the cross border market. Under the principle of the least restrictive alternative, as well as in light of actual commercial experience, the Community should not permit any reservation of cross border services.

146 Third, under the principle of subsidiarity, the Community may accept a measure of the Member State discretion in the reservation of local and national delivery services to the postal administration. However, in light of the principle of proportionality, the Community should not accept a reservation of services which appears clearly unnecessary to achieve universal national postal service. The Community may properly look to the experience of the Member States themselves for guidance as to what services are clearly unnecessary to sustain universal service. On this basis, the Community may prohibit the reservation of any service which is unreserved in a substantial portion of the Community that is satisfactorily served by a universal service.

147 In addition, where a Member State's reservation of services appears to interfere with the achievement of a minimum level of universal service as defined by the Community, then the Community may prohibit such reserved service as well. This conclusion is based on the "threshold" effect[37] of a Community definition of universal service discussed above.

148 The foregoing conceptual framework results in a scope for acceptable reserved services that is similar to that recommended by the *Postal Green Paper*. Our comments, however, are intended to suggest a somewhat more

[37] See ¶¶ 98-101, above.

explicit legal basis than developed in the *Postal Green Paper*. In our view, this explication allows a more precise discussion of the details of what types of reserved services the Community should and should not permit.

4.2.3 Neutral application of non postal laws

149 Before addressing the details of which services may or may not be reserved under this approach, we must first emphasise one particular concern. Under Community law, the issue is not *reserved* services, but services which have been granted "special or exclusive rights" and services which are the beneficiaries of "state aids." EC Treaty, Articles 90(1), 92. A Member State may favour a postal administration not only by granting it a monopoly, but also by allowing it other legal privileges such as: exemptions from taxes or customs duties, special or late night access to airport facilities, priority access to air transportation, and so forth. *The principles that we have discussed in respect to "reserved services" apply equally, we believe, to all "special or exclusive rights" and "state aids."*

150 In principle, the *Postal Green Paper* recognizes the importance of non discriminatory application of customs and value added tax (VAT) laws:

> *The Commission have recognised that neither VAT nor customs charges should be a source of competitive advantage or disadvantage* to any of the different postal operators, either public or private, where they compete in the non-reserved sector. Accordingly, the Commission will be reviewing the competitive interface between the services of the public operators and those of the private express carriers, in order to ensure that the fiscal treatment is equal where there is direct competition. [§ 3-6.4.2]

In recommendation § 9-4.11, the *Postal Green Paper* states that

> The appropriate authorities, whether at national or community level, need to ensure that application of general legislation to the postal sector's non-reserved services does not unfairly advantage or disadvantage any operator competing in the non-reserved area.

151 We wholeheartedly agree with these general principles, but we do not feel that the *Postal Green Paper* evinces the sense of urgency or depth of concern that is appropriate to these vital issues. Appendix C presents examples of how differential treatment under non postal laws substantially distorts the delivery services market. In some cases, the gravest distortions are caused by Community law, not Member State law.[38] There can be no doubt that such

[38]For example, § 13 of the Sixth VAT Directive, 77/388/EEC, 1977 OJ L145/1, provides that postal operators are VAT exempt while from the first of 1993, private operators will be required to charge VAT on intra Community traffic. While many users of private operators will be able to reclaim this VAT, others (such as banks and insurance companies) are VAT exempt and will be unable to do so. The net result will be an extremely serious distortion of competition between postal and private operators and even between customers of private operators. On the other hand, we recognise that not all of distortions accrue to the benefit of postal operators. In some cases, postal administrations are disadvantaged compared to private competitors.

differences materially distort commerce in the delivery services sector today.[39] Nor can there be any doubt that postal operators are vigorously competing against private operators in many segments of the delivery services sector.

152 Under these circumstances, we would urge that the mission of Senior Officials Group on Post (SOGP) working party described in recommendation § 9-2.9 should be expanded to include a review of all non postal laws for differences in application to the activities of postal and private operators in the *non reserved* area.[40] The review should include both *de jure* and *de facto* application. The extent of economic distortions should be estimated and expeditious, but practical, remedies should be proposed.

4.2.4 Domestic services

a) Services unnecessary to universal service

153 Under the suggested rationale for a Community approach to reserved services, one may simply compare the items and services reserved in each of the Member States. § A4-3 (table 1). Whichever items or services are, *de jure* or *de facto*, outside the reserved area in a substantial portion of the Community should be declared outside the reserved area throughout the Community. Accordingly, we would suggest the following items and services have been demonstrated to be *unnecessary* to the maintenance of affordable universal service:

- Letters weighing more than 500 grams
- Letters priced at more than 5 times the postage rate for the lowest weight step (or priced above alternative standards).
- Printed matter *or* matter not covered by a designated "content neutral" reserved service
- Small packets and parcels
- Document exchanges
- Mail preparation services
- Fax
- New services[41]
- Delivery services which are liberalised *de facto* or which must be liberalised *de jure*.

Several of these items require further explanation.

b) Price and weight limits

154 All Member States have reserved the carriage of "letters," but all Member States limit the reserved area to letters less than a certain weight. In traditional postal law, the concept of a "letter" is defined, not too helpfully, as "corres-

[39] [Unused]

[40] The SOGP working party, in particular its composition, are discussed further at ¶ 217 et seq, below.

[41] New services have, by definition, never been monopolized by any Member State and hence reserving such services is unnecessary to assure the existing universal service.

pondence of a current and personal nature."[42] One geographically small Member State, the Netherlands, uses a 500-gram weight limit for the "letter" monopoly. Other Member States use one kilogram as the limit, while others use two.[43] In our view, even if one accepts the questionable proposition that affordable universal service depends upon a monopoly, the letter monopoly can be safely confined to letters of a much lower weight. The vast majority of letters weighs less than 50 grams; most probably weigh less than 20 grams.[44] Either limit would suffice, we would argue, as a matter of *national* postal monopoly policy. Hence, we agree with the observation of the *Postal Green Paper* that "the weight limit for the reserved area should almost certainly be less than 500g." § 8-10.2.1.

155 However, it must also be recognised that only one Member State has adopted the 500-gram limit, although it has proved workable for many years and compatible with one of the best universal services. Then, too, one must consider the situation *de facto*. As the *Postal Green Paper* suggests, shipments weighing more than 500 grams can, in most cases, be treated as "parcels" and shipped privately in most Member States regardless of the higher formal weight limit for letters. § 8-10.2.1. In light of these somewhat conflicting considerations, we suggest a 500-gram limit represents an appropriate *Community* approach towards the national postal monopolies.

156 A reservation of "express" delivery services has also been proven unnecessary to the maintenance of assured universal service, but the definition of "express" requires clarification. The only definitional approach that has proven workable in the Member States is, in our view, a price based approach. The leading example is the United Kingdom, where, since 1981, express operators have been permitted to carry letters if they charge more than UK£ 1.00. This is today a little more than four times the minimum postage rate of UK£ 0.24 for letters weighing 0-60 grams. Similarly, Germany has introduced a DM 10 rule (10 times the basic postage charge of DM 1.00 for a 0-20 gram letter), and the Netherlands has adopted a rule of D*f* 8.20. As the

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[42]See, e.g., Universal Postal Convention, Article 20, unchanged in this respect since the original convention of 1874. Indeed, the concept of a "letter" as the object of the postal monopoly goes back to the origin of the monopoly itself. See, e.g., the first English postal monopoly proclamation of King Charles I, Proclamation of July 31, 1635, Patent Roll (Chancery) 11 Car I, Pt 30, No. 11.

[43]Denmark and Germany adhere to the one kilogram rule. Although § A4.3 (table 1) lists France as having a two kilogram limit, we understand the monopoly to effectively end at one kilogram because the monopoly over "*papiers d'affaires*" is limited to one kilogram. In the U.K., the UK£ 1.00 rule effectively exempts from the monopoly letters weighing more than one kilogram. Belgium, Greece, Ireland, Italy, Luxembourg, and Portugal use a two kilogram rule. Spain also uses the two kilogram rule, but only for intercity shipments.

[44]Some postal officials would argue that a monopoly over higher weight letters is disproportionately important because postal administrations make disproportionately high profits on higher weight letters. We cannot, however, understand why higher weight letters should be more profitable than other letters. No public policy appears served by allowing a universal service provider to make extra high profits on a particular segment of users.

Postal Green Paper reports, most other Member States have, in fact, permitted express services to operate if they charge significantly more than the basic postage rates, even though they have not adopted a specific rule. Against this background, the German 10 times postage may, in fact, be unduly conservative.

157 The concept of a price based definition of express services has proved workable and acceptable. The U.K. rule has been in force for a decade without disruption to universal service. The U.K. is a substantial portion of the Community with a variety of urban and rural areas. While we believe that the price limit could in fact be substantially reduced without endangering affordable universal service,[45] in accord with the general approach described above, we suggest that a *Community* price policy should be grounded in the experience of the Member States. The question is, what is the most feasible way of adapting the British example to the Community as a whole?

158 The *Postal Green Paper* suggests a price limit for the reserved area of 1.5 or 2 times the postage rate applicable to a shipment whose weight is the weight limit for reserved services. If, as we suggested, the weight limit is set at 500 grams, then the price limit would be 1.5 or 2 times the postage rate for a 500-gram letter in each Member State. The rationale for this approach is, as we understand, that the postage rate for the maximum weight will be influenced by a competitive price regime at the next higher weight step. For example, the 500-gram reserved service rate would likely be less than, say, the 750-gram competitively set rate. This seems plausible; however, we are still concerned that such a high weight step affects so few letters that it may be become a "fictitious" rate, used only to increase the minimum rate that private operators may charge. A postal administration could possibly sustain this practice by using a different, parcel tariff as the "real" tariff for 500-gram items.

159 As an alternative price limit, one might suggest a multiple of the letter post rate for the minimum weight step. The advantage of this approach is that the minimum letter rate affects so much traffic that it is necessarily a "real" rate that cannot be manipulated for the primary purpose of limiting competition. Moreover, since a large fraction of total postal revenues are derived from the minimum letter rate, a standard based on this rate serves as a good index of the financial threat posed by competition. The main disadvantage of using the minimum letter rate is that, unlike the letter rate for the highest reserved weight step, it is insulated from the restraining effect of competition. Another disadvantage is more technical. If a minimum rate standard is adopted and continental postal administrations follow the pricing approach of the British postal administration, the 20-gram rate might abruptly become a much higher 50-gram rate standard. This possibility, in turn, suggests a standard based upon the postage rate for the 50-gram, instead of the 20-gram, letter weight step.

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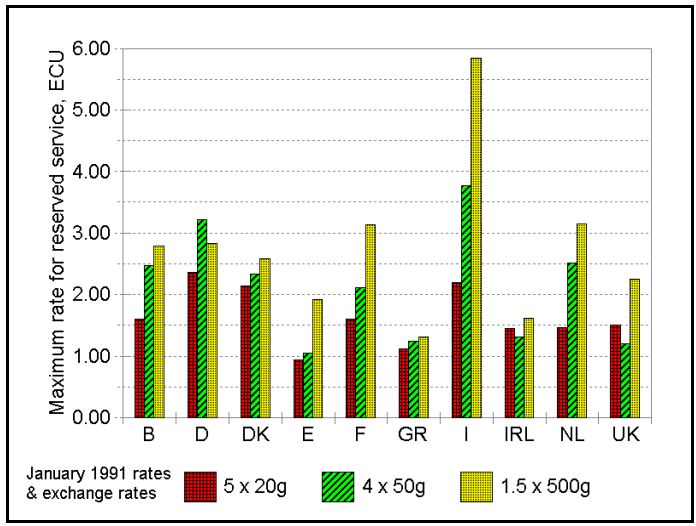
[45]Indeed, the United Kingdom, with the support of the postal administration, is contemplating a reduction of this rule, to UK£ 0.50 or less.

Table 5. Price limit standards for reserved services



160 In light of these various considerations, it seems to us there are good reasons for using each of these standards even though none is perfect. The answer may be to combine the strengths of each by using them in the alternative. For example, the rule could be that the maximum price for a reserved service could not extend beyond the *lowest* of the following price standards:

- 5 times the 20g letter rate (if a 20g rate is used);
- 4 times the 50 - 60g letter rate (if no 20g rate is used); or
- 1.5 times the 500g letter rate.

Table 5 compares these three standards for postal rates in effect on January 1991. In this graph, the rule that we have suggested would use the *lowest* of the three bars as the maximum price limit for the reserved area in each Member State.

c) Printed papers and "content neutral" classification

161 The *Postal Green Paper* notes that Italy, Luxembourg, and the Netherlands do not include printed papers in the reserved service. § A4-3 (table 1). Neither, we believe, do France[46] and the United Kingdom.[47] Thus, it is clear that in a substantial portion of the Community printed papers fall outside the reserved area without demonstrable impairment of the universal service. Based upon this experience, the Community should limit reserved services in all Member States so as to exclude printed papers. This conclusion is consistent

[46]Post and Telecommunications Code, Decree of March 12, 1962, Article L.2 (3).

[47]British Telecommunications Act of 1981, § 66(5) defines a "letter" as "any communication in *written* form which [meets various conditions]."

with the *Postal Green Paper*, although grounded in a somewhat different rationale.[48]

162 To base an exemption upon the "printed" status of documents, however, may be at odds with the growing trend among Member State postal administrations to recast postal service classifications into "content neutral" terms. Traditional postal rates might be described roughly as: (i) a rate for letters based on fully allocated costs and (ii) a lower rate for printed papers based upon marginal, or even subsidised, costs. Reflecting this price differential, postal administrations would usually give handling priority to letters over printed papers. In fact, in the twentieth century, the "letter" rate has also been applied to envelopes sealed against inspection, so that the high priority "letter" rate has become, in this sense, applicable to printed papers as well as letters. In 1968, the British Post Office extended this concept by introducing a two tiered system based strictly on priority of service. "First class" service offers high priority treatment, while "second class" service provides a lower priority, less expensive service. The mailer can choose either service to transmit his letters and printed papers. The two-tiered mail classification scheme is neutral regarding the content of what is mailed. Denmark and Portugal now follow the U.K. system.

163 In a two-tiered classification system, we believe that it would be fair to say that the great majority of printed papers are transmitted at second class rates. As we see it, the two tiered system is not truly inconsistent with the letter/printed papers distinction. It is rather a reformulation of this distinction in more explicit operational terms. Both the letter/printed papers system and the two-tiered system seem to us to be based upon the idea of a fully cost allocated primary service supplemented by a second service that is priced closer to marginal costs and used to complement the operational peaks and valleys of the primary service. The two-tiered system is, in some respects, a more sophisticated version of the traditional letter/printed papers system.

164 Based upon these observations, it seems to us that a rule generally excluding printed papers from the reserved service area can be adapted to the two tiered system as well. As adapted, the rule would state that if a Member State's postal administration employs a content neutral classification scheme, then the Member State may, in its discretion, reserve one of the content neutral classifications in order to ensure the provision of an affordable universal service, *but it may not reserve more than one*. One would expect that the

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[48] § 8-9.1.3 suggests that printed papers should not be included in reserved services because they are not "individualised." We agree with the implication of the *Postal Green Paper* that the dissemination of non individualised communications is of less absolute social importance than the dissemination of individualised communications. However, as noted above, we are unable to discern any clear connection between the general goal of ensuring an affordable universal service and the inclusion in the monopoly of any particular type of mail. Hence, we have grounded our approach upon the experience of the Member States rather than in the individualisation of communications.

Member State would reserve the "first class" service, since "first class" most nearly corresponds to "letter" class. The British government, however, has reportedly considered limiting its assurance of universal service to second class service, and we perceive no reason why the reservation might not be limited to second class service instead of first class service. It is clear, however, that a reservation of both first and second class services would effectively circumvent the *Postal Green Paper*'s correct policy of placing printed papers outside the reserved area.

d) Document exchanges

165 A document exchange is an office with boxes or "pigeon holes" reserved for companies and individuals who are members of the exchange. The office provides a safe place where a member can deposit mail for later collection by other members of the exchange. Obviously, a document exchange is viable only among a group of users that exchange mail on a regular basis. The *Postal Green Paper* proposes a generally liberal approach to document exchanges, as follows:

> Mailers ought to be able to deliver their own mail, whether in their own country or in another Member State . . . .
>
> Member States should therefore permit the functioning of document exchanges. . . . Further, in order to enhance flexibility available to customers, each Member State should permit document exchanges to transfer mail between each other, *unless it was convinced that such a step would harm the universal service provision of the postal administration*. [§ 8-5.1]

166 While we welcome the *Postal Green Paper*'s recognition of the useful role of document exchanges, we are concerned by the qualification regarding the right to *link* document exchanges. Document exchanges are "*linked*" if a member can deposit his mail in a box in office A, to be transmitted by the document exchange operator to a box in office B. For example, it might be desirable to link document exchanges serving the financial districts of major cities within a Member State. As far as we are aware, the evidence from document exchanges in various Member States indicates that:

- document exchanges, whether or not linked, achieve only a relatively small market presence;
- document exchanges are suitable only for a very distinctive group of users (such as banks and insurance companies), so their potential user base is limited;
- linked document exchanges provide both rural and urban services (e.g., in the U.K.), suggesting a minimal cream skimming effect;
- extensive linked document exchanges have proved consistent with a high quality universal service in at least one large Member State (the U.K.) for many years.

167 In view of this experience in the Member States, we submit that there are

no evidentiary grounds for allowing Member States to restrict the linking of document exchanges. On the contrary, the evidence supports a Community position that, within the framework of an adaptation period, document exchanges should be exempted from the set of reserved services in all Member States, without any residual restrictions on linking.

e) De facto and de jure non reserved services

168 The Community policy towards reserved services should also exclude from reservation those services which are in fact liberalised in a Member State where universal service is available. As the *Postal Green Paper* observes, the *de facto* monopoly does not always coincide with the *de jure* monopoly. A good example is rapid downtown messenger services. In many cities in the Community, such services openly carry urgent letters despite a rather unclear legal status under the postal monopoly law. Under the principle of proportionality, a Member State should not be permitted to extend the monopoly to a service which has, in fact, proved unnecessary to support universal service.

169 Finally, as a matter of completeness, a statement of Community policy should make clear that a Member State may not reserve a delivery service that unduly restricts the free movement of goods and services. Put another way, the Community should explicitly reserve the right to apply the strict norms of the EC Treaty wherever it finds that Community interests are paramount.

f) Direct mail

170 According to the *Postal Green Paper*, direct mail comprises about 20 to 25 percent of letters. § 4-4.1 (table 7). The *Postal Green Paper* recommends that direct mail should be excluded from the reserved area:

> Direct mail is becoming increasingly "personalized." However, since the same or a similar message is being sent to other addressees, it is clear that it would not pass *the test of referring specifically to the affairs of the addressee*. However, this trend of personalizing direct mail entails that the traditional criterion of determining whether or not the text was identical is probably no longer sufficient. [§ 8-9.1.2]

171 As we understand it, the *Postal Green Paper* is suggesting that bulk, individualised, advertising documents, which are today likely to be prepared by means of a computer program, are more like traditional printed papers than traditional letters in terms of production and delivery operations. Hence, direct mail, like traditional printed papers, should be excluded from the national postal monopolies. We believe that the *Postal Green Paper* has identified an important point. Direct mail is, in many operational respects, more like printed papers than letters. Computers simply provide a more sophisticated way to "print." Moreover, the introduction of direct mail is so important that it is changing the nature of the postal business. We agree, as well, that the inherently commercial quality of direct mail argues strongly that it should be not considered part of the assured universal service and therefore should not

be considered within the scope of the national reserved services.

172 On the other hand, it is unclear to us to what extent the Member States have satisfactorily come to terms with the distinctions between direct mail and the traditionally monopolized category of "letters." As we understand it, a few Member States have classified direct mail as "printed papers," and hence outside the scope of the "letter" monopoly. We gather, however, that this definitional approach is not clearly explicated nor generally accepted. Moreover, some in the direct marketing industry appear to feel that direct mail should subsumed in a larger category of "bulk mail," a category which would include printed papers, direct mail, computerized statements of accounts, and the like. This situation reminds us of the express industry in the late 1970's. At that time the distinct nature of express service, compared to traditional postal service, was palpable to all involved in the industry, but there was no consensus as to how the distinction should be articulated in law.

173 In line with the general Community policy towards reserved services we have suggested, it would seem to us appropriate for the Community to permit one or more of the Member States to experiment further with definitions and policies towards direct mail before adopting a Community wide approach. As a practical matter, however, we do not believe that such a strategy will appreciably diminish the program of reform envisioned by the *Postal Green Paper*, because of the following considerations:

- Direct mail is such a significant proportion of total mail that it would likely qualify for adaptation periods of substantial length, during which time we expect reforms at the Member State level will offer clarification of the relevant issues.
- Direct mail is generally business to household mail, so that it will take a long time for private operators to establish competitive "first class" services for direct mail, even if they are allowed to do so.
- Under the approach we have suggested for "content neutral" mail classifications, competition for "second class" direct mail delivery will be liberalised in a number of Member States.[49]
- Liberalisation of the cross border market will permit competition in the delivery of another important portion of direct mail.
- The direct marketing industry is likely to take advantage of liberalisation only after a long period of testing and the foregoing areas seem likely to create sufficient liberalisation to permit testing to proceed.

4.2.5 Cross border services

a) Size of reserved cross border market

174 At the outset, it is important to clarify the size of the cross border market. The Postal Green Paper states that the cross border market amounts to 7

[49] See ¶ 162, above.

percent of the total Community letter post market by volume. About 56 percent of the cross border market is intra Community traffic; the rest is international. See Table 6. However, by comparing PGP data to official UPU data for the same year, it appears likely that the Commission's consultant counted both outward and inward traffic in developing cross border statistics. See Table 7. For example, a letter from London to Paris was apparently counted as both a U.K. intra Community letter and as a French intra Community letter. We suggest that, to give a correct sense of the relationship between national and intra Community traffic, it would be possible to count all outbound letters, or all inbound letters, but it is impossible to count both. Thus, we believe that the *Postal Green Paper* overstates the size of the intra Community market, compared to the national markets, by a factor of two. If so, the intra Community market represents only about 2 percent, not 4 percent, of the total Community postal volume. The same analysis, more or less,[50] can be applied to the international market, indicating that the international postal volume is about 1.5 percent of the Community volume. The total cross border volume, intra Community and international combined, appears to be about 3.6 percent of total volume, rather than the 7 percent used in the *Postal Green Paper*.

175 Of this cross border traffic, much is already non reserved, and some is not realistically amenable to competition. Almost half of cross border mail is printed papers, generally regarded as outside the reserved area, *de facto* if not *de jure*. Another 10 to 30 percent represents postcards and letters addressed to suburban and rural areas. As a practical matter, this mail is effectively beyond the ability of the private operator to deliver. The remaining cross border traffic, perhaps 1.5 percent of Community postal volume, is already subject to considerable competition. § 3-3.8. Thus, it seems clear, *liberalising cross border traffic will expose less than 1 percent of Community traffic to new competition*, probably substantially less.

b) Cross border services generally

176 The *Postal Green Paper* recommends liberalisation of the cross border delivery services. § 9-2.12, § 9-2.13. We agree. Moreover, we agree with a number of reasons for this recommendation cited in Annex 15, but we would expand on some and add others.

177 The *Postal Green Paper* notes that competition exists in fact in the cross border market, demonstrating that, as a matter of fact, a monopoly over cross border traffic is unnecessary to assure affordable universal service. § A15-3.1. We agree. Indeed, quite aside from the activities of private operators, modern telecommunications and printing technology makes it impossible to monopolize outward bulk cross border mail.

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[50] In the intra Community market, the number of outbound and inbound letter post items should be exactly equal. In the international market, there may be some differences between inbound and outbound volumes.

Table 6. Cross-border traffic, PGP statistics, 1988

	Total post	Total PGP/ UPU	Intra EC /EC	Intl/ EC	Cross border /EC
Belgium	3,145	102%	8.4%	5.6%	14.0%
Germany	14,262	90%	1.9%	2.1%	3.8%
Denmark	1,573	90%	2.3%	1.9%	4.2%
Spain	5,014	113%	6.7%	4.9%	11.6%
France	15,894	86%	2.6%	2.1%	4.7%
Greece	451	100%	14.4%	11.6%	26.0%
Italy	10,534	126%	4.6%	2.6%	7.2%
Ireland	494	NA	24.9%	5.2%	30.1%
Luxembourg	168	98%	35.2%	11.6%	46.8%
Netherlands	5,408	92%	7.6%	2.0%	9.6%
Portugal	596	99%	8.1%	5.3%	13.4%
U.K.	13,774	97%	2.8%	5.2%	8.0%
EC	71,313	97%	4.1%	3.2%	7.3%
EC w/o IRL, E	65,805	111%	3.7%	3.1%	6.8%

Source: PGP § 4-5.1 (table 8) (total traffic); § A2-4 (table 2) (cross border).
Notes: "Total PGP/UPU" column compares PGP total postal traffic with sum of domestic, outward, and inward traffic from UPU *Statistiques*. Deviation from 100% indicates discrepancy between PGP and UPU data.

Table 7. Cross border traffic, UPU statistics, 1988

	(N) Nat'l	(O) Outward	(I) Inward	O / N+O	O+I / N+O+I
Belgium	2,606	236	241	8.3%	15.5%
Germany	14,752	471	620	3.1%	6.9%
Denmark	1,613	65	66	3.9%	7.5%
Spain	3,913	252	269	6.0%	11.7%
France	17,945	267	348	1.5%	3.3%
Greece	345	67	39	16.3%	23.5%
Italy	7,668	277	384	3.5%	7.9%
Ireland	NA	NA	NA	NA	NA
Luxembourg	92	40	40	30.3%	46.6%
Netherlands	5,356	314	219	5.5%	9.1%
Portugal	521	48	32	8.4%	13.2%
U.K.	13,204	538	500	3.9%	7.3%
EC w/o IRL	68,017	2,574	2,759	3.6%	7.3%
EC w/o IRL, E	54,813	2,037	2,259	3.6%	7.3%

Source: UPU, *Statistiques* (1988), cols. 5.1.1, 5.1.2., 5.1.3.
Notes: No data for Ireland; 1987 data for Spain.

178 The *Postal Green Paper* notes that competition in the cross border market has already improved the quality of delivery services in the cross border market, by both postal and private operators, and that this trend is likely to continue. § A15-3.2. We agree, and postal studies support this conclusion. Moreover, we submit that it is important to maintain a sense of perspective on the current debate about cross border liberalisation by keeping in mind the events which have led to these improvements.

- Private operators began end to end cross border express operations in the 1970's.
- Postal administrations opposed, predicting dire results for the universal service.
- The Commission intervened to permit cross border services in a series of decisions, most notably in regard to Germany (1984), France (1986), and Italy (1989).
- After years of argument, postal administrations have accepted that express operations are desirable. Postal express services have improved substantially. Universal service has been maintained.
- Private operators began using outbound express capabilities to provide improved cross border *postal* services ("remail").
- Postal administrations opposed, predicting dire results for the universal service and the terminal dues system.
- The Commission intervened, signalling (still informally) that remail should be permitted and terminal dues adjusted.
- After years of argument, postal administrations have agreed that cross border remail is desirable and terminal dues must be adjusted. Cross border postal service has improved. Universal service has been maintained.

It is a rare operator, postal or private, that will readily recognize the public interest in abandoning a regime which offers him a position of special commercial advantage. Nonetheless, the liberalising influence of the Commission has proved vital to the Community, and ultimately beneficial to the long term viability of the operators, both postal and pri vate.

179 The *Postal Green Paper* suggests that, unlike in the national markets, the postal administrations do not possess a special expertise in the cross border market, while private operators have demonstrated such expertise. § A15-3.3. We do not believe that expertise justifies a legal monopoly in any market. Nor, in all candor, can we claim for private operators any particular expertise not also possessed by many of our postal colleagues. Our view is simpler. The long distance, cross border delivery services market is operationally distinct from the local delivery services market. It is difficult or impossible for a single delivery operation to optimize both local and cross border service. Postal services must first optimize their local services, serving long distance markets secondarily. At the cross border level, administrative independence further degrades postal service. To serve the cross border market by linking local

operators, postal or private, is a second best solution to the problem. The private operators, on the other hand, have end to end administrative control over cross border operations and have structured their operations to optimize cross border service. For the same reason, they cannot (and do not) provide the same level of service in the local market as the postal administrations do. It is, in our view, a question of organisation and specialisation, not expertise.

180 Postal economists will argue that the disaggregating effects of distance on postal operations diminish with the speed of service. We agree. If one developed, for example, *a once per month, Community wide delivery service*, one could likely integrate perfectly the downtown London service and the Isle of Skye to Crete service. On the other hand, the private operators have proved the commercial viability of separate local and regional express services. As the *Postal Green Paper* implies, the success of remail and the historically poor performance of cross border letter post services suggest strongly that at least some separation of cross border and local letter services should also be tested in the commercial market. Our position is that liberalisation of the cross border market will permit further limited and reasonable commercial developments, by postal and private operators. If successful, these developments promise substantial benefits to the Community at the regional level and pose no significant threat to the postal administrations at the national level. No one knows what the future will bring, but the liberal policy proposed by the *Postal Green Paper* is prudent and sound.

181 The *Postal Green Paper* notes that profits from outward cross border service will not be needed to cross subsidise inward delivery costs if terminal dues are adjusted to domestic tariffs. § A15-3.4. We agree; there can be no disagreement about the mathematical correctness of this point.

182 The *Postal Green Paper* does not deal with one argument for monopolisation of outward postal services sometimes mentioned by postal officials: that cross border mail is especially important to the universal service because it accounts for a larger share of revenue than of traffic. For example, the *Postal Green Paper* states that cross border traffic accounts for about 7 percent of traffic and 10 percent of revenues. § A2-4. Standing alone, however, such figures do not suggest that a cross border monopoly supports universal service. Average costs and revenues may be different for cross border and domestic items for many reasons (for example, differences in average weight per item). The issue in each case is the relation of costs and revenues. Insofar as the intra Community mail is concerned, the Member State postal administrations charge the same rates for intra Community mail as for domestic mail, yet the costs of providing intra Community service must logically be higher[51] than for domestic

[51]A special study done by the Danish, Dutch, and German postal administrations, "Approaches to Pricing for Intra Community Postal Service" (September 1991), implies (but does not actually conclude) that the end to end costs for cross border service are 140 percent of the comparable domestic costs.

service. Since the postal administrations collectively do not make a profit on domestic services, it seems highly likely that intra Community service is a financial drain on domestic universal service.

183 The *Postal Green Paper* further suggests that competition in the cross border market is particularly appropriate because postal administrations treat domestic delivery costs as largely fixed whereas cross border delivery costs, which take the form of charges between postal administrations, may be viewed as wholly variable. § A15-3.6. This is an interesting point, but we suspect it requires further scrutiny. In postal accounting, the cost of delivery, it seems to us, must include a reasonable proportion of fixed costs, whether the delivery is made by the same postal administration or by another postal administration.

184 Finally, the *Postal Green Paper* argues that outbound remail should be permitted because it is merely an extension of the possibility of private mail preparation. § A15-3.6. We agree. Moreover, if terminal dues are correctly fixed, there is no economic difference between "downstream access" in a domestic system and intra Community remail.

185 The *Postal Green Paper* does not discuss in detail the application of the EC Treaty to cross border mail. However, we believe that legal considerations are decisive. In the cross border market, unlike the wholly national markets, there can be no question of the principle of subsidiarity blunting the full force of the EC Treaty's requirement for the free movement of goods and services within a framework of undistorted competition.

c) Inward cross border service

186 As we understand it, some postal administrations have conceded the reasonableness of liberalising outward cross border services, including remail, but have argued that inward cross border delivery services must still be reserved. Collection and outward functions comprise about 30 percent of the cost of end to end service; inward functions and delivery account for about 70 percent. § 5-3.0. Outward services consist primarily of the collection of mail. Outward liberalisation is thus hardly a major step. Most postal administrations have already accepted the concept of mail preparation by private operators for all mail. A monopoly on the inward delivery of cross border mail is, in practical effect, a monopoly on cross border postal service.

187 The rationale for an inward monopoly is as follows, as we understand it (postal administrations have not provided public exposition of their position). Since a postal administration achieves economies of scale in the final delivery operation, the more items delivered, the greater the "profits" available to subsidize losses incurred in the provision of universal service to rural areas. Hence, if any cross border letters are delivered by private operators, the profits will be lost to the postal administration and its ability to provide universal service will be correspondingly diminished. Further, it is suggested that, while the fraction of cross border mail may be small today, with increased integration of the Community economy, the fraction of cross border mail will become

greater and the threat of competition to the universal service ever more important.

188 Stripped to essentials, the argument for a reservation over the delivery of inward cross border mail is the same as the argument for a reserved service over any delivery service—i.e., the more items a postal administration delivers within a given delivery network, the greater the economies of scale and the greater profits that are generated to cross subsidize rural services. As discussed above, this argument does not in any way satisfy the EC Treaty's principle of the least restrictive alternative.[52] Nor does it provide any guidance to the application of the principle of proportionality.[53] If the Community were to accept this argument, it would not only maintain the reservation over inward cross border mail, it would also extend the postal monopoly to include the delivery of all other items regularly delivered to houses and businesses, including printed papers, direct mail, newspapers, parcels, milk, flowers, and dry cleaning. The issue is not whether a postal administration can make more money by maintaining a reservation over the delivery of inward cross border items. The issue is whether liberalisation of inward delivery would make it substantially impossible for the postal administration (or its *Member State*, author of the reservation) to continue to assure universal service.

189 In gross quantitative terms, the postal argument does not seem to us to be persuasive. There is no apparent reason why a reservation over one segment of traffic is more important than a reservation over another segment of traffic.[54] Standing alone, the volume of domestic printed papers is about 10 times the volume of all cross border mail.[55] If liberalisation of domestic printed papers traffic is consistent with affordable universal service, as it seems to be, what is so special about a reservation of cross border traffic?

190 More specifically, the postal argument does not answer the several particular considerations presented by the *Postal Green Paper* in favour of liberalising cross border mail:

- The cross border market is already substantially competitive, yet universal service is provided and postal administrations dominate the traditional postal delivery services in the cross border market as well as the domestic market.
- A national postal administration retains great economies of scale in the local delivery service, which give it substantial advantages over private operators in the delivery of cross border mail.

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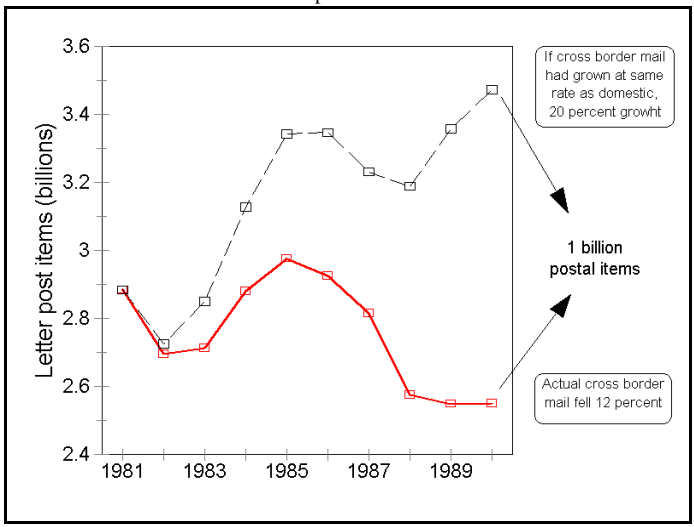
[52]See ¶¶ 112-125, above.

[53]See ¶¶ 126-136, above.

[54]Unless one admits the possibility of overcharging some reserved services very much more than others, a practice that does not seem to us tenable under the norms of the EC Treaty.

[55]According to the UPU, *Statistiques* (1988), in 1988, Community postal administrations handled about 36 billion domestic letters and cards, about 32 billion domestic printed papers, and about 2.5 billion cross border items of all types (1987 data for Spain; no data for Ireland and the U.K.).

Table 8. Decline in cross border compared to domestic mail



- Since liberalisation of cross border service will affect only a small fraction of all postal service (less than 1 percent, as suggested above),[56] it cannot be demonstrated that a reservation over inward cross border services is required to assure the provision of affordable universal service. Under the competition rules, the mere fact that competition makes a particular task more difficult to accomplish does not justify a monopoly.
- A monopoly over the delivery of cross border things—letters, freight, passengers, or anything else—is inconsistent with the free movement of goods and services between Member States.
- Cross border services by national postal monopolies have been relatively poor compared to domestic services. As a direct result of increased competition in the last decade, cross border services, postal and private, have improved.
- The key to high quality delivery service is end to end administrative control. The Community has an overriding interest in the development of good quality intra Community delivery services to bind together the Community; hence, the Community should encourage the development of cross border, end to end, delivery systems, postal and private, to supplement the series of national delivery services developed by the Member States.

191 The Community's interest in better cross border services is substantial and immediate. Although the growth in cross border mail has historically kept

[56]See ¶ 175, above.

pace with domestic mail, in the last decade cross border mail growth in the Community has declined markedly relative to domestic. As Table 8 demonstrates, if the cross border mail of Community postal administrations had grown at the same rate as domestic mail, by the end of the decade, the Community's postal administrations would have carried about *one billion* more letter post items, an increase of about 40 percent. Less than (probably much less than) one third of this "lost" business can be attributed to private operators. The fact is that cross border postal services have not kept up with the demands of modern commerce.

192 Postal data thus imply that a geographically defined patchwork of administrative monopolies over the cross border market has tended to limit the development of the cross border delivery services sector. This limitation of development in the cross border market may, in fact, depress cross border postal revenues far more than any positive effects derived from the current, limited reservation over cross border services. The Member State postal administrations can and will participate in an expanded, liberalised cross border system, both directly and as subcontractors, but they cannot exercise a shared monopoly over the cross border market without restricting this possibility. Nor can they reconcile a shared monopoly with the principles of the EC Treaty. The suggestion that an inward delivery of cross border letters *may* increase net postal revenues marginally and that this, in turn, *may* make the provision of universal service slightly less burdensome—this economic rationale is entirely unproven and, in any case, is of no significance compared to the legal and economic imperatives requiring complete cross border liberalisation.

193 Nor are these considerations altered by the possibility that the cross border traffic *may* increase as a percentage of the total Community market. Over the last century, growth in the international postal market does not appear to have increased as a percentage of total mail among developed countries, despite increasingly interdependent economies. We agree that, over time, the economy of the Community is likely to become more integrated and that, intuitively, increased integration should result in an increase in the demand for cross border delivery services relative to national services. But these developments are still speculative and, in any case, will take many years to unfold. Such developments could well be overwhelmed by other changes in the postal market, such as the increasing use of the fax. Most fundamentally, it must be recalled that the frequency of all types of human interaction decreases with distance. The majority of communications and delivery services will always, under any conceivable set of circumstances, remain local and national in scale. For the foreseeable future, the volume of mail delivered by postal administrations will be affected far more by modifications in the scope of national postal monopolies than by the proposed liberalisation of the inward cross border market.

d) Doomsday scenario: diversion of domestic mail

194 Finally, some postal administrations argue that the real danger from cross border liberalisation comes not from competition for the existing or future cross border mail stream but from diversion of the national mail stream. That is, liberalisation of the cross border market will permit a private operator to collect normally domestic mail in Member State A, transmit it to Member State B for central sorting, and transport it back to Member State A for private delivery. Alternatively, large mailers in Member State A can use modern electronics to produce their mail in Member State B, saving the first leg of the journey. If the private operator delivers only the mail to the centre cities and gives the remainder of the mail to postal administration A at a uniform tariff, then the private operator will be able to "skim the cream" from the postal operator. Such a large fraction of national mail will be diverted in this manner, the argument goes, that the postal operator will be unable to provide universal service at affordable rates.

195 Let us consider this argument from the standpoint of a large user, for example, a French bank with customers all over the national territory. The suggestion is that the French bank will print its statements of account in, say, Brussels, where they will be given to a private operator for delivery to addressees in France. The Brussels printer, by hypothesis, is no better than the available French printer,[57] and the French bank will incur the cost and inconvenience of establishing a new office in a distant location to perform one of its most vital business functions. Assuming (incorrectly) that the private operator can load and unload large long haul trunks with the same ease and cost as the French postal administration manages its local Parisian transport operation, the private operator must absorb an operational penalty of three or four hours for each item. This penalty affects the efficiency of work schedules, as well as the end to end transit time. Nonetheless, let us suppose that the private operator will be able to provide more or less in the Paris area that is equivalent delivery by the French postal administration, i.e., that the private operator, like the postal administration, will be able to provide J+1 delivery to all Paris destinations for 90 percent of the mail. The private operator will then, it is suggested, give the rest of the mail to the French postal administration to delivery at a loss to the provinces. For this service, the private operator will charge a price that is less than that charged by the French postal administration to what is, by hypothesis, one of its best customers. Is this scenario truly plausible?

196 The private operator will have an extremely small amount of mail compared to the French postal administration, yet its price must cover the substantial fixed costs necessary to establish a daily delivery service for the Paris area. Indeed, as a commercial reality, the private operator's price will

[57] Otherwise, the Brussels printer is providing a "value added" service.

have to be not only less than the French postal administration's bulk rate, it will have to be still lower by an amount that compensates the French bank for the cost and uncertainty of moving its mail production operation to Brussels. How can the private operator succeed? Recall that some 70 percent of postal costs are employee costs. A private operator in Paris, no less than the French postal administration, will have to hire from the same pool of French men and women to make delivery of items in Paris. Nor is the private operator likely to realize substantial savings in the cost of vehicles or facilities. The doomsday scenario suggested by post offices does not appear to us to be realistic. We do not think that it will be possible to private cross border operators to offer a "first class" service that can compete in price terms with an efficient post office across an area even as small as the Paris area.[58]

197 If, however, such competition materializes, we believe that the French postal administration should be able to respond competitively. That is, it should be able to introduce a bulk, "Paris only" rate to the bank to compete with the Parisian mail that is being delivered by the private operator. The "Paris only" rate would reflect the lower costs that are (as supposed in the example) involved in serving Paris as opposed to the rest of France.

198 Of course, in our example, the plausibility of the scenario changes if one imagines a precipitous decline in the quality of the French postal administration. Suppose the French postal administration achieves not 90 percent, but 20 percent, delivery in the Paris area within J+1. Suppose, indeed, that 50 percent to the mail is not delivered until J+5. Under such circumstances, the French bank might be willing to pay a premium for a higher quality of delivery to Paris through Brussels. While we do not think that a private operator could underprice the French postal administration, it might be able to provide a better service at a price that is higher but still affordable. In such a situation, however, is it legally or economically desirable for the Community to deprive the French bank of this possibility?

199 Legally, we believe that ABA competition, whether physical or non physical, affects trade between Member States. It is similar to the competition concept of "parallel imports." A national monopoly that limits cross border competition is inconsistent the EC Treaty. We do not believe such a national monopoly could limit the right of a Community airline to fly passengers or freight from a point in Member State A to a hub in its home Member State B and then to a second point in Member State A. Hence, it does not seem to us

[58]Nor, indeed, do we believe that the French postal administration would lose money on mail tendered at the normal postage rate for distribution across so large as an area as France outside of Paris. We believe that only a small fraction of destinations for which mail loses money on a *marginal* basis, i.e., incurs marginal delivery costs that exceed marginal revenue. For a private operator to impose losses on the postal administration, it would be necessary to tender mail that is predominantly directed to this very narrow class of destinations. For an estimate of losses on rural mail, see ¶ 132, above.

that such restrictions are permissible for ABA postal traffic either.[59]

200 More importantly, in economic terms, we believe that the possibility of cross border competition constitutes *one of the most powerful tools that the Community possesses to "level up"* the quality of national postal services. As our example illustrates, ABA competition might serve as a limited competitive stimulus for a poor quality or overpriced postal administration. From an overall economic standpoint, the national postal systems are far more important than the cross border system. Hence, we believe that the Community should encourage ABA cross border competition where national postal service appear inadequate. From the standpoint of the user (like the French bank), the cross border delivery system can serve as a safety net if they are faced with inadequate service from a reserved service provider. From the standpoint of the Community fulfilling its duty to assure basic universal service, ABA cross border competition represents a more evolutionary and delicate tool than direct subsidy of a national postal administration or a complete abolition of its reserved service area.

201 Of course, this discussion is not a complete economic analysis of the "doomsday scenario." One can imagine many situations where cross border competition could be more commercially plausible than in our example (in and out of Luxembourg, for example). Nonetheless, we submit that foregoing considerations are adequate to support the general conclusion that, for the Community as a whole, there is no reasonable likelihood of a rapid and substantial migration of domestic letter or "first class" mail into a liberalised cross border mail service. Moreover, the possibility of such migration, although limited, will offer a desirable stimulus to improve the weakest postal administrations in the Community. The Commission, we believe, should stoutly defend the general principle of cross border liberalisation for physical and non physical ABA traffic—ameliorating the impact with adaptation measures—and carefully monitor developments. We anticipate that developments will be limited in scale, but decidedly positive for users and the Community as a whole.

e) Intra Community ABA remail

202 As noted,[60] it seems to us axiomatic that Member State postal administrations should provide the same delivery services, for the same prices, for intra Community mail as for equivalent tenders of national mail. Thus, terminal dues must be adjusted to domestic postage rates.[61] Once this adjustment is made, there will be no reason not to permit intra Community ABA remail. Indeed, in general, we expect ABA remail to occur only as part

[59]We are referring to genuine ABA operations, such as facing, sorting, bar coding, loading, unloading, etc., of mail in Member State B. We are not referring to merely driving or flying a vehicle across the border and back.

[60]See ¶ 75, above.

[61]See ¶ 242 *et seq*, below.

of consolidated Community wide mailings, a commercial development that, we believe, the Community should encourage.

203 We do not believe that postal administrations may, consistent with the EC Treaty, enforce UPU article 25(1) against intra Community ABA remail. This UPU article purportedly authorizes postal administrations to "take the law into their own hands" by refusing to deliver such mail. The proper recourse is, we believe, the national postal monopoly laws, including the various procedural protections which the legislator has seen fit to grant the accused. The national monopoly laws, however, are constrained by the EC Treaty. If postal administrations charge the same rate for the delivery of intra Community mail as for national mail (as they must under the EC Treaty), then we do not believe there is any justification, cognizable under the EC Treaty, for the application of the national postal monopoly to intra Community ABA remail.

f) Extra Community ABA remail

204 Extra Community ABA remail stands on a different footing. In the Universal Postal Convention of 1989, the Member State postal administrations agreed with non Community postal administrations to a schedule of terminal dues unrelated to the actual cost of delivering mail. In some cases, Member State postal administrations agreed to deliver foreign mail below marginal cost. If intra Community terminal dues are related to domestic postage rates and intra Community postage rates are adjusted accordingly, Community mailers could have an economic incentive to send or print mail outside the Community and post it with non Community postal administrations for delivery in the Community. To limit this economic incentive, Community postal administrations argue that the Community should control extra Community ABA remail.

205 It is difficult to sympathize completely with the Member State postal administrations on this subject. Although domestic postage related to terminal dues in the Community will give mailers an incentive to post intra Community mail via non Community postal administrations, this incentive was created by the postal administrations themselves in a terminal dues system adopted in 1989. This terminal dues system, in turn, was agreed to by Member State postal administrations in an attempt to suppress remail competition. When the 1989 Universal Postal Convention was signed, a complaint requesting the Commission to apply the competition rules to the terminal dues system was already a year and half old. It was the Member State postal administrations themselves that prevented an early resolution of this complaint, blocking clarification of the implications of the EC Treaty for terminal dues. Indeed, among the postal *cognoscenti*, by the time the UPU Convention was signed, there was little doubt that the 1989 UPU terminal dues system was inconsistent with the EC Treaty. It should be made clear that the commercial difficulties posed by extra Community ABA remail are the result of anticompetitive activities undertaken within the UPU framework by many Member State admin-

istrations, activities taken in defiance of the liberal principles of the EC Treaty.

206 Nonetheless, it is also true that Member State postal administrations will not bear the costs of extra Community ABA remail. Losses incurred in delivering foreign mail will be paid for by higher postal rates for national mailers. The benefits of extra Community ABA remailing devolve primarily upon the Community mailer who gets unreasonably low postage rates.[62] Thus, in essence, extra Community ABA remail represents a non economic shift of resources from national mailers to large intra Community mailers. This is unjust.

207 We suggest the quickest and easiest means of controlling this problem would be a program of voluntary cooperation between major mailers, major private operators, and the Member State postal administrations, developed under the leadership of the Commission. Such a program will probably ha ve to continue in place until at least 1 January 1995, the earliest possible advance effective date of the next UPU Convention.[63] *We pledge to cooperate in such a voluntary program, provided our various competitors do likewise, at least to a reasonable degree.*[64]

4.2.6 Adaptation periods

208 The *Postal Green Paper* suggests that adaptation periods may be needed for the proposed reforms in the reserved area. In our view, the degree of adaptation required varies with the type of reform and the individual Member State. In the foregoing, we have suggested two basic elements in a Community policy towards reserved services:

- limiting the scope of the national postal monopolies by excluding those services that, in a substantial portion of the Community, have been demonstrated to be unnecessary for the provision of assured, affordable universal service; and
- liberalisation of the cross border mark et.

209 Limitation of the domestic monopolies will affect the postal administrations differently depending upon the degree to which the postal monopolies of the various Member States include reservations that must be ended. For some postal administrations, we believe that the list of services to be excluded suggested above will have virtually no effect (e.g., Denmark, Luxembourg, Netherlands, U.K.). For these postal administrations, a transition

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[62]The private operator and the remail post office both make a profit on the service they contribute to extra Community ABA remailing, but the business is competitive and the profit is not abnormal.

[63]The 1994 Convention would normally become effective on 1 January 1996, but the UPU sometimes provides for immediate effect of important new provisions.

[64]We must add, however, that our pledge presumes a reasonably equal application of non postal laws to postal and private operators. In particular, the prospective application of VAT to private operators but not to postal operators after 1 January 1993 will introduce distortions of such magnitude that it may encourage the migration of some intra Community traffic through extra Community hubs for reasons not specifically related to different terminal dues regimes.

period appears unnecessary. On the other hand, the elimination of reserved status might have a significant effect on administrations with large monopolies or uncertain financial status. However, we believe firmly that the longer a postal administration is given to reform, the longer it will take. Still, it is also true that fundamental reforms cannot be accomplished quickly.

210 In principle, we suggest that the Commission should fix a firm time period for the elimination of all services in the list of services to be excluded from the monopoly. This period might be, say, three years. Within this framework a system of some flexibility will be necessary. The following list of points gives a summary idea of one procedure which, we suggest, might be a possible means of handling adaptation measures.

- No administration will qualify for an adaptation period unless it can prove the need for such a period.
- An administration may prove the need for an adaptation period by demonstrating that it is in fact economically dependent upon the reservation of a service among those to be excluded and that the administration exercises an effective monopoly over such service, both in law and in fact.
- For each administration and for each service for which an adaptation period is shown to be needed, the Commission will set an adaptation period based upon the degree of reliance upon the service in question, the financial stability of the administration, the interrelationship with other adaptation periods applicable to the same administration, the needs of the users, and the effect upon private operators.
- In all cases, an adaptation period should be the shortest period reasonably necessary to accomplish clearly defined public objectives.
- During the running of each adaptation period, an administration should make regular "progress reports" to the Commission to demonstrate progress towards the elimination of economic dependence upon the reserved service in question.
- No adaptation period for any service shall extend for more than three years.

211 In addition, a postal administration should have the opportunity to demonstrate that it requires adaptation periods for reasons unrelated to the current scope of reserved services. The extra burdens borne by the Bundespost after reunification might, for example, require special consideration.

212 Liberalisation of the cross border market, we submit, should not qualify for any adaption period, although it would be appropriate for the Commission to take into account cross border liberalisation in developing adaptation periods for limiting the national monopolies. Liberalisation should, in our view, include the following measures, to take effect simultaneously:

- Private and postal operators may collect, transport, and deliver any physical item to be carried in cross border commerce (other than ABA direct delivery).

- Postal administrations may, on a unilateral basis, set terminal dues charges for intra Community mail to X percent of comparable domestic tariffs. Alternatively, postal administrations may, by bilateral agreement with another Member State postal administration, set terminal dues to any level that is reasonably related to comparable domestic rates.
- Postal administrations may, and must, adjust prices to customers for cross border services to reflect actual costs.
- UPU article 25 shall, in all respects, be declared inapplicable to cross border postal services in the Community (except extra Community ABA remail).

213 We believe that no adaptation is appropriate for liberalisation of cross border traffic because:

- Except for a few postal administrations (see below), cross border traffic is relatively small and already substantially competitive.
- Postal administrations have already begun preparations and studies for adjustment of terminal dues and cross border rates.
- In 1987, when motivated to suppress remail competition, the postal administrations were able to revise terminal dues rates within 6 months.
- Limitations and distortions in the cross border market daily impose costs on the mailer, the private operator, and some postal administrations (as well as the Community economy as a whole); these continuing costs must be set against the inconvenience to the postal administrations of accommodating short deadlines for liberalisation.
- There will be, in any case, a substantial period between the proposal of Community legislation and its adoption.

214 In respect to cross border liberalisation, certain postal administrations might qualify for special adaptation periods by virtue of an extraordinary economic dependence upon cross border traffic. These, we suggest, are the postal administrations of Greece, Ireland, Luxembourg, and Portugal. We would also suggest, however, that a high volume of cross border traffic should not *automatically* imply the need for an adaptation period. For example, a large number of tourist postcards does not seem to support the need for an adaptation period, since there is no reason why a tourist cannot immediately adjust to paying appropriately higher cross border postal rates. Since the postcards are sent to the tourist's home Member State, the higher rates will simply reflect the postage rates the same tourist already pays for delivery of domestic mail by his home postal administration. Each postal administration, then, should be dealt with individually, under the same basic principles that are applicable to the adaptation periods for national monopolies.

215 In light of the foregoing principles, it seems reasonable for the Community to permit adaptation periods for ABA direct delivery service, since the effect of ABA is place greater stress on the national, rather than the cross border, service of a postal administration. One possible approach to phasing

would be to permit ABA service by *air* transport after one year, and perhaps ABA service by *surface* transport after two or three years.

216 In all cases of adaptation, it is obvious, we submit, that it is the Commission, and not the Member States, that must make the final decisions as to appropriate measures. Furthermore, adaptation measures must operate only as exceptions to the general rule, and not overwhelm the rule itself. In discussing adaptation periods for intra Community and international mail, the recommendations in the *Postal Green Paper* contain a rather opaque sentence: "If a Member State was convinced that such liberalisation might prejudice the universal service, it could apply a more restrictive solution provided it was proportional to the objective and compatible with Community law." §§ 9-2.13, 9-2.14. Given the political power of the postal administrations in the Member States, this sentence could possibly be construed to suggest postal administrations should be able to exempt themselves from liberalisation measures proposed by the Commission and required by the EC Treaty. Clearly, this cannot be the intention of the Commission. We would urge, therefore, that the Commission clarify that the Member States, and all interested parties, may present their arguments for and against adaptation proposals, but it is for the Commission itself to adopt an overall adaptation program that is consistent with general Community policy.

4.2.7 Additional study of reserved services

217 Recommendation § 9-2.9 proposes the establishment of a Senior Officials Group on Posts (SOGP) working group to

> analyse in detail: the economics of universal service provision in the Community; the size necessary for the reserved area; and the set of controls needed to protect the reserved area. The working group will also analyse the economic implications for the universal service of each liberalisation measure.

218 The *Postal Green Paper* does not propose specific participants for such a working party, but we would urge the Commission to include at least the following, in addition to governmental officials:

- experts from both postal and private operators;
- experts from large users;
- representatives of individual consumer interests; and
- independent experts in appropriate fields of economics.

To ensure a careful examination of data and arguments, it is absolutely essential that all participants have access to all information presented to the working party. (Of course, procedures must be adopted to protect the confidentiality of sensitive commercial data.)

4.3 COMMUNITY RELATIONS WITH THE UNIVERSAL POSTAL UNION

219 We believe that it is important that the Community participate actively in

all meetings of the UPU and its major committees, the Executive Council and the Consultative Council for Postal Studies. The UPU is a governmental body, and the Community delegation should reflect the interests of the Community, not only the Community's postal administrations. Thus, we believe the Community delegation should include representation from the general economic and competition areas, as well as from the more technical areas. Further, in developing Community positions on matters of general policy, we submit that Community representatives should consult with postal administrations, private operators, and major users.

220 At the UPU, we believe the Community should actively seek a number of reforms in the 1994 UPU Convention, both by way of amendment and by way of a special reservation for the Community. These reforms include:

- True separation of commercial and regulatory functions, so that regulatory functions are exercised solely by authorities with general governmental responsibilities.
- Abolition of Article 25 in its entirety.
- Terminal dues based upon domestic postage rates.
- Development of an assistance program for the postal administrations of developing countries, if appropriate, that is independent of the terminal dues system.
- Abolition of provisions that permit postal administrations to price international services at levels below cost.
- Adoption of a principle of equal treatment for the international operations of all operators, postal and private, under all laws, including postal, transport, customs, and tax.

4.4 NATIONAL REGULATORY BODIES

221 The *Postal Green Paper* proposes the establishment of national regulators in each of the Member States to regulate the conduct of certain aspects of the delivery services sector. § 9-4. It should be appreciated that the design of the regulator's task is an exercise in some of the most fundamental of society's legal and constitutional principles. What is required is not merely a "job description," but a specific application of the Community's concepts of how individual rights should be protected and governmental power exercised.

4.4.1 Impartiality and power of the regulator

222 Along with liberalisation of cross border services and, to a limited extent, national services, we believe that the most important fruits of the *Postal Green Paper* process should be a careful definition of the concept of "separation of commercial and regulatory functions." § 9-4.1. This concept is unmysterious, for it is manifest in the general Western European tradition of an independent judiciary. The essential principle is that the adjudicator should have no personal, financial, or professional interest in the outcome of the proceeding before him. In respect to postal matters, the courts and competition authorities

generally exercise truly separate decision making functions in all Member States. The PTT ministries, on the other hand, function roughly as *owners* of the postal administration. While not directly involved in the operation of the administration, they have a definite responsibility for the overall success of the administration. Often, governmental officials move jobs from PTT ministry to postal administration and back.

223 In our view, in fleshing out recommendation § 9-4.1, the Community should identify the elements of "separation of commercial and regulatory functions." Purely by way of illustration, we put forth the following basic ideas:

- The regulator should be impartial; he should not have any financial, managerial, political, or personal interest in any delivery service, postal or private.
- The regulator should be able to compel the production of information necessary for an informed decision.
- The regulator should adopt, subject to Commission approval, transparent procedures for the conduct of its work.
- To an extent compatible with commercial confidentiality, all affected parties should be able to examine and comment upon the proposed factual basis of regulatory decisions.
- All affected parties should be able to comment upon the proposed legal basis of regulatory decisions.
- The regulator should be able to make binding decisions, subject to appeal to the courts.
- The regulator should explicitly state the legal and factual basis for his decision.

224 We believe that it is very important that the Community should set out strict standards to define separation of commercial and regulatory functions, standards consistent with the best Western traditions of the impartial adjudication of disputes.

4.4.2 Clarification of regulator's role

225 Inevitably, the regulator's role will be to serve as the referee between interests of quite different levels of political and economic power. The regulator will be required to protect the interests of small and individual mailers against the commercial power of very large mailers. The regulator will have to guard the private operators, especially the smallest operators, against abuses of the dominant commercial position enjoyed by the postal administrations. Indeed, the regulator will also be called upon to protect the postal administrations themselves against a tendency of governments to use their ownership position to gain short term political benefits.

226 To serve these noble purposes, the *Postal Green Paper* proposes a number of tasks for the regulator. We suggest, however, that the tasks assigned the regulator should be considered not in isolation, but with an appreciation of the relationship between the role of the regulator and the distinctly different roles

of owner/administrator, legislator, and court. In § 9-5, the *Postal Green Paper*, it seems to us, blurs distinctions that should be kept clear.

227 We submit that the most important function of the regulator will be to provide expert and impartial judgements in regard to three sets of problems arising from the provision of delivery services with governmental aid (in the form of monopoly protection or any other form):

- How should common costs of delivery services be allocated fairly among different mailers in the same class of service and different classes of service? § 9-5.1, § 9-5.2, § 9-6.1.
- How should common costs of delivery services be allocated fairly between reserved and competitive services so as to avoid "cross subsidy"? § 9-4.9, § 9-4.10, § 9-4.11, § 9-5.3, § 9-6.4.
- What rights—such as rights of information, non discrimination, and compensation for non performance, cost based prices—should a mailer have with respect to a monopoly service provider? § 9-4.8, § 9-5.5, § 9-6.1, § 9-6.3.

In our view, such questions necessarily involve difficult technical judgements for which a regulator is particularly qualified.

228 In contrast to these technical decisions, basic policy decisions are best, it seems to us, recognized as the province of the legislator. Not only is the regulator by his nature less qualified to strike political balances than the legislator, it is also true the regulator should not approach his task with the same partisan spirit that necessarily attaches itself to the political process. In the province of the legislator, we would place:

- Basic definition of service required of the national postal administration. § 9-4.7.
- A clear definition of the scope of reserved services, if any, deemed necessary to accomplish public service goals. § 9-4.2, § 9-4.3.

229 The concept of true separation of regulatory and commercial functions also seems to us largely incompatible with commingling the role of regulator and the role of manager. § 9-4.5. If the regulator is responsible for "ensuring the reserved service provided meets its service obligations," there is a danger that the regulator will become interested in the commercial success or not of the postal administration. We believe, then, that it is the job of the PTT ministry, as owner, and postal management to set the standard of service expected from a governmentally supported postal delivery service, within a framework of public purposes set by the legislator. § 9-4.6, § 9-4.7.

230 Similarly, the prosecuting of alleged offenses against the law—whether postal monopoly law, business law, or other laws—should be the role of the public prosecutor, competition authorities, and governmental auditors. § 9-4.3, § 9-4.4. The regulator's impartial judgement on technical economic issues may be a necessary ingredient in a judicial or administrative prosecution, but it is difficult to combine impartiality with the spirit of advocacy that prosecution must entail.

231 Overall, then, we urge that the role of the regulator should be more carefully defined to focus on matters requiring technical expertise, recognizing as well the distinct functions of the legislator, executive, and judiciary.

4.4.3 Regulation of reserved and non reserved sectors

232 Overall, we believe that the extraordinary regulatory regime advocated by the *Postal Green Paper*—involving the regulation of access, prices, and services as discussed below—is appropriate only for the control of reserved services. A fully liberalised postal administration should be permitted, like a private operator, to conduct its business under the rules that apply to commerce generally. In essence, regulation is a substitute for normal competitive discipline. It must be recognised, as well, that the mixed nature of the delivery services sector will require the regulator to assume an "ancillary" jurisdiction over some non reserved service, postal and private.

233 Where reserved and non reserved postal services are produced with common facilities, it will be logically necessary for the regulator to have access to sufficient accounts so that he can allocate common costs. In many cases, the only solution will be a uniform accounting system that includes the costs of both reserved and non reserved services. On the other hand, for separate "arms length" non reserved postal operations, "open access" conditions may (or may not) be sufficient to avoid distortion of competition.

234 The mixed nature of the delivery services sector also will require postal and private operators to abide by certain rules, even though they are conducting wholly unreserved operations. Even large users may have to accept a certain degree of oversight. For example, as discussed above, extra Community ABA remail should not be allowed to undermine desirable reforms in intra Community terminal dues. Similarly, the benefits of cross border liberalisation depend upon maintaining the integrity of the legal boundary between cross border services and wholly domestic services, which may be reserved by a Member State. To police such activities, the regulator must be able to require that appropriate parties—including postal and private operators—maintain records sufficient to demonstrate the lawfulness of operations that affect the integrity of the reserved service or the achievement of universal service.[65] Such record keeping requirements need not be burdensome. Indeed, in all (or almost all) cases, routine business records should be sufficient to indicate the routing of trunk transportation, prices paid to suppliers, overall traffic volumes, etc. Since these delivery services are offered to the public, it will be impossible to hide large scale infractions. What is important is to recognize the basic principle: adequate record keeping requirements should be determined by the

[65]Such "ancillary" jurisdiction of the regulator should not include the regulation of services, such as parcel delivery services, which are neither reserved themselves nor obviously related to the provision of universal or UPU service obligations. Neither does such ancillary jurisdiction require the regulator to establish a general licensing regime for all private operators, any more than a taxation regime implies a need to license all taxpayers.

impartial regulator and the records themselves should be available to enforcement authorities.[66]

4.5 REGULATION OF ACCESS TO POSTAL SERVICES

235 For *reserved* services, all persons should be accorded the same price for the same services. The prices and service characteristics of all services should be publicly available. Large users should be permitted cost related allowances if they prepare or transport their mail for delivery by the reserved service. Smaller mailers should be able to obtain the same treatment as large mailers by using a mail preparation service. § 9-5. For the reasons explained above, we would suggest that these strict regulatory conditions need not to be extended to non reserved postal services. Postal services provided on a competitive basis should be subject to the normal rules against abuse of dominant position and anticompetitive behaviour.

236 We can think of no reason why there should be an exception to such principles for mail exchanged between Member State postal administrations, nor does the *Postal Green Paper* seem to identify any such considerations. The potential for distortion of trade between Member States is obvious. Hence, we must firmly disagree with the suggestion that such discrimination among cross border mailers may be appropriate. § 9-5.4.

4.6 REGULATION OF POSTAL TARIFFS

237 The *Postal Green Paper* recommends that all *universal* postal services should be priced according to *average* costs. § 9-6. This seems to us too sweeping. *Reserved* services, we suggest, should be priced so that each class of service bears all directly attributed costs (e.g., the costs of specialized advertising), all costs which vary with the volume of the service (measured in an appropriate manner), and a fair share of fixed costs. The allocation of fixed costs should take into account demand elasticity, competitive effect, social policies, and so forth. These general principles will give effect to the *Postal Green Paper*'s call for cost based postal prices, with which we agree strongly. § 9-6.1.

238 In general, the prices of reserved services should be available on an "unbundled" basis so that a large mailer can purchase and pay for only the inward delivery service, or only the transport and inward delivery services. The differences between unbundled and bundled prices should reflect cost differences. Hence, we agree with § 9-6.3 and § 9-6.7.

239 There should be no cross subsidy, or subsidy, or other state aid provided to non reserved services. Non reserved services subject to a universal service requirement should not be an exception to this rule. In this, we disagree strongly with the recommendation § 9-6.4. In our view, if cross subsidy or

[66]Of course, in all cases, the privacy of commercially sensitive information must be strictly observed.

subsidy is permitted for universal, non reserved postal services, there will a irresistible temptation to use the universal service requirement as a device to justify such subsidies. Once justified, it will be very difficult or impossible to police the amount of the subsidy. Hence, we believe that no cross subsidy, or subsidy, should be permitted for any non reserved service. If a postal administration is unable to provide a universal non reserved service on an unsubsidised basis, then the Member State should contract for needed services in a transparent manner open to all operators.

240 This is not to say that the reserved service cannot, in some sense, serve as the "backbone" of a universal, non reserved service. We have suggested that all reserved postal services should cover long run marginal costs and a fair share of fixed costs. Where a reserved service and a non reserved service are produced with common facilities, it would reasonable, in our view, to permit the reserved service to bear a greater share of the fixed costs than the non reserved service. It would be the task of the impartial regulator to oversee this allocation. However, we would anticipate that, in this manner, the reserved service will indeed support the provision of other universal services, even if it does not provide a "cross subsidy," properly defined.

241 While the foregoing principles are easily stated, they are difficult to apply. The measurement of how costs vary with volume presents many factual and economic issues about which reasonable people can disagree; so does the question of what represents a "fair" allocation of fixed costs. There is no way to resolve all of these issues in a manner deemed "fair" by all mailers. The only solution, it seems to us, is transparency. A postal administration must be required to publish its accounts for reserved services, and mailers must be permitted to raise appropriate concerns with an impartial re gulator.

4.7 COMPENSATION BETWEEN POSTAL ADMINISTRATIONS

4.7.1 Terminal dues based on domestic postage

242 We believe that the fundamental principle is that a Member State postal administration must charge the same rate for the same delivery service. Any financial agreement between Community postal administrations that gives effect to this principle should be permitted. Under the principles of § 9-5, any agreement involving reserved services should be publicly available.

243 In order to avoid a breakdown in intra Community postal services due to disagreement, it may be desirable for the Community to establish a default standard of 70 percent of domestic, non bulk, postage rates. Thus, by the Community universal service standard suggested above, each Member State postal administration would be legally required to deliver intra Community letters, printed papers, and small packets tendered by any other Member State postal administration for a rate of 70 percent of the comparable domestic, non bulk, service if no other rate could be mutually agreed.

4.7.2 Effect on intra Community postal tariff

244 Some supporters of a uniform terminal dues approach have expressed concern that a uniform charge serves social interests because it facilitates uniformity of intra Community postage rates charged to mailers in a given Member State. It is important, we believe, to clarify the fallacies of such an argument.

245 Under a uniform terminal dues approach, a Member State postal administration must pay every other Community postal administration a uniform rate for the delivery of its intra Community mail. This rate, in an ideal version of the uniform terminal dues approach, represents an average of the actual delivery costs. So the Member State postal administration would pay actual delivery costs in total.[67] If, on the other hand, terminal dues are set by reference to the local postage rates in other Member States, the origin postal administration will likewise pay the actual delivery costs in total, and in addition would pay each postal administration the proper delivery charges. Under both approaches, a Member State postal administration would pay other Member State postal administrations the same total amount for delivery of the same mail. Since the total bill is the same, under a system of inter postal charges based upon the domestic postage rate, a postal administration has no more, and no less, economic incentive to create a separate tariff classification for intra Community mail than it does under a uniform terminal dues scheme.

246 In any case, uniformity of intra Community mail costs does not affect the ability of a postal administration to equate intra Community and domestic postage rates. Suppose, for example, that the average cost per intra Community letter dispatched by the U.K. postal administration was 28 pence per letter. The standard domestic postage stamp in the U.K. is 24 pence. For the U.K. postal administration, the commercial question is whether the extra cost of intra Community mail is worth the expense of printing and distributing a 28 pence (or 4 pence) stamp. Hence, not only will domestic postage based terminal dues have no effect on the *uniformity* of intra Community postage rates, it will have almost no effect on the ability of small mailers to use *domestic postage stamps* to pay for intra Community mail service.

247 In order to facilitate intra Community mailings within the Community, the Commission has encouraged Member State postal administrations to apply the same postage rate to intra Community mail as they apply to domestic mail. Most, but not all, postal administrations have done so. The major advantages to the mailer are:

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[67]To be very precise, each origin post office will pay the proper costs of outbound delivery to the extent that its outbound mail conforms to the formula by which the "average" terminal dues rate was set. To give a rough example, if the uniform terminal dues rate was calculated according to a weighted average of international traffic in the Community, an origin post office would pay the proper costs of delivery if its traffic was apportioned among Member State post offices in the same proportions.

- Most individuals and small businesses pay for postal services by postage stamps.
- Domestic postage stamps are commonly available while especially denominated "international" stamps are used infrequently and are troublesome to obtain.
- In the interest of encouraging intra Community social and commercial ties, the intra Community postal service should be as convenient to use as the domestic postal system.

248 In regard to the pricing of intra Community postal services, the Commission's social goal should be, we submit, to save the *small mailer*, individual and business, the difficulties and inconveniences of intra Community stamps that are different from domestic stamps. For small intra Community mailers, individual and business, our analysis suggests that there is no reason to believe that domestic postage based terminal dues will significantly affect the ability of most postal administrations to continue to charge domestic rates for intra Community mail.[68] Since intra Community mail is only about 2 to 8 percent of all mail, it seems unlikely that the postal administration will incur the costs of administering a separate rate classification, except for bulk mailings.

249 For large intra Community bulk mailings, we believe that it is in the interest of both postal administrations and large mailers to have the right to adjust the price of large intra Community mailings to actual costs. Bulk mailings, however, are invariably commercial in nature and should pay the proper associated costs. Any discrepancy between postage rates and postal costs will either artificially encourage the bulk mailer to print his material out of the Member State or represent a subsidy from other mailers to his business. Neither result is desirable.

4.8 REGULATION OF THE QUALITY OF POSTAL SERVICE

4.8.1 Community quality of service standards

250 The direct monitoring of service quality is a difficult and complicated task. For the reasons noted, we believe that the Community regulation of service quality is generally appropriate only for reserved services.[69] While we

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[68]See EEO, *Community Delivery Services* at ¶¶ 302-309 (1990). The postal administrations of Greece and Spain, and perhaps Portugal, should charge twice domestic postage, a solution that is equally *convenient* for the small mailer. Given the high proportion of postcards in the intra Community mail of these three countries, it also appears possible that a rule permitting intra Community postcard rates which are not an even multiple of domestic postage rates might be economically desirable, without burdening local mailers. An intra Community postcard postage rate could be used to make small adjustments that may be economically justified by the "two stamp" approach suggested.

[69]Outside the reserved area, each operator, postal and private, will be required by competitive pressures to maintain an internal mechanism to monitor the quality of its services. For a national regulator to operate a general quality control program for the non reserved services of a postal administration would be for the Member State to underwrite a substantial administrative cost that should properly be borne by the postal administration itself.

support such regulation for reserved services, we also believe that service can also be improved more economically by extending certain rights to mailers.

251 Regulation of the quality of reserved services, as we understand it, stands on a different basis from regulation of tariffs and access. If a postal administration fails to abide by tariff or access regulations, it can be ordered to modify its practices accordingly. However, if a postal administration persistently fails to achieve minimum Community service standards in the primary distribution area, it has proved itself incapable of assuring universal service in a portion of the Community. The only remedy, it seems to us, is for the Community to withdraw the reservation in favour of a competitive system. As discussed above, a competitive system must, by definition, provide an acceptable level of service for the majority of the market.[70]

252 For this reason, Community quality of service standards are different from service standards set by Member States. § 9-8.2. A Member State acts, in effect, as the owner of the postal administration, demanding certain levels of achievement of management. If the levels are not attained, the Member States can change the management or other institutional arrangements. A Member State's standards can be "stretching." § 9-8.4. The Community's standards, on the other hand, must be in the nature of minimum or threshold standards, for they trigger the Community's duty to intervene to assure universal service for the Community as a whole.

4.8.2 Specification of service quality

253 A quality of service specification would have to include at least three service performance characteristics: a particular transit time, with a particular completion standard, for a particular geographic route or group of routes. Since mail service is mostly local, it will be necessary to consider service levels for each local area for delivery to other areas, perhaps grouped by distance from the origin point.

254 In the U.K., the Post Office Users' National Council (POUNC), an independent users group not affiliated with the U.K. Post Office, has developed this approach in measuring the quality of U.K. postal service. POUNC measures the percentage of shipments which are delivered within a specified time period over a given geographic area. For example, for Croyden, a London suburb, POUNC determined that 94 percent of local mail, 89 percent of mail to adjacent towns, and 83 percent of mail to distant U.K. destinations, was delivered by the second day after posting. While the POUNC system is not the only possible approach of specifying service performance, it provides a good example of what is involved.

255 The POUNC system aggregates end to end delivery routes according to distance from the origin point: local, adjacent postal district, and distant postal district. Performance is specified for all three levels of geographic distances for

[70] See ¶ 93 - ¶ 106, above.

each of the 63 postal districts in the U.K. A Community service standard definition would logically proceed in the same manner, perhaps adding additional categories for nearby and distant intra Community service.

4.8.3 Mailers' bill of rights

256 We suspect that the most beneficial result of systematic and objective monitoring of the quality of reserved services is likely to be that it will give mailers greater bargaining power with postal administrations. Where services are reserved, the user should have full disclosure as to the cost and quality of services available. In addition, the user should have comparative data from the reserved services in other Member States, for it is very difficult to ascertain the correct level of costs and services *in vacuo*. Hence, the *Postal Green Paper*'s call for a consistent, Community wide monitoring system is, we believe, entirely correct. § 9-8.5. Further, where a reserved service does not complete delivery within a promised time frame or satisfactorily perform other required services, the user should have redress in the form of compensation for inadequate service. Rights of information and redress should be formalized into a "mailer's bill of rights." So armed, we are confident users will act as a powerful force to improve reserved postal services (as they act already in respect to competitive services).

257 It should be noted that a model for a "mailers' bill of rights" has already been developed by certain postal administrations. At the cross border level, postal administrations are large mailers vis-à-vis each other. In certain situations, postal administrations have demanded and receive carefully detailed information regarding quality of services rendered and a right of compensation for service inadequately rendered. There seems to be no reason, however, why such arrangements should be limited only to postal administrations. If compensation for poor service is available only to foreign postal administrations, then the cost of the compensation must be shifted to other mailers, who presumably also receive poor service. The right to compensation, and the right to know the quality of services provided, must logically be extended to all mailers.

4.9 HARMONISATION OF NATIONAL POSTAL SERVICES

258 The *Postal Green Paper* calls for harmonisation of a number of postal services. § 9-9. In our view, the broad umbrella of harmonisation covers several considerations that should be treated separately.

259 Harmonisation of legal rules, such as pertain to access conditions and pricing policies, is necessary and desirable. In other respects, however, we believe that postal administrations should be able to develop discounts and contracts that, in their judgement, best meet the needs of their users. Thus, for example, it would seem to us that the magnitude of discounts would likely offer more scope of harmonisation than contract conditions, § 9-9.3, and services, § 9-9.5.

260 There would seem to be some scope for harmonisation of national postal practices in such a way as to improve national postal services. By and large, these are commercially sensible decisions that the postal administrations can, and should, implement on their own. Harmonisation of national postal practices for purpose of facilitating cross border operators seems to offer much less promise. It will rarely be practical to modify 96 percent of the system to accommodate 4 percent of the system. See § 9-9.6. The best hope for truly harmonized cross border service is from cross border specialists. At this level, it may be anticipated that Community mailers will have access to systems that are harmonised on a worldwide basis.

261 The most important harmonisation for the long term good of the Community postal system is, we suggest, harmonisation of cost and service accounting data and data collection techniques, especially for reserved services. This will permit postal officials, regulators, and users to assess what works and what does not far more knowledgeably than they can today. See § 9-9.7.

4.10 COMMUNITY COHESION

262 The overall effect of policies advanced in the *Postal Green Paper* on Community cohesion will be, we believe, predictably positive. Like improvements in the Community telecommunications system, improvements in the delivery services sector will diminish further the importance of distance and location. Those who live and work in the major cities already enjoy easy access to the largest available markets for buying goods and selling their services. The chief beneficiaries of a better Community delivery system will be those who do not live in the major cities, but who will find it easier to participate in the economic and social life of the Community.

263 The diminution in the importance of distance will occur at both the intra Community and Member State levels. At the intra Community level, where Member State postal administration still handle more than 95 percent of the traffic, a significant degree of competition over the past two decades has given birth to a second tier of postal, private, and joint postal and private, delivery service operations. This development has already produced substantial improvements for intra Community (and international) mailers and shippers. The explanation for the emergence of delivery services specially adapted to intra Community operations lies not, we believe, in postal mismanagement nor in a special expertise of private operators but in operational considerations which make it difficult or impossible for a single delivery service operation, postal or private, to serve a local market and a distant market with equal efficiency. The policies proposed in the *Postal Green Paper* will, correctly we believe, permit further development of new Community level services.

264 At the Member State level, we have suggested that, in line with the policies of the *Postal Green Paper*, Community policy should explicitly focus upon the issue of isolation of rural and remote areas from the delivery service

systems available in urban centers. Isolation may be flexibly defined in terms of the price and quality of service relative that available in the primary distribution area. The benefits of such an approach for Community cohesion are obvious.

265 Overall, we believe that what is taking place in the delivery services sector is, as in other sectors, a trend towards increasing diversity and specialisation. We believe that the liberal approach of the *Postal Green Paper* wisely seeks to accommodate this trend. In the end, Community cohesion will be furthered not merely by more competition, but also by greater cooperation and complementarity between all types of operators, postal and pri vate.

266 In this spirit, we agree completely with the recommendation of the *Postal Green Paper* that further work should be undertaken to appreciate the implications of the Community delivery services policy for social and economic cohesion in the Community. § 9-10. We would add only that a Community study should encompass all elements of the delivery services sector.

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EEO Comment on Draft Postal Directive (1996)

On December 2, 1995, the European Commission published drafts of two legal texts that, when finished, will establish the framework for Community postal policy for the next several years. The first text was a draft "Notice" explaining how the Commission intends to apply the competition rules of the EC Treaty to the postal sector.[1] The second text, included in a communication from the Commission to the Council, was a draft Directive, based on Article 100a of the EC Treaty, that establishes norms at Community level for a universal postal service that Member States are to ensure all Community citizens.[2] In this document, the European Express Organisation[3] (EEO) would like to offer preliminary observations on the draft Directive proposed by the Commission.

1. FINDINGS

EEO believes that the delivery services sector is too important for Community policy to be based on erroneous or unfounded factual premises. Unfortunately, the draft Directive appears to endorse several factual propositions that are not well founded. For example, finding 15 states that "*the maintenance of a range of certain services that may be reserved . . . appears justified on the grounds of ensuring the operation of the universal service*

European Express Organisation. "Preliminary Observations on the Draft Directive on Postal services" (Feb 1996) (submitted to European Commission).

[1][Draft Notice from the Commission on the Application of the Competition Rules to the Postal Sector and in Particular to the Assessment of certain State measures relating to Postal Services, OJ C 322/3 (Dec 2, 1995).] On February 2, 1996, the European Express Organisation submitted to the Commission comments on the draft Notice.

[2]Communication from the Commission on the Set of Measures Proposed for the Development of Community Postal Services, COM(95) 227 final (Jul 26, 1995), OJ C 322/22 (Dec 2, 1995).

[3]The European Express Organisation (EEO) is a Brussels-based trade association that includes most of the private companies that provide extensive private delivery services throughout Europe.

under financially equilibrated conditions." Based upon the public record, however, it appears that the Commission has discovered no evidence that reservation of a certain range of postal services is necessary to maintain a given set of universal postal services. Nor is there any evidence to suggest that a larger reservation will lead to higher quality of universal services. If universal postal services are today provided at a loss in some Member States, it is entirely possible that these losses could be eliminated by more efficient operations, modest tariff increases, and/or direct payments for discrete rural services. More monopoly does not appear to be a logical remedy to any postal ill.

Similarly, findings 17 and 18 state that a reservation of direct mail and inward cross-border mail "*could nevertheless be justified until 31 December 2000, in so far it is necessary for the financial equilibrium of the universal service provider*." However, as the Commission has repeatedly noted, post offices and other advocates of a large postal monopoly have failed to provide evidence to demonstrate that reservation of these two types of services is necessary to protect the financial equilibrium of the universal service, much less to satisfy the much stricter requirements of Article 90(2) of the EC Treaty. Indeed, in regard to inward cross-border services, the Commission has published an economic study, undertaken at its request, which indicates that a reservation is *not* necessary for maintenance of universal service.[4]

In finding 20, the draft Directive cites "reasons of public order and public security" as support for granting a post office a monopoly over public collection boxes. Again, there appears to be no evidence to support such an assertion.

2. UNIVERSAL SERVICE (ARTICLES 3-7)

As the consultation over the Commission's Postal Green Paper[5] revealed clearly, Community users recognize that an expansive definition of universal service poses problems as well as benefits. On the positive side, a broader universal service definition implies a broader scope of delivery services that will be assured by the government. On the other hand, the broader the universal service definition, the greater is the potential excuse for restricting competition.[6] While almost everyone wants an assured supply of universal services, the great majority of commercial mailers—who pay for about 90 percent of all mail—want greater competition in postal services as well,

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[4]J. Dodgson and S. Trotter, Study on the Impact of Liberalization of Inward Cross-Border Mail on the Provision of the Universal Postal Service and the Options for Progressive Liberalization (Oct 1994) (ISBN 92-826-9596-4).

[5]Green Paper on the Development of the Single Market for Postal Services, COM(91) 476 final (Jun 11, 1992) (371 pages) (hereafter, "Green Paper").

[6]As the Green Paper noted, the concept of "universal service" may define the scope of the exception to the liberal principles of the Treaty of Rome provided in Article 90(2): "Member States, *where the application of Community law would obstruct the universal service objective*, might benefit from an exception to the application of Community law to the extent provided by Article 90.2." Green Paper, Chapter 8, § 4, p. 188.

particularly in the cross-border markets. Indeed, a substantial fraction of consumers, perhaps a majority, also favor greater competition.[7] As the Union of Industrial and Employers' Confederations of Europe (UNICE) declared,

> *The Green Paper does not examine whether the notion of "basic universal service" really corresponds to a market need*. It goes no further than affirming the need for it without giving a precise definition. *This affirmation should not be used as an alibi, either for the maintenance of extensive reserved services or to justify existing and/or new cross-subsidisation practices between reserved and non-reserved services.*[8]

In proposing a universal service definition that includes all items up to 20 kilograms, the draft Directive does not appear to have taken into account these widely shared concerns over the possibly negative implications of an expansive definition of universal service.

The potentially negative implications of a broad universal service definition are greatly reinforced by the draft Directive's embrace of the concept of "*universal service provider(s)*." Article 4 of the draft Directive declares that "each Member State shall appoint one or more postal operators to be responsible for providing universal service." Nothing in the Green Paper or consultation reveals the basis for this article. *There is no reason to suppose that universal service depends on designation of a universal service provider*. All Member States have universal provision of groceries, yet none has designated a "universal grocery provider." In an normal market, widespread service is achieved by the complimentary and competing activities of a number of providers, none of whom is a universal service provider. Such service may achieve universality without any state intervention at all. In some cases, a Member State may decide to supplement a market by arranging for additional services where they are not normally available. Of course, a Member State may also conclude that a given market is so imperfect that the entire market should be supplemented by entrusting certain nationwide tasks to of a single service provider.[9] Under Article 3b of the EC Treaty, such policy decisions properly fall within the discretion of the Member States, especially given the predominantly local nature of postal services.

EEO submits that the proper object of the draft Directive should be the assurance of universal services adequate to needs of the Community citizens. Universal service can be assured by setting out the obligations of the Member States. EEO does not question the propriety of individual Member States choosing to fulfill such obligations by conferring special or exclusive rights on

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[7]Fédération Européene du Direct Marketing, "Survey of Postal Services in Europe: A Survey by Harris Research Covering Business and Consumers in 4 European Countries" (1994).

[8]Comment of UNICE § 2, par.1, in *Liste des Contributions*, vol . 1. *See also* FEDIM § 3.2, par. 2, in *Liste des Contributions*, vol . 1.

[9]In light of the principle of separation of commercial and regulatory functions, derived from Article 86 of the EC Treaty, it is inappropriate for the draft Directive to direct Member States to delegate this state responsibility to one or more commercial undertakings. The *responsibility* must remain with the Member State.

certain undertakings as may be necessary for them perform particular tasks of general interest. Nor should the draft Directive cast doubt on the propriety of individual Member States fulfilling such obligations by means of more liberal market structures. The focus on draft Directive should remain on the Member States and the services to be assured.

3. RESERVED SERVICES (ARTICLES 8-9)

Articles 8 and 9 declare that Member States deal with harmonization of Member States' postal monopoly laws.

A. BASIC SCOPE OF THE POSTAL MONOPOLY

Article 8(1) declares that: "To the extent necessary to ensure the maintenance of universal service, the services which may be reserved to the universal service provider(s) in each Member State are the collection, sorting, transport and delivery of items of domestic correspondence."

EEO notes first that the factual premise of this sentence is highly ambiguous since the Commission has found no evidence that a reserved area is actually necessary to ensure maintenance of universal service.

EEO further points out the proposal to allow reservation of upstream postal functions (collection, sorting, and transport) appears to be inconsistent with the draft Notice. Section 5.3 of the draft Notice declares that:

> An analysis of the revenues obtained from mail flows in the Member States establishes that the maintenance of special or exclusive rights with regard to this market [*general letter service]* is, in the absence of exceptional circumstances, sufficient to guarantee the improvement and maintenance of the public postal network.

The *general letter service* includes only final delivery services and not upstream functions. If the Commission's analysis reveals that reservation of the *general letter service* is, absent exceptional circumstances, sufficient to ensure universal service, then there is no reason to offer Member States the possibility to reserve upstream functions.

Most fundamentally, EEO notes that the proposal to allow the reservation to extend to all "items of correspondence" represents a broad *expansion* of the basic postal monopoly as set out in the laws of the Member States and elucidated in the Green Paper. Historically and legally, the postal monopoly covered the transmission of *letters*. As the Green Paper correctly explained, the basic concept of letter is an "*individualised communication*."[10] According to the definitions in the draft Directive, however, the definition of an *item of correspondence* is substantially broader than individualised communication.

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[10]*See, e.g.,* Green Paper, chapter 8, section 4, page 189("[I]t seems clear that the reserved services should be centred on *those items for which universal provision is absolutely essential - that is, on the postal communication items of a personal or individualised nature."* [emphasis added]).

Since wholly printed direct mail is considered an *item of correspondence*, it seems that an item of correspondence may include any physical item with a textual message on it or in it, excepting only a few specific types of items mentioned in the definition of *item of correspondence*, viz., "books, catalogues, newspapers, and periodicals." Forsaking the concept of individualization implies that not only direct mail, but also pens embossed with a written advertisement, printed forms, computer programs, credit cards, and other physical items with textual information, would all seem encompassed within the definition of "item of correspondence."

B. RESERVATION OF DIRECT MAIL AND INWARD CROSS-BORDER MAIL

Section 8.2 declares that

> The distribution of incoming cross-border mail and direct mail may continue to be reserved until 31 December 2000, in so far as their reservation is necessary for *the financial equilibrium* of the universal service provider(s). The Commission shall decide on 30 June 1998 at the latest, as to the appropriateness of maintaining the reservation of these services after 31 December 2000, taking into account the developments, in particular economic, social and technological developments, that have occurred by that date and also taking into account *the financial equilibrium* of the universal service provider(s). [emphasis added]

It may be noted that Article 8.2 declares that direct mail and inward cross-border mail may be reserved to protect the "*financial equilibrium*" of the post office, without a showing that such reservation is "necessary to ensure the maintenance of universal service" (as required by Article 8.1). Further, it states that the Commission will consider the appropriateness of extending the reservation after 2000 based upon the *financial equilibrium* of the universal service provider. Protection of the "financial equilibrium" of the post office is not, however, a sufficient justification for maintaining a restriction on trade that is otherwise prohibited by the EC Treaty. Article 90(2) requires the proponent of such a restriction to show that the restriction is necessary to maintain a service of a general economic interest, such as universal postal service, and not contrary to the interests of the Community. There is no legal basis for the suggestion that reservations of direct mail and cross-border mail may be permitted without passing muster under the strict standards of Article 90(2). Indeed, as noted above, the Commission has unearthed no evidence at all that reservation of these services is necessary to the maintenance of universal postal service.

C. RESERVATION OF PUBLIC COLLECTION BOXES

Article 9 states that Member States may restrict the right to place collection boxes along public highways.

This idea was not considered by the Commission in the Green Paper, and the public has not heretofore had an opportunity to offer comment. So far as

EEO is aware, there is no publicly available evidence that such a provision is needed to maintain universal service in any Member State. Nor is there any evidence that such a measure is needed to establish or facilitate the functioning of the internal market (as envisioned by Article 100a). On this basis, the EEO suggests that it would be more appropriate for the Commission to defer consideration of this provision until after the Commission staff have had an opportunity to prepare a report on its consequences and the public has been formally consulted.

On the merits, EEO submits that, since restriction of the right to place collection boxes may restrict trade between Member States in a manner inconsistent with the EC Treaty, this article must, at the outset, be limited to situations in which such restrictions are demonstrably necessary to maintain universal service.

4. REGULATION AND TAXATION OF NON-RESERVED SERVICES (ARTICLES 10-12)

Article 10 declares that Member States may (i) license private delivery services (in a non-discriminatory manner), (ii) subject them to (proportional) universal service obligations, (iii) condition their right to do business on an obligation "not to improperly impair" the postal monopoly or other special legal advantages of post offices, and (iv) levy taxes on private delivery services to underwrite costs incurred by the post office in providing universal service.

These ideas were not considered by the Commission in the Green Paper, and the public has not heretofore had an opportunity to offer comments. So far as EEO is aware, there is no publicly available evidence that such provisions are needed to maintain universal service in any Member State. Nor is there any evidence that such measures are needed to establish or facilitate the functioning of the internal market (as envisioned by Article 100a). On this basis, the EEO suggests that it would be more appropriate for the Commission to defer consideration of this provision until after the Commission staff have had an opportunity to prepare a report on its consequences and the public has been formally consulted.

On the merits, EEO submits that this article is completely contrary to the fundamental objective of the Green Paper: "*to seek the least restrictive solution that will safeguard the standard service network that provides universal service to all the citizens and organisations of the Community*."[11] In contrast the lofty goals of the Green Paper, Article 10 of the draft Notice allows Member States to impose the burden of universal service on private delivery services without conferring upon them the legal benefits enjoyed by the universal service provider. The result will be a more restricted, not a less restricted, Community postal sector. The mechanisms set out in this article make sense only as policy options in the context of total liberalization of postal

[11]Green Paper, chapter 8, section 4, page 188.

services and the development of alternate funding schemes for universal service.

5. TARIFF PRINCIPLES (ARTICLES 13-15)

Article 13 provides certain principles for universal service postal tariffs. One provision requires particular comment: "Member States may decide that a *uniform tariff* should be applied on their territory for each service composing the universal service [emphasis added]."

The Green Paper proposed that the universal service obligation should be defined in terms of an obligation to provide universal services at *affordable* tariffs. Affordability is a flexible standard that allows a universal service provider to adjust prices to meet competition and changing costs. Such flexibility is essential outside of the presumptively reserved *general letter service* defined in the draft Notice. If a Member State can require a public postal operator to provide a normally competitive, universal service at a *uniform* tariff, then the Member State can use this requirement to extend the reserved area into a supposedly unreserved universal service area. A uniform tariff is such an inflexible standard that, it will surely be argued, competition may deemed inconsistent with the standard. Thus, if a Member State can decide that a uniform tariff should be applied for each service composing the universal service, the potential for monopolization and regulation of the *entire universal service area* is greatly enhanced. The result will be precisely contrary to that recommended in the Green Paper proposals.[12]

Article 14 states that "Member States shall take steps to ensure that terminal dues are determined in relation to the costs of the universal service providers responsible for the processing and distribution of the mail in a non-discriminatory manner in the country of arrival, and in relation to the quality of the services provided." EEO believes that setting of terminal dues and other postal tariffs should be the responsibility of postal operators, not the Member States. The responsibility of the Member States should be to ensure that post offices abide by the requirements of the EC Treaty in their relations with other post offices. In particular, post offices should avoid anti-competitive agreements that are inconsistent with Articles 85 and 86. Post offices should, as well, avoid abusing their dominant position by discriminating between mailers based upon their nationality. That is, a post office should not make different charges for the delivery of similar tenders of domestic and intra-Community mail. EEO submits that the principles of the EC Treaty are quite adequate to resolve the problems associated with the pricing of terminal dues. It is only necessary to ensure they are enforced.

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[12] The Green Paper specifically examined and rejected the proposition that a uniform postal tariff obligation should be used to justify a reservation of a universal service. Green Paper, chapter 8, section 3.2, page 187 ("One of the benefits of the granting of exclusive rights is that it can enable the reserved service provider to continue to offer a single unitary tariff (*péréquation tarifaire*). However, this is not itself a justification for establishing a set of reserved services.").

Article 15 defines the obligation of post offices to maintain cost accounts. The goals of accounting standards should be to ensure that (i) one group of mailers is not forced to bear costs that should properly be paid by another group of mailers and (ii) mailers using reserved services are not forced to pay costs that should properly be paid by mailers using non-reserved services. Accounting for the costs of postal services is such a complicated topic that it is impossible to set down standards by general rule. EEO submits, therefore, that accounting controls will be not prove workable unless the regulator is authorized to determine the form of accounts to be kept for regulatory purposes and to compel the production information needed to verify the accounts. As drafted, Article 15 does not appear to offer the regulator a reasonable prospect of assuring the public interest objectives underlying accounting standards.

The Green Paper embraced transparency of accounts as a fundamental check against abuse of the reserved area. In speaking of the possibility of cross-subsidy from the reserved area to the non-reserved area, the Green Paper declared "*Such cross-subsidies would need to be the subject of vigorously transparent treatment*."[13] More generally, in setting out the tasks of the regulator, the Green Paper recommended, "*Appropriate levels of transparency need to be determined, both for access to the network and for the costs underlying the prices for access*."[14] While these principles formed the basis of the public discussion on the Community postal policy, Article 15 does not appear to require any level of transparency whatsoever in respect to cost accounts.

EEO submits the Green Paper correctly identified the critical importance of transparency of cost accounting. If mailers are required by law to use certain postal services, the accounts for such services should be completely transparent. Furthermore, the accounts on non-reserved services produced in common with reserved services should be sufficiently transparent as to ensure—and assure all—that revenues from the reserved area are not being used to cross-subsidize services in the non-reserved area.

6. QUALITY OF SERVICE (ARTICLES 16-19)

Articles 16-19 declare in sum that Member States shall ensure that universal services are of good quality. EEO agrees that Member States should be responsible for the quality of service of *reserved* services because they have, by law, required their citizens to use such services by means of a postal monopoly. In the reserved area, the Member State should set strict standards of service and see that they are met. Likewise, Member State should ensure that customer services are offered in the reserved area, including adequate response to customer complaints.

The situation is different, however, with respect to *non-reserved services*.

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[13]Green Paper, chapter 8, section 15.2, page 219.
[14]Green Paper, chapter 9, section 4.8, page 248.

Where undertakings compete, each should be responsible for the quality of its services, and each should gain or lose business based upon its ability to satisfy the needs of customers. For a Member State to ensure or assist the quality control of one competitor and not the others is not only self evidently unfair but of doubtful legality under Article 92. In the non-reserved area, therefore, the operational role of the Member State should be to ensure, and set standards for, the provision of supplemental services where none are offered by the competitive market. Beyond this, it is inappropriate for the draft Directive to require or encourage Member States to intervene on behalf of any competitor.

This is not to suggest that Member States have no interest in the quality of the services provided in the non-reserved area. Member States might wish to monitor the quality of services provided by the market. They might wish to adopt measures to improve the functioning of the market. But such measures should, like all general business and commercial laws, affect all participants in the market equally and should be aimed at improvement of the market as a whole.

These remarks concerning the role of the Member States in the non-reserved area apply equally to the role of the Commission at the cross-border level. EEO submits that the Commission's role should be commercially neutral, directed towards improvement in the functioning of the market as a whole and not in the services of selected participants in the mark et.

7. HARMONIZATION OF TECHNICAL STANDARDS (ARTICLE 20)

No comment.

8. ADVISORY COMMITTEE (ARTICLE 21)

Article 21 provides for the establishment of an advisory committee made up of representatives of the Member States. EEO submits that the Commission should, in some manner, consult periodically with cross-border mailers and cross-border operators as well.

9. NATIONAL REGULATORS (ARTICLE 22)

The Green Paper described the independence and impartiality required of the national regulatory authorities in the following terms.

> In order to achieve this impartiality, it is essential that the regulatory body be separated from any operational function. It would seem preferable if the regulatory body was a completely separate institution from the reserved service provider (so that, for example, it was not common for individuals' careers to move frequently from one to the other). However, the more important point is that *all concerned (the consumers, the reserved service provider(s) and the private operators) are all convinced of the regulatory body's impartiality.* If this is achieved, even if the reserved service operator and the regulatory body both appear to come under the umbrella of a single

organisation, there should be few complaints. [emphasis added][15]

This a strict standard, but a sound one. An impartial regulator is one who has no personal or professional stake in the outcome of a given decision. Further, he must have the power to obtain the information necessary for an informed decision, and in the postal sector virtually all of the relevant information is in hands of the post office. Article 22 does not appear to provide an adequate basis for impartial and informed regulation. For example, it is not possible for a single regulator to be, at the same time, responsible for the quality of competitive services and impartial towards competitors. A more careful distinction needs to be drawn between the roles of the regulator in the reserved area and in the non-reserved area.

Another fundamental failing in the charter of the national regulator is the draft Directive's silence on the regulator's authority to compel the production of accounting information from post offices. Without such authority, none of the duties of the national regulators can be executed with confidence. Indeed, if post offices are free to grant or withhold accounting information from the regulator, they will, in effect, regulate the regulators.

Finally, EEO must also object to the draft Directive's failure even to authorize national regulators to control unlawful cross-subsidy from classes of service in the reserved sector to classes of service in the competitive sector. While Article 22 of the draft Directive directs national regulators to ensure compliance with "the obligations arising from this Directive," it leaves to the Member States whether regulators should enforce compliance with the competition rules of the EC Treaty. Since the draft Directive does not mention the subject of cross-subsidy, regulators are apparently left with no inherent authority in this area. As the Commission is aware, cross-subsidy from the reserved sector to the competitive sector is one of the most fundamental problems of Community postal policy. The Green Paper and virtually all users have condemned the practice. EEO submits that draft Directive should be amended to give national regulators the authority, the powers, and the independence necessary to control this problem.

10. FINAL PROVISIONS

No comment.

[15]Green Paper, chapter 8, section 12, page 212.

Part 8

U.S. Postal Reform

CHRONOLOGY

23 Feb 1995	House Postal Subcommittee, chaired by John McHugh, begins hearings on postal reform.
25 Jun 1996	H.R. 3717 introduced in 104th Congress by McHugh.
26 Sep 1996	Testimony of Fred Smith, Federal Express.
18 Mar 1997	FedEx submits legislative proposals to Subcommittee.
12 Dec 1997	McHugh's White Paper on revision of H.R. 22.
17 Jun 1998	Rep. Northup amends appropriations bill to shift authority over UPU from USPS to USTR.
28 Jun 1998	Sen. Cochran amends appropriations bill to require annual report on international mail by Postal Rate Commission.
31 Aug 1998	McHugh proposes substitute amendment for H.R. 22.
4 Sep 1998	Administration, Postal Service, and express companies agree on revised Northup Amendment giving authority over UPU to Department of State.
24 Sep 1998	H.R. 22 reported by House Postal Subcommittee (105th Congress).
21 Oct 1998	Northup and Cochran amendments enacted into law.
29 Apr 1999	H.R. 22 reported by House Postal Subcommittee (106th Congress).
Nov 2000	H.R. 22 dies when 106th Congress adjourns.

23

Overview: U.S. Postal Reform

I personally believe that rational change should take place now, before the Postal Service is in crisis.

- John McHugh (1999)

In the United States, birthplace of three of the four major international express companies, postal reform has lagged Europe and other industrialized countries by five years or more. As in Europe, postal reform began with an effort by postal officials to escape regulatory controls; in the U.S., the controls were those of the Postal Rate Commission rather than competition authorities. A five-year Congressional inquiry led by Representative John McHugh ensued. Citing vast changes in technology and commercial practice, McHugh forged a plan, H.R. 22, to modernize the Postal Service's 1970 charter. H.R. 22 would give the Postal Service more commercial freedom while requiring it to compete on more nearly equal terms with private operators. McHugh's proposal for a more freely competitive delivery services sector was opposed by the Postal Service (until too late), by the largest postal union, and by several of the Postal Service's largest private competitors. It also fell afoul of fiercely partisan political struggles. In late 2000, H.R. 22 died in committee. As in Europe, however, progress was made. The postal policy review led by McHugh served to enlighten if not wholly convince. One way or another, the United States will be forced to address postal reform, and when it does, the starting point in many areas will be the ideas set out in H.R. 22.

Postal Service and Postal Rate Commission

Although the United States government has operated a national postal service since before the American Revolution, its organization has varied considerably. At first, the Postmaster General was a contracting officer within

the Treasury Department. He arranged with private stagecoach lines and other transport services for the carriage of mail from town to town along routes determined by Congress; there was no local mail service and no delivery of mail. In each town, the Postmaster General appointed a postmaster who operated a post office as a franchise, retaining most of the postage collected. In 1839, President Jackson added the Postmaster General to the cabinet. In 1872, the Post Office Department was established as part of a larger effort to reorganize and codify the laws of the United States. The Post Office Department was abolished with the creation of the United States Postal Service in 1970.

The gist of the 1970 act was give the Postal Service greater independence from the President and Congress. The independence of the Postal Service derives from the Board of Governors, a board composed of nine "Governors" and a Postmaster General and Deputy Postmaster General. Governors are appointed by the President for staggered nine-year terms. Under the 1970 act, the Governors, not the President, appoint the Postmaster General and the Deputy Postmaster General. Likewise, the Governors, not Congress, set postage rates, subject to review by a second agency, the Postal Rate Commission. Neither the President nor Congress exercises direct supervisory authority over the Postal Service.

The Postal Rate Commission is composed of five members appointed by the President. Before changing postage rates, the Postal Service is required to seek a formal opinion from the Commission. In public hearings, the Commission assesses the fairness of the new rates, primarily to ensure that the Postal Service does not impose unreasonably high rates on mailers who have no alternative to the Postal Service. By the same token, the Postal Rate Commission prevents the Postal Service from undercharging competitive products in a manner that would distort markets or injure private competitors. Although the Commission can recommend modifications in the structure of new rates, it cannot limit the total revenue to be raised; the Postal Service has sole discretion to determine its own revenue needs.

THE PROPOSED 30-CENT STAMP

In March 1990, the Postal Service asked the Postal Rate Commission to approve an increase in the first class stamp rate from 25 cents to 30 cents as part of a general increase in postage rates. After a ten-month review, on January 4, 1991, the Postal Rate Commission concluded that it would be fairer to limit the first class stamp to 29 cents and provide larger than requested increases in other postage rates.[1] Postmaster General Tony Frank was outraged

[1]Postal Rate and Fee Changes, 1990, Docket No R90-1, *Opinion and Recommended Decision* (Jan 4, 1991). On reconsideration, the Postal Rate Commission issued two further opinions: *Opinion and Further Recommended Decision* (May 24, 1991) and *Opinion and Recommended Decision Upon Further Reconsideration* (Oct 4, 1991).

at the Commission's interference in the pricing strategy of the Postal Service and said so publicly. The Postal Service twice returned portions of the case to the Postal Rate Commission for further reconsideration. As one well informed observer put it, "PMG Frank and the governors want to put the rate commissioners 'in their place'—which is just a little this side of the Gobi Dessert."[2] When the Postal Rate Commission refused to yield on reconsideration, the Postmaster General demanded that the Board of Governors overrule the Commission and approve a 30-cent stamp, an action requiring a unanimous vote by all Governors. In early November 1991, three Governors declined to support the 30-cent stamp, ending almost two years of public dispute. Two months later, Tony Frank announced his resignation as Postmaster General.

The demise of the 30-cent stamp was not the end of the matter. In defense of the higher stamp rate, Postmaster General Frank sought to develop the intellectual case for greater commercial freedom for the Postal Service. The Postal Service maintained that postal revenues could be increased and universal postal service improved if only Congress would allow the Postal Service more pricing flexibility by limiting the regulatory authority of the Postal Rate Commission. To flesh out this argument, the Postal Service, in May 1991, retained the Institute for Public Administration (IPA), a private research organization, to prepare a report on the ratemaking process.

On October 8, 1991, IPA issued "The Ratemaking Process for the United States Postal Service," a 250-page report that heavily criticized the postal ratemaking process and concluded "the ratemaking process has had a negative impact on the Postal Service's ability to serve the public, on its financial condition, and on its competitive services."[3] IPA maintained that Congress intended the Postal Rate Commission (PRC) to assist the Postal Service, not to restrain it:

> The Postal Reorganization Act meant the PRC to function as an expert and collaborative body. It has instead been fashioned as an adjudicatory panel operating within strict legal parameters but without up-to-date legal procedures. . . . It is definitely time . . . for the PRC to join in the process of regulatory reform that has proceeded in the federal and state government, providing for more efficient proceedings and more flexible review procedures.[4]

Rather than helping the Postal Service, IPA concluded, the main effect of Commission regulation had been to impede Postal Service performance while giving an unfair and unreasonable level of aid and comfort to private competitors:

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[2]*Business Mailer's Review* (May 13, 1991) at 3.

[3]Institute for Public Administration, "The Ratemaking Process for the United States Postal Service" 1 (Oct 1991).

[4]Ibid, 38-39.

> The pattern and content of rate cases over the 20-year period demonstrate that two concerns drive the process:
> - concern that the protected services—that is first and third class addressed letter mail protected by the Private Express Statutes—should not be taken advantage of to subsidize competitive services; and
> - concern that the Postal Service should not compete with other firms. . . .
>
> . . . The methodologies chosen for Postal Service ratemaking, and the ways of thinking they promote, impede rapid improvement in Postal Service performance. . . .
>
> . . . The ratemaking process has not allowed the Postal Service flexibility to make competitive moves in a timely fashion. . . .
>
> . . . the Postal Service is making an effort to compete and the PRC is tacitly maintaining that competition is inappropriate.[5]

IPA recommended that the Postal Service and Postal Rate Commission establish a Joint Task Force to develop a plan to help the Postal Service. IPA suggested the Joint Task Force consider remedies such as use of a four-year "test year" in ratemaking proceedings,[6] authority for the Postal Service to implement annual rate increases on 90-day notice if consistent with a price cap approved by the Postal Rate Commission, and non-regulation of competitive products priced above incremental costs. IPA also advocated legislative reforms including allowing the Postal Service Board of Governors to overrule the Postal Rate Commission on a two-thirds vote.

In March 1992, IPA's criticisms of the ratemaking process were reinforced by a report by the General Accounting Office (GAO). Like IPA, GAO, with the assistance of Postal Service staff, looked for and found evidence that the ratemaking process had hobbled the Postal Service's competitive offerings. In parcel and express markets, GAO concluded that "it is unlikely that the Postal Service will be able to gain ground on its competitors unless it can offer competitive prices to volume customers" and urged Congress to permit such discounts.[7] To a greater degree than IPA, the GAO questioned core economic concepts underlying Commission regulation of non-competitive products, roughly 90 percent of Postal Service offerings. GAO argued that the Postal Service should be allowed more freedom to implement

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[5]Ibid, 24, 26, 28, and 31.

[6]A "test year" is an accounting device used to evaluate and justify rate changes proposed by the Postal Service in proceedings before the Postal Rate Commission. A "test year" is a period in the future which the Postal Service designates as the period during which revenues from new postage rates will yield revenues equal to costs, as required by the Postal Reorganization Act of 1970. Prior to the IPA report (and since), the Postal Rate Commission has used a year-long period beginning roughly one year after new rates are to take effect. The idea is that the Postal Service will make a profit in the first year that new rates are in effect, break even in the "test year," and lose money in the year after the test year. Rates established in this manner will, more or less, allow the Postal Service to break even for a three-year period before new rates are needed. A four-year test year would allow the Postal Service to introduce rates that are deliberately non-compensatory in the earlier years if it can reasonably expect to make up losses with profits in later years.

[7]General Accounting Office, *Pricing Postal Services in a Competitive Environment* 22 (1992). GAO is a congressional agency that provides research and auditing functions for Congress.

price discrimination among mailers based upon demand elasticity, i.e., what mailers would be willing to pay for service. GAO justified this recommendation in part on the prospect of growing indirect competition from telecommunications services and in part on the view that such price discrimination is more economically efficient:

> Because the Postal Service is a limited monopoly whose demand for many of its services is not assured by the Private Express Statutes . . . GAO believes that the future marketplace will dictate that postal rates should be based to a great extent on economic principles that consider value-of-service or demand pricing. This concept is an economically efficient pricing mechanism that will help minimize mail-volume losses and help maximize postal revenues even as rates are increased."[8]

GAO support for "demand pricing" went to the heart of the inter-class dispute that is the gravamen of all general rate cases including the 30-cent stamp case. The question is, Who should pay for the common "institutional" costs of the Postal Service? Should first class letter mailers pay more of this common burden through higher stamp prices? Or should advertising mailers, the only other large pool of mailers, pay more through higher bulk third class rates? In rejecting the 30-cent stamp, the Postal Rate Commission ruled in favor of first class mailers on grounds of equity, holding it unfair to raise so much money from those most firmly bound by the postal monopoly. GAO, on the other hand, implicitly agreed with the Postal Service and advertising mailers on grounds of revenue efficiency; more price discrimination could yield more money from the same mail.[9]

With these reports, the Postal Service laid seize to the regulatory acropolis of the Postal Rate Commission. The Postal Service was substantially successful in creating the public perception that, but for unreasonable regulatory restraints imposed by a hostile Postal Rate Commission, it could offer better service at lower rates and compete more successfully with private competitors. This refrain was continued by Marvin Runyon, named Postmaster General in May 1992 and previously chairman of another government enterprise, the Tennessee Valley Authority.

Bowing to political pressure, the Postal Rate Commission agreed to consider modifications in its approach to regulation. In January 1992, staff members of the Postal Rate Commission and Postal Service formed a Joint Task Force to study IPA's recommendations.[10] In its June 1992 report,[11] the

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[8]Ibid, 8 (footnote omitted).

[9]In an appendix to the GAO report, the Postal Rate Commission vigorously challenged the correctness of GAO's legal and economic analyses.

[10]The Postal Rate Commission also formally sought public comments on the IPA report. 56 FR 56955 (Nov 7, 1991). The Postal Rate Commission sought comments on the IPA report as part of an inquiry into ways to improve and expedite proceedings launching in June. 56 FR 28850 (Jun 25, 1991).

[11]Joint Task Force on Postal Ratemaking, "Postal Ratemaking in a Time of Change" (Jun 1, 1992).

Joint Task Force proposed a number of reforms in the ratemaking process. The major proposal was to adopt a two-step model for general rate cases. In the first step, the Postal Rate Commission would approve a four-year framework for rates based on projections of costs and revenues for four years. Two years later, the Postal Rate Commission would approve or adjust rates in an abbreviated case that would not reexamine rate structure or costing issues. In addition, the Joint Task Force proposed division of products into non-competitive and competitive groups. For competitive products, such as parcels and express mail, rate bands would be established within which the Postal Service could change rates without Commission approval. Declining rate blocks would allow discounts for large volume users of competitive products. The Joint Task Force further endorsed expedited review procedures for market tests, provisional services, minor classification cases, and negotiated service agreements between the Postal Service and individual mailers. Multi-year cost coverage rules for new services—permitting prices below cost in early years—were also advocated.

Postal reform by interagency agreement ultimately failed. In August 1992, the Postal Rate Commission proposed rules to implement many of the recommendations of the Joint Task Force.[12] In the course of the rulemaking, the Postal Service reversed course and opposed the centerpiece of the reforms, the four-year framework for general rate cases, concluding it was insufficiently flexible for future rate cases. In March 1993, the Commission gave up and terminated the rulemaking.[13] In March 1994, the Postal Service filed another general rate case with the Postal Rate Commission, effectively precluding further consideration of postal reform by the Commission for at least a year.

INTRODUCTION OF H.R. 22

Although the Postal Service and Postal Rate Commission did not agree on postal reform, the underlying issues did not disappear. Indeed, the national election of 1994 encouraged the Postal Service to put its case directly to Congress. In November 1994, the Republican Party gained control of the House of Representatives for the first time in forty-two years. Chairmanship of the House Subcommittee on Postal Service in the 104th Congress[14] fell to John McHugh, a moderate Republican from a district in upstate New York along the Canadian border.

Chairman McHugh immediately signaled willingness to explore the case for postal reform. He organized a series of hearings designed to solicit the views of all affected parties. On February 23, 1995, the first witness in the first hearing, Postmaster General Marvin Runyon, reprised the themes of the IPA

[12]57 FR 39160 (Aug 28, 1992).

[13]58 FR 16392 (Mar 26, 1993).

[14]A new Congress is created every two years by the election of all members of the House of Representatives and one third of the members of the Senate.

report:

> The Postal Reorganization Act of 1970 . . . never envisioned today's highly competitive communications industry. To a large degree it puts our destiny outside of our control.
>
> Regulatory oversight is appropriate, but it should not impair our ability to serve customers and provide them with products they want at market prices. It is time to reexamine the 25-year-old law that created this organization. It is time to take the next step—to make the Postal Service more business-like and competitive for the American people.
>
> There are three areas we need to focus on. First we need to free our employees from burdensome rules and bureaucratic read tape and focus their efforts on serving our customers' mailing needs; second, we need to free the price setting process so we can respond to the market, stay competitive, and keep costs down; and third, we need to free our products of bureaucratic restrictions and make them more modern and customer oriented.[15]

During 1995 and early 1996, the McHugh Subcommittee heard from a broad range of postal officials, postal regulators, postal users, postal employees, and the General Accounting Office.[16] Private competitors of the Postal Service were also invited to testify in recognition of their contribution to development of delivery services since 1970 and the blurring of distinctions between public and private sectors.

Chapter 24 reproduces the testimony of the Air Courier Conference of America, the trade association of private express companies in the U.S. ACCA was represented by Harry Geller, president of a small international express company, Global Mail. In spring 1995, ACCA's members did not have a common position on most of the issues presented by postal reform due primarily to disagreements between its largest members, Federal Express and United Parcel Service. ACCA did, however, have long standing, well-developed positions in two areas: the postal monopoly and international postal policy. These formed the basis of Geller's testimony. Extensive notes were included in this testimony, both to lend weight to the argument and to assist the Subcommittee in understanding these rather arcane topics. ACCA's comments on international postal policy pave the way for policy reforms enacted in1998.

As result of oversight hearings, McHugh became convinced of the case for postal reform. He accepted the Postal Service's argument that it needed greater commercial flexibility to respond to the competitive threat of private carriers and to increasing pressure from electronic alternatives such as email

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[15]*General Oversight of the U.S. Postal Service: Hearings Before the Subcommittee on the Postal Service of the House Committee on Government Reform and Oversight*, 104th Cong, 1st Sess, 6-7 (1997).

[16]Ibid. See also *United States Postal Service Reform: The International Experience: Joint Hearing Before the Subcommittee on Post Office and Civil Service of the Senate Committee on Governmental Affairs and the Subcommittee on the Postal Service of the House Committee on Government Reform and Oversight*, 104th Cong, 2d Sess (1996).

and the internet. At the same time, McHugh believed that the Postal Service should compete on equal terms when facing private companies. In non-competitive markets, McHugh was sensitive to fears expressed by the Postal Rate Commission and some mailers that, given too much freedom, the Postal Service might favor large mailers over small mailers. The fact that postal reform was far advanced in other industrialized countries reinforced McHugh's perceptions. Finally, as representative of a rural district, McHugh was determined to ensure continuation of universal postal service in the United States.

Drawing on such perspectives, on June 25, 1996, Chairman McHugh introduced his proposal for postal reform. In the 104th Congress, his bill was numbered H.R. 3717 and titled "the Postal Reform Act of 1996." In January 1997, McHugh re-introduced the same proposal in the 105th Congress as H.R. 22, "the Postal Reform Act of 1997." In the 106th Congress, starting in January 1999, the same bill number was retained but the 1999 version of H.R. 22, "the Postal Modernization Act of 1999," was significantly revised from the 1997 version.

McHugh's initial proposal was derived from several sources: proposals in the IPA report, reform ideas adopted in other countries, and regulatory reform measures adopted by the Federal Communications Commission in unwinding the long distance telephone monopoly of the American Telephone and Telegraph Company. In principle, H.R. 3717 would divide all Postal Service products into two categories, non-competitive and competitive. Ratemaking for non-competitive products would be streamlined. Postal Rate Commission review of new rates prior to implementation would be ended. Henceforth, the Postal Service would be permitted to revise rates annually if rates remained within specified price caps. Under the price cap regime, non-competitive services would be grouped into four baskets of roughly similar demand characteristics. Price caps would increase each year according to an "adjustment factor" which would be revised every five years by the Postal Rate Commission. In addition, for non-competitive products, the Postal Service would be granted substantial freedom to offer volume discounts, to negotiate service agreements with individual mailers, and to conduct market tests for new products. For competitive products, the Postal Service would be almost completely free to change rates at will provided prices covered "attributable costs" (roughly, long term marginal costs). Furthermore, the Postal Service would gain discretionary authority to invest in private sector companies and to reward key employees with large bonuses.

In the 1996 McHugh plan, the new commercial flexibility granted the Postal Service was balanced by giving the Postal Rate Commission increased enforcement authority and by applying some business laws to the Postal Service in the same fashion as already applicable to private competitors. The Postal Rate Commission would be given subpoena authority and authorized to review the books of the Postal Service annually. The postal monopoly would

be limited to letters for which carriage was priced at $2 or less. An experiment would be conducted to test the possibility of relaxing the Postal Service's exclusive access to private mailboxes.[17] Antitrust laws would apply to the Postal Service's competitive products.

In the second half of 1996 and 1997, the Postal Service Subcommittee held hearings on the McHugh plan.[18] Prospects for legislation appeared dim because the Postal Service itself opposed many features of H.R. 22, including the increase in Postal Rate Commission authority, application of the antitrust laws, and reduction in the scope of the postal monopoly.

Chapter 25 reproduces the testimony of Fred Smith, Chairman and Chief Executive Officer of Federal Express, at a Subcommittee hearing on H.R. 3717 held on September 26, 1996. Although Smith and Federal Express were philosophically opposed to government enterprise, they were willing to accede to the political wisdom of the compromise implicit in H.R. 3717: allow the Postal Service to compete but force it to compete fairly. Federal Express was very concerned, however, that H.R. 3717 failed to level the competitive field occupied by the Postal Service and private companies. Moreover, Federal Express wanted changes in several aspects of existing postal laws, including an end to the authority of the Postal Service to define its own monopoly and send postal inspectors to harass customers of Federal Express, clarification of the application of fair trade laws and traffic laws to the Postal Service, and elimination of legal advantages of the Postal Service in international trade. By offering knowledgeable and supportive testimony, Federal Express sought to encourage McHugh to flesh out key principles of H.R. 3717 in greater detail.

In answer to a question from the Subcommittee, Smith later identified the following as additions to H.R. 3717 necessary to Federal Express's support:

- clarification that, for competitive products, the Postal Rate Commission is authorized (i) to obtain all data which is, in the Commission's judgement, necessary to assess the lawfulness of competitive postage rates and (ii) to order unlawful rates revised to lawful levels and impose such other penalties as may be appropriate;
- a requirement that competitive products as a whole make a contribution to overhead that is comparable to that contributed by non-competitive products;
- a definition of the boundary between non-competitive products and

[17]Under a 1934 law, only the Postal Service is permitted to place unstamped "mailable matter" in private postal boxes located along streets and highways. 18 USC 1725.

[18]*H.R. 3717, the Postal Reform Act of 1996: Hearings before the Subcommittee on the Postal Service of the House Committee on Government Reform and Oversight*, 104th Cong, 2d Sess (1997) (four hearings held in July and September 1996); *General Oversight of the U.S. Postal Service: Hearing before the Subcommittee on the Postal Service of the House Committee on Government Reform and Oversight*, 105th Cong, 1st Sess (1997) (hearing held on Apr 24, 1997); *H.R. 22, The Postal Reform Act of 1997: Hearing Before the Subcommittee on Postal Service of the House Committee on Government Reform and Oversight*, 105th Cong, 1st Sess (1997)(hearing held on Apr 16, 1997).

competitive products that reflects precedents and concepts developed by the Federal Communications Commission in deregulating the AT&T monopoly;
- transfer of authority to administer the postal monopoly to an impartial agency or to the courts and establishment of a price limit for the postal monopoly that is reasonably near postage rates for first class mail;
- transfer of authority to represent the United States at the Universal Postal Union to an impartial Executive Department or agency;
- equal application of mailbox access rules (preferably by abolition) and customs laws (U.S. and foreign) to all competitive products and at least a start towards equal application of all other federal and state laws to competitive products;
- clarification of "market test" provisions in such a way that allows the Postal Service flexibility to test new products without taking unfair advantage of its governmental advantages.[19]

In addition to formal hearings, McHugh actively solicited informal comments and written submissions from all interested parties. In March 1997, Federal Express followed up Smith's testimony with detailed legislative suggestions for postal reform. Federal Express' proposals addressed all aspects of H.R. 22, not only issues of specific short term significance for Federal Express. From the Subcommittee hearings, Federal Express was satisfied that McHugh and his staff would honestly and fairly address the competitive issues of deepest concern to the Postal Service's competitors. Federal Express therefore sought to use its expertise in postal law and policy to assist McHugh in realizing the approach towards to postal reform that he had outlined in initial legislation even if this approach may not have been the first choice of Federal Express. Federal Express made the further decision to keep these proposals out of the public eye so that McHugh and his staff could evaluate the suggested revisions on their merits, without political pressure to accept or reject "the Federal Express proposal."

REVISION OF H.R. 22

On December 12, 1997, McHugh issued a "White Paper" that outlined a plan for a thorough revision of H.R. 22 based on the results of the Subcommittee's eighteen months of hearings. In announcing the White Paper, McHugh indicated acceptance of many of the constructive suggestions advanced by Federal Express

> A key component of the Chairman's revision is the premise that the Postal Service's participation in competitive markets must be, to the maximum extent possible, on the same terms and conditions as faced by

[19] *H.R. 3717, the Postal Reform Act of 1996: Hearings on H.R. 3717 before the Subcommittee on the Postal Service of the House Committee on Government Reform and Oversight*, 104th Cong, 2d Sess, 941-42 (1997).

> private sector competitors. The revision is grounded on the basis that such competitive operations, when carried out, must not leverage captive customers' revenues in efforts to finance the Postal Service's competitive and non-postal ventures.
>
> In general, the revisions build on the original provisions of H.R. 22 that created a new postal ratemaking framework and enhanced the Service's pricing flexibility. However, the revision markedly strengthens the fire-walls established between competitive and noncompetitive postal products.[20]

McHugh asked for written comments on the White Paper by the first week in April. At last, the Postal Service began to offer constructive suggestions despite deep opposition from within its Board of Governors.[21]

After sifting through extensive submissions, on August 31, 1998, McHugh announced a "substitute amendment" for H.R. 22. The substitute was a comprehensive revision of H.R. 22 and reflected input from a wide range of views, including those of the Postal Service, certain postal unions, the Postal Rate Commission, Federal Express, Pitney Bowes (leading manufacturer of postage meters), advertising and parcel mailers, and economic experts called to testify before the Subcommittee. The revised version of H.R. 22 represented an order of magnitude advance in legal and political sophistication. The revision introduced the following changes to H.R. 22, among many others:

- divided postal products into *three* categories: non-competitive postal products, competitive postal products, and non-postal products;
- introduced rate bands to limit Postal Service authority to adjust prices within the price cap regime and clarified authority to offer "negotiated service agreements" to large individual mailers;
- expanded the freedom of Postal Service to price competitive prices without prior approval of the Postal Rate Commission and to engage in price discrimination but added an overall requirement that all competitive products collectively must bear a share of overhead costs that is the same or greater than the system wide average, subject to adjustment and phase-in by the Commission;
- required the Postal Service to account separately for costs, revenues, and assets of non-competitive and competitive postal products;
- authorized USPS to provide non-postal products and to invest in private companies but required the Postal Service to do so through an arm's length private law corporation whose funds were limited to profits earned from competitive activities and loans supported by

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[20]"McHugh Proposes Postal Reform Act Revisions" (press release, Dec12, 1997).

[21]Vice Chairman of the Board of Governors, Einar Dyhrkopp, denounced the revised version of H.R. 22 as "a carefully crafted blueprint for the destruction of the USPS" and "the most gobbledygook nonsense ever presented to the public as a serious reform proposal." *Linn's Stamp News*, p. 9 (Mar 9, 1998). The reporter for this story was the regular postal reporter for the *Washington Post*. A plain spoken Navy combat veteran, Dyhrkopp was elected chairman of the Board of Governors in January 1999.

competitive activities;
- abandoned the proposed experiment in open access to mailboxes and indexed the price limit on the postal monopoly by restating the limit as six times the stamp price (rather than $2);
- applied a wide range of laws to the Postal Service's competitive postal activities in addition to the antitrust laws;
- established procompetitive guidelines for international postal policy and provided that customs laws should apply to competitive international postal services in the same manner as to private express services;
- prohibited the Postal Service from adopting regulations or standards that implement the postal monopoly or otherwise impair the ability of competitors to compete with the Postal Service; and
- expanded authority of the Postal Rate Commission to adopt remedial orders in case of violation of law.

On September 24, 1998, the Postal Service Subcommittee approved H.R. 22 as amended by the McHugh substitute and other minor amendments. Since the 105th Congress was on the verge of adjournment, the effect of Subcommittee approval was to the set the stage for serious consideration of postal reform in the 106th Congress.

INTERNATIONAL POSTAL POLICY REFORM

In the 1995 testimony of the Air Courier Conference of America and the 1996 testimony of Federal Express, the private express industry objected strongly to the manner in which international postal policy was determined and implemented under the Postal Reorganization Act of 1970. In essence, the Postal Service itself determined U.S. policy at the Universal Postal Union without supervision by the Administration. No public policymaking mechanism ensured that U.S. policy reflected the needs of the nation generally as opposed to the commercial interests of the Postal Service. In particular, there was no means to protect the interests of the private express industry, even though private carriers accounted for more than half of the international mail market. There was a long history behind these concerns.[22]

A closely related area of concern was international postage rates, which were not reviewed by the Postal Rate Commission. Private express companies suspected that the Postal Service's rates were unreasonably low and therefore unfairly competitive. In 1992, ACCA sponsored an economic analysis of international postal services presented to the Senate Subcommittee on Postal Service.[23] This analysis led to a joint request by the chairman and ranking

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[22]*See* General Accounting Office, *U.S. Postal Service: Unresolved Issues in the International Mail Market* (Mar 1996). This study was prepared at the request of Chairman McHugh. See also, Part 9, below.

[23]James I. Campbell Jr. and A.D. Strickland, "Preliminary Analysis of USPS Rates for International Postal Services" (May 8, 1992).

minority member of the Subcommittee for a Postal Rate Commission study on the costs and revenues of international postal services.[24] The study was thwarted by the Postal Service's refusal to cooperate. In the 1994 general rate case, Federal Express cast further doubt on the Postal Service's international activities by demonstrating that the Postal Service had failed to explain adequately the cost and revenue assumptions embedded in its rate request.[25] In this case, the Postal Service blocked inquiry by illegally refusing to comply with discovery orders of the Postal Rate Commission.[26]

In H.R. 22, Chairman McHugh included provisions responding to the concerns of private express carriers in regard to international postal policy. In the original version of H.R. 22 (i.e., H.R. 3717), McHugh proposed to extent Postal Rate Commission review to include international as well as domestic postal services. In the Senate, Senator Thad Cochran agreed, proposing, in May 1998, a one-page bill, S. 2082, to the same effect. In revising H.R. 22 in 1998, McHugh further proposed to transfer from the Postal Service to the Department of State authority to represent the United States in procompetitive organizations such as the Universal Postal Union.

As the months of 1998 passed without a new law, reforming procedures for development of U.S. international postal policy became a matter of special urgency. The Universal Postal Union was scheduled to meet in August 1999 to negotiate a new postal convention that would govern international postal exchanges from 2001 through 2004. Chairman McHugh wanted to avoid piecemeal postal legislation for fear of diminishing support for overall postal reform, but in late 1998 he reluctantly agreed with Federal Express that imminence of the UPU congress required special purpose legislation.

Representative Anne Northup provided the vehicle for such legislation. Northup represented Louisville, Kentucky, site of UPS's national air transportation hub. A year earlier, at UPS's behest, Northup had tried to amend the annual appropriations bill to limit the Postal Service's ability to offer certain international postal services which she considered unfair competition for private operators. This effort failed when McHugh opposed the amendment. In fall 1998, Northup was again interested in amending the appropriations bill. McHugh suggested that Northup borrow the proposal in H.R. 22 to shift authority to represent the United States at the Universal Postal Union to (in the latest version) the United States Trade Representative. Northup agreed. On June 17, 1998, with agreement of Representative Jim

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[24]*See* 57 FR 56610 (Nov 30, 1992) (Postal Rate Commission request for public comment on a special study of international mail at the request of Senators David Pryor and Ted Stevens).

[25]Although international rates are not part of a general rate case before the Postal Rate Commission, it is necessary for the Postal Service to subtract international costs and revenues from total costs and revenues in order to project domestic rates that will equal domestic costs. In reviewing proposed changes to domestic rates, the Postal Rate Commission must ensure that the Postal Service adequately and accurately documented this threshold calculation.

[26]*See* Postal Rate Commission, Postal Rates and Fee Changes, 1994, Docket R94-1, *Opinion and Recommended Decision* (Nov 30, 1994) at I-25 to I-33.

Kolbe, chairman of the relevant subcommittee, Northup attached her amendment to the Treasury-Postal Service appropriations bill, H.R. 4104, during consideration by the House Appropriations Committee.[27]

The Northup amendment provoked a storm of protest from the Postal Service, the United States Trade Representative, and direct mailers. The Postal Service did not want to lose the right to negotiate international laws on behalf of the United States. The United States Trade Representative complained that it did not have sufficient staff to oversee international postal policy. Direct mailers supported the Postal Service, believing, inaccurately, that the amendment was intended to undercut a discount international postal service for parcels designed for direct mailers.

The Northup amendment was also threatened by procedural difficulties unrelated to postal policy. In House proceedings on July 16, 1998, Northup, with great skill and tenacity, succeeded in protecting a temporary version of her amendment against in a series of parliamentary objections. This temporary amendment was a place-holder for a final version of the substantive amendment still under discussion. Chairman Kolbe agreed to seek approval of the substantive amendment in the House-Senate conference if and only if all parties were in agreement.[28]

On September 4, 1998, after lengthy discussions among the Postal Service, Department of State, United States Trade Representative, Federal Express, United Parcel Service, and the staffs of Representatives Northup and McHugh, a mutually acceptable version of the amendment was agreed. The revised version substituted the Department of State for the U.S. Trade Representative as the Executive Department responsible for international postal policy and limited the scope of the Department of State's policy responsibility to "United States participation in the Universal Postal Union, including the Universal Postal Convention and other acts of the Universal Postal Union . . . and all postal treaties and conventions concluded within the framework of the Convention and such acts." The Postal Service retained authority to negotiate other treaties outside the UPU framework provided they remain consistent with policies set by Department of State. The phrase "postal and other delivery services" was added to the list of service industries which the Department of Commerce and the United States Trade Representative are charged with promoting in international fora such as the World Trade Organization. Due to adamant opposition by the Postal Service, the group dropped a provision that would prohibit the government from negotiating a treaty or convention giving the Postal Service or any other person "an undue or unreasonable preference." Instead, the group recommended a "sense of

[27]HR Rept No 105-592, 105th Cong, 2d Sess, 80 (to accompany HR 4104) (sec 646).

[28]When the House of Representatives and the Senate approve differ versions of a bill, a conference committee composed of representatives of both chambers is created to reconcile differences and recommend a single compromise version which must then be agreed by both houses.

Congress resolution" formally declaring a Congressional intent

> that any treaty, convention or amendment entered into . . . should not grant any undue or unreasonable preference to the Postal Service, a private provider of postal services, or any other person.

On October 1, 1998, the House-Senate conference committee submitted a conference report on H.R. 4104 that included the final consensus version of the Northup Amendment.[29] The conference report also included a remnant of Senator Cochran's proposal to extent the jurisdiction of the Postal Rate Commission to include international postal services. On July 28, 1998, during consideration of the Senate version of the Treasury-Postal appropriations bill (S. 2312), Senator Cochran added an amendment to require the Postal Rate Commission to prepare an annual report on the costs and revenues of international mail.[30] This amendment was noncontroversial.

On October 21, 1998, the Treasury-Postal appropriations bill was enacted into law as part of omnibus consolidated appropriations bill.[31] In this convoluted manner, a portion of the international postal reforms envisioned in H.R. 22 were split from the main bill and enacted into law at the end of 1998.

FAILURE OF H.R. 22 IN THE 106TH CONGRESS

In February and March, 1999, the House Postal Service Subcommittee convened a final round of hearings on the revised version of H.R. 22.[32] The Postal Service, led by Postmaster General William Henderson since May 1998, now lent its support to H.R. 22. So did the leading first and third class mail groups, small newspapers and magazine publishers, parcel shippers, the majority of postal unions, and major competitors such as Federal Express and Pitney Bowes. H.R. 22 was opposed by the largest post union (representing clerks and mailhandlers), by large newspapers (competitors in the delivery of printed advertisements), and by United Parcel Service (the major competitor in the delivery of parcels).

Chapter 26 reproduces the testimony of Fred Smith, chairman of FDX Corporation, a newly formed holding company that included Federal Express and Roadway Package Service (RPS), a parcel delivery company. In this testimony, FDX sought to summarize the case for H.R. 22 in terms persuasive to those concerned about the prospect of unrestrained "government enterprise." FDX answered common criticisms of the bill while opposing several amendments proposed by the Postal Service. In this hearing, Chairman

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[29]HR Rept No 105-790, 106th Cong, 2d Sess (1998)

[30]144 Cong Rec S9103 (daily ed, Jul 28, 1998).

[31]The Northup Amendment was enacted as Pub L No 105-277, Div. A, §101(h) [Title VI, § 633] 112 Stat 2681, 3204 (1998), *codified* 19 USC 2114b(5) and 39 USC 407. The Cochran Amendment was included in the same act as § 648, 112 Stat 3208, *codified* 39 USC 3663.

[32]*H.R. 22, The Postal Modernization Act of 1999: Hearing Before the Subcommittee on Postal Service of the House Committee on Government Reform*, 106th Cong, 2d Sess (1999) (hearings held on Feb 11 and Mar 4, 1999).

McHugh generously remarked, "I normally don't recommend reading to anyone, but . . . the testimony you have submitted is among the more complex and thoughtful we have had, and I would recommend it to anyone who would care to review it."

On April 29, 1999, the Postal Service Subcommittee approved H.R. 22 and reported it to the full Committee on Government Reform.

At this point the legislative progress stopped. H.R. 22 died when the Committee on Government Reform failed to report the bill to the floor of the House of Representatives before expiration of the 106th Congress at the end of 2000. In the closely divided 106th Congress, the full Committee was composed of 24 Republicans and 20 Democrats (including an Independent aligned with the Democrats). No Democrat supported H.R. 22. Instead, the ranking Democrat, Representative Henry Waxman of California, proposed a short bill, H.R. 3535, as an alternative to H.R. 22. It was evident to all that H.R. 3535 was not a serious proposal; most observers ascribed Democratic opposition to H.R. 22 to larger political considerations rather than to disagreement over the merits of H.R. 22. Since a majority of 23 votes was required to report a bill from the Committee to the House, additional opposition by two Republicans was sufficient to prevent further action. On the Republican side, opposition was led by Representative Steven LaTourette of Ohio, a member of the Postal Service Subcommittee since 1997, who, until April 1999, appeared supportive of H.R. 22. In May 1999, LaTourette circulated a draft substitute for H.R. 22 written by United Parcel Service, a vigorous opponent. When a handful of other Republicans also proved unwilling to vote for H.R. 22 for diverse reasons, it became impossible to report H.R. 22 out of committee.

FUTURE OF U.S. POSTAL REFORM

In early 2001, the future of postal reform in the United States is unclear. What is clear is that the technological and commercial trends which have persuaded other industrialized countries to reform their postal laws are at work in the United States as well. The debate over H.R. 22 has educated Congress, the Postal Service, mailers, and other interested parties about the likely implications of these trends and the available public policy options. This debate may yet prove to have been the prelude to postal reform.

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ACCA Testimony on Postal Reform (1995)

I am the president and owner of Global Mail, Ltd., a private international mail company located at Dulles Airport in Sterling, Virginia. Global Mail was founded in 1987. Our annual revenues now exceed 25 million dollars, and we employ over 150 people in the United States. I am testifying today on behalf of the Air Courier Conference of America (ACCA). Global Mail has participated actively in the postal affairs work of ACCA for many years and, until recently, I was the chairman of the postal policy subcommittee of ACCA's International Committee. Since several of our largest members are representing themselves in the current hearings, ACCA felt it would probably be most helpful to the Subcommittee to offer a witness who could provide not only general industry views but also the perspective of a small businessman operating in the delivery services sector.

It is an honor and a pleasure for ACCA to accept the invitation of the Subcommittee to address public policies pertaining to the U.S. Postal Service. ACCA is a trade association that includes the great majority of courier and express companies operating in the United States, from the largest such as United Parcel Service and Federal Express to smaller regional, local, and specialist companies. ACCA counted 78 members in 1995 with total revenues of about $ 30 billion. ACCA was founded in 1975.

As a trade association, ACCA endeavors to speak for the industry on important policy issues on which a substantial consensus has developed among the membership. This morning, we would like to bring to the attention of the Subcommittee specific postal policy issues which we, as an industry, have found it necessary to address in recent years. We hope that these will be taken

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Harry L. Geller,"Statement of Harry L. Geller, President, Global Mail on Behalf of the Air Courier Conference of America" (Jun 14, 1995), published in *General Oversight of the U.S. Postal Service: Hearings Before the Subcommittee on Postal Service of the House Committee on Government Reform and Oversight*, 104th Cong, 1st Sess, 566 (1997).

into account in the early deliberations of the Subcommittee and that we may have an opportunity later to offer views on other issues when they are embodied in a specific proposal.

1. POSTAL SERVICE ADMINISTRATION OF THE POSTAL MONOPOLY IS UNFAIR AND INCONSISTENT WITH THE PRINCIPLE OF DUE PROCESS.

Over the years, ACCA has addressed postal monopoly related issues several times. ACCA was a strong supporter of a *legislative* exception for urgent letters in the mid-1970s.[1] ACCA also supported an exception from the postal monopoly for international remail in the mid-1980s.[2] ACCA has repeatedly urged that the Postal Service's Express Mail rates should comply with the minimum rate standards which the Postal Service, in its "urgent letter" monopoly regulation, imposes upon private express companies; alternatively, ACCA has urged the Postal Service to modify this regulation to make clear that private express companies may lawfully charge lower rates. (The "urgent letter" rule is discussed in the next section of this testimony.) In the last several years, ACCA has deplored the Postal Service's "enforcement" of the postal monopoly by harassing customers of private express companies with threats of fines[3] and "audits" of customers records,[4] both of which appear to exceed

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[1]There is no doubt that Congress would have enacted such a *legislative* exception to the postal monopoly in the late 1970s but for the fact that USPS undercut the legislative momentum by adopting a regulation purportedly suspending the postal monopoly for urgent letters *as that term was defined by USPS and under conditions prescribed by USPS*. *See* 39 CFR 320.6. Congress, however, has never authorized USPS to suspend the postal monopoly law. USPS's assumption of such authority appears to be a device to thwart Congressional oversight of the monopoly. *See, e.g.*, "Legal Memorandum of Assistant General Counsel, Litigation Division, Concerning the Role of the Postal Rate Commission in the Exercise of the Legal Controls over the Private Carriage of Mail and the Postal Monopoly," at 33, Postal Rate Commission, Docket No MC73-1 (1974). As a legal basis for its "suspension" power, USPS points to the Act of March 25, 1864, ch. 40, 13 Stat 37, codified at 39 USC 601(b). A careful reading of the text and legislative history of this statute makes clear that it does not provide authority to suspend the postal monopoly, only authority to apply the postal monopoly by suspending the exception to the postal monopoly for the private carriage of letters in stamped envelopes now found at 39 USC 601(a).

[2]The Postal Service "suspended" the postal monopoly for international remail in 1986. *See* 39 CFR 320.8 and previous note.

[3]39 CFR 310.5(a) states that "Upon discovery of activity made unlawful by the Private Express Statutes, the Postal Service may require any person or persons who engage in, cause, or assist such activity to pay an amount or amounts not exceeding the total postage to which it would have been entitled had it carried the letters between their origin and destination." However, as both the Attorney General of the United States, 4 Ops AG 349 (1844), and the Post Office Department, 6 Ops Sol POD 619 (1918) have ruled, it is well settled that USPS has no legal authority to collect or threaten such a fine. "Fines for shipments can not be levied by post-office inspectors, but only by the courts in suits properly brought by the Government" where the accused is entitled to the normal procedural protections, including presumption of innocence. POD, *Postal Decisions of the United States* (1939 ed.) at 543. In effect, USPS is intimidating customers of private express companies with illegal fines that could never be upheld in court.

[4]Postal inspectors' search of customer records, much publicized in recent years, far exceed the limited search authority which Congress has granted USPS's agents. 39 USC 603. When questioned about its legal authority for such searches, USPS's stock answer is that the searches are

the statutory authority of the Postal Service.

The common thread running through all of these efforts has been ACCA's frustration with the fact that the Postal Service acts as both player and umpire in the delivery services sector. This combination of commercial and regulatory functions is plainly and fundamentally wrong. Quite aside from whether or not Congress should, for the public good, grant the Postal Service a monopoly over some portion of the industry,[5] it is clear that the administration of this public power should be in the hands of a disinterested agency and not a "business-like" Postal Service. USPS's administration of the postal monopoly is inconsistent with the due process principle that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."[6]

ACCA therefore submits that authority to administer the postal monopoly, if any, should be vested in a disinterested governmental agency and not in the Postal Service.

2. CONGRESS SHOULD SET A PRICE LIMIT CEILING FOR THE POSTAL MONOPOLY.

As noted above, the Postal Service has adopted a postal monopoly regulation which, in effect, sets minimum prices that express carriers must charge to avoid possible investigation under the postal monopoly. Under this rule, the shipper must pay the carrier at least $3 or double the otherwise applicable First Class or Priority Mail postage. 39 CFR 320.6.

Since this rule was adopted in 1979, express traffic has grown enormously and the actual cost of providing nationwide express service for shipments of more than a few pounds has fallen to less than double the postage rate. Fierce competition has forced prices down to costs, as it should. In the late 1980s, both the Postal Rate Commission and the Economics Bureau of the Federal Trade Commission urged the Postal Service to revise the "urgent letter" rule to reflect modern commercial realities. The Postal Service declined to do so.

If the postal monopoly has any public purpose at all, it is only to protect the basic ability of the Postal Service to provide universal service, not to guarantee to the Postal Service every single dollar of current income. A simple

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"voluntary" on the part of the customer. In truth they are voluntary only because USPS has conducted them under false color of law and most citizens wish to cooperate with law enforcement officials. *See United States v Helbock*, 76 F Supp 985 (D Oregon, 1948).

[5]To date, ACCA has not taken a position on the appropriate scope, if any, of a postal monopoly.

[6]*In re Murchison*, 349 US 133, 136 (1955). The "interest" required is that which is sufficient to offer "a possible temptation to the average man." *Tumey v Ohio*, 273 US 510, 532 (1927). An official's interest in the revenues of his agency is sufficient to create a violation of due process. *Ward v Village of Monroeville, Ohio*, 409 US 57 (1972). Thus, a state optometry board may not issue a rule defining qualifications for the practice of optometry if the board is composed of independent optometrists and the effect would be to bar optometrists who are associated with manufacturers of eyeglasses. *Gibson v Berryhill*, 411 US 564 (1973). The Court concluded, "the pecuniary interest of the members of the Board of Optometry had sufficient substance to disqualify them." 411 US at 579.

"price limit" for the postal monopoly would protect the vast bulk of the Postal Service's business while permitting needed flexibility for private express operations. Since the "urgent letter" rule was implemented in the United States, price limits for the postal monopoly have been adopted in a number of other countries including the United Kingdom (£ 1.00 or about $1.60), Canada (3 times the basic postage rate or about $1.74), Australia (4 times the basic postage rate or about $1.39), and New Zealand (NZ$ 0.80 or about $0.51). The European Union is now seriously considering a Europe-wide price limit of 5 times the basic postage rate.

At a minimum, the United States should adopt similar "price limit" legislation for its postal monopoly.

3. THE U.S. GOVERNMENT, NOT THE POSTAL SERVICE, SHOULD REPRESENT THE UNITED STATES AT INTER-GOVERNMENTAL ORGANIZATIONS, SUCH AS THE UPU, WITH AUTHORITY TO ADOPT INTERNATIONAL LAWS.

The legal framework for international delivery service is established by international conventions negotiated within the Universal Postal Union (UPU). In addition, the UPU coordinates and promotes the commercial activities of the various national post offices. The UPU is an procompetitive organization headquartered in Berne, Switzerland. It meets in full congress once every five years to revise and reenact these international postal agreements. The last UPU congress was held in Seoul, Korea, in August 1994. Acts of the UPU are negotiated by "plenipotentiaries" of the member countries. According to the terms of the UPU Constitution, the Universal Postal Convention and other acts of the UPU are binding international law.[7]

Under U.S. law, acts of the UPU are viewed as "executive agreements" concluded by the President. Legal consequences flowing from acts of the UPU may be seen in instances such as the following:

- Non-postal laws give effect to some provisions of the UPU acts.[8]
- Federal agencies implicitly or explicitly give effect to some provisions of the UPU acts.[9]

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[7]UPU Const § 22.3 ("The Universal Postal Convention . . . shall embody the rules applicable throughout the international postal service and the provisions concerning the letter-post services. These Acts shall be binding on all member countries."). The *Convention* establishes the basic rules for exchanging international mail. It is supplemented by more detailed implementing provisions, *Detailed Regulations of the Convention.* The *Constitution* and the *General Regulations* (detailed rules implementing the Constitution) establish rules for governing the UPU and adopting the acts of the UPU. These are the four major acts of the UPU. Other acts include several agreements on the exchange of parcel post, money orders, etc.

[8]For example, the Federal Aviation Act requires the Department of Transportation to consider UPU air conveyance dues in the setting of international air transportation rates for mail. 49 App USCA 1376.

[9]For example, special legal treatment is accorded "mail entries" in US customs regulations. As discussed below, the Department of State has repeatedly cited UPU regulations as limiting the discretion of the President to take a reservation to the UPU acts upon ratification or to add non-

- Non-postal treaties give effect to UPU acts.[10]
- U.S. courts have given judicial recognition to executive agreements as the law of the land in some cases, although the precise legal effect of an executive agreement is not always clear.[11]
- In legal briefs, USPS and other post offices have cited the UPU acts as legal authority for non-application of other laws.[12]

While most of the Universal Postal Convention and other UPU acts are not relevant to the private express industry, the legal status of the UPU is important in areas in which acts of the UPU permit or encourage postal administrations to fix prices, refuse to deal with private express companies, or otherwise avail themselves of legal treatment that is unavailable to private industry.[13]

Under the Constitution, the President has exclusive authority to negotiate international agreements on behalf of the United States. In regard to international postal agreements, the 1970 Postal Reorganization Act specifically preserves presidential authority by providing that the "Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions." 39 USC 407(a).

Despite the constitutional and statutory requirement that the Postal Service must obtain Presidential consent before representing the United States at meetings of the UPU and other international postal fora, the Postal Service in fact represented the United States without the consent of the President from 1970 until last year. At UPU congresses, the Postal Service has agreed, in the name of the United States, to various anticompetitive provisions. After Postal Service signature of each successive Universal Postal Convention, the

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postal persons to the US delegation to the UPU.

[10]For example, Kyoto Convention, Annex F.3 (customs simplification).

[11]*See, e.g.*, *Weinberger v Rossi*, 456 US 25 (1982) (the President may enter into certain binding agreements with foreign nations and, even when the agreement compromises commercial claims between U.S. citizens and a foreign power and such agreement is not a treaty, it may have an effect similar to treaties in some areas of domestic law). A court is more likely to honor an executive agreement made by the President in accordance with existing statutory authority. International postal agreements were apparently the first example of Presidential executive agreements authorized by Congress. 1 Stat 232, 239, § 26 (1792). *See generally Rest 3d, Restatement of Foreign Relations Law of the United States* § 111 (effect of international agreements as U.S. law) and § 303 (authority of President to conclude executive agreements) (1987). Moreover, ACCA does not accept USPS's claims that UPU acts offer legal authority to issue regulations which further inhibit competition in international delivery services. *See, e.g.*, 58 FR 25959 (Apr 29, 1993) (proposing new section 790 of the International Mail Manual).

[12]*See, e.g.*, USPS, "Defendant's Opening Brief in Support of Its Motion to Dismiss UPS's Amended Complaint" at 22 (Nov 16, 1993), *UPS Worldwide Forwarding, Inc. v United States Postal Service*, 853 F Supp 800, (D Del 1994). USPS states, "ICM service agreements are also authorized by the Acts of the Universal Postal Union." In cases brought before the European Commission, various postal administrations have likewise cited UPU acts to justify terminal dues agreements.

[13]Examples include Article 25 (a market allocation scheme), terminal dues (a price fixing agreement), preferential rates for large users (possibly predatory pricing), and UPU-generated customs forms (impossible for private companies).

President has had no practical choice but to ratify the Convention *in toto* since the UPU Constitution prohibits reservations to specific provisions.

The manner in which USPS has used this appearance of public authority may be illustrated by the story of the ACCA's efforts to reform international restraints on remail. Remail is the practice of using a private express company to forward international mail "downstream" to a post office in the country where the mail is to be delivered or to an intermediate post office that will provide good forwarding services at low postage rates. Remail provides additional services unavailable from traditional international postal services, such as collection from mailer's premises, sorting, monthly billing, greater speed, and competitive prices. Remail also takes advantage of the fact that traditionally post offices have agreed to deliver each others' mail at rates (called "terminal dues") below those charged the general public. Some post offices are more willing than others to pass on this low inter-postal rate to customers. While this economic irrationality has encouraged remail, it has also been used by post offices to justify restrictions on international remail. In response, express companies have urged the post offices to align delivery charges for international and domestic mail, permitting competition to proceed on an equal basis.

The post offices' most infamous anti-remail measure is Article 25 of the current (1989) Universal Postal Convention. This provision facilitates allocation of national markets by authorizing postal administrations to intercept international mail that was not posted with the post office in the country where the mailer resided. For example, suppose an American bank sends statements of account for its European customers to the very efficient Dutch Post Office for distribution throughout Europe. Because the U.S. has agreed to Article 25, European post offices are authorized to intercept this American mail for the sole reason that it was not posted with the U.S. Postal Service.

In 1986, ACCA urged President Reagan to take a reservation to this provision (then numbered Article 23) in the 1984 Universal Postal Convention prior to ratification. Although the Reagan Administration was inclined to agree with the proposed reservation, USPS successfully argued that, under the terms of the UPU acts, a specific reservation could only be taken at the time of signing of the Convention.[14] In May 1986, President Reagan ratified the Convention but instructed USPS to administer it in a procompetitive manner.[15]

Notwithstanding this Presidential directive, by April 1987, USPS and other postal administrations were engaged in meetings to develop a strategy to restrict international remail. These meetings resulted in, among other things, a new agreement on terminal dues charges designed to discourage remail.[16]

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[14]UPU Const § 22.6 states, "The Final Protocols annexed to the Acts of the Union referred to in paragraphs 3, 4, and 5 shall contain reservations to those Acts."

[15]Letter from President Reagan to Postmaster General Casey, dated May 1, 1986.

[16]The majority of postal administrations were European; "CEPT" refers to the Conference of European Postal and Telecommunications Administrations, a European union of postal

When ACCA brought this anticompetitive agreement to the attention of the U.S. government, the Department of Justice urged the addition of procompetitive conditions and a pledge of U.S. advocacy of cost-based terminal dues in the upcoming 1989 UPU congress. The Department of Commerce opposed USPS participation in these agreements in order to guarantee U.S. advocacy of terminal dues reform.[17] ACCA supported these positions. In the end, USPS joined the new terminal dues agreement without procompetitive conditions and, in the 1989 UPU Congress, went on to advocate UPU adoption of a similarly anticompetitive terminal dues scheme, reenactment of Article 25, and other anti-remail provisions. Again, when the smoke cleared, President Bush had no practical alternative but to ratify the 1989 UPU Convention as negotiated by USPS.

In October 1990, ACCA suggested to President Bush that ACCA should, as a matter of fairness, be included in the U.S. delegation to the UPU's Executive Council. In January 1991, the Department of State denied ACCA's request, citing UPU provisions which limit the head of the U.S. delegation to postal officials. As an alternative, the DOS suggested the express industry apply for observer status at the UPU.[18]

In April 1991, ACCA and its international affiliate, International Express Carriers Conference (IECC), requested observer status from the UPU. These requests were denied by the UPU Executive Council, chaired by USPS.

As an alternative, the UPU agreed to establish a "Private Operators-UPU Contact Committee" safely outside the course of UPU proceedings. The first meeting of the Contact Committee was held in October 1992. At the second meeting, in May 1993, the express industry proposed the establishment of a working party to consider jointly ideas for reform of the UPU and international framework of postal laws, subjects that were already under active review by the UPU internally. The UPU Executive Council refused. Nevertheless, at the third meeting of the Contact Committee, held in October 1993, the express industry tendered a Six-Point Reform Plan. These proposals were generally dismissed by the UPU Executive Council in a paper presented at the same meeting. At this meeting, the express industry also renewed its request for observer status at UPU activities that concerned regulatory issues. The USPS

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administrations. In April 1993, in response to a complaint by the express industry, the European Commission adopted a "Statement of Objections" which condemned the CEPT terminal dues agreement as inconsistent with the competition rules of the Treaty of Rome. Case IV/32.791 - Remail. Further proceedings in this case are pending.

[17]Letter from Charles F. Rule, Assist. A.G., DOJ, to Carol T. Crawford, Assoc. Dir. for Economics and Government, OMB, dated May 1, 1988; letter from R. David Luft, Dep. Assist. Sec. for Services, DOC, to Carol T. Crawford, Assoc. Dir. for Economics and Government, OMB, dated May 3, 1988.

[18]Letter from John Bolton, Assist. Sec. of International Organization Affairs, Department of State, to Peter Farkas, counsel for ACCA, dated 15 April 1991. Mr. Bolton cites UPU Gen Reg § 102 and Rules of Procedure of the UPU Executive Council §§ 2-4 for excluding ACCA from membership in the US delegation to the UPU.

chairman of the UPU Executive Council again rejected this request, supported by the delegates from Russia, Japan, and China.

At the fourth meeting of the Contact Committee, held in February 1994, the express industry presented a paper explaining why it felt the UPU's reasons for rejecting the Six-Point Reform Plan were unpersuasive. The USPS chairman of the UPU Executive Council criticized this paper at length and declared that:

> *this forum is not an appropriate one in which to discuss—in effect—the fundamental principles on which the UPU is based* as an inter-governmental organization. It is—I repeat—for governments to decide what arrangements are in the interests of their citizens in the postal sphere. I do not feel, therefore, that any useful purpose would be served by further discussion of "UPU Reform" in this Committee.[19]

Given the chilly reception at the UPU, in fall 1993, ACCA renewed its request for official participation, as an observer only, in the U.S. delegation to the 1994 UPU congress. This time, the Department of State took a new tack and disclaimed responsibility for the U.S. position or its delegation:

> As you are aware, the United States Postal Service (USPS) has the lead for the United States on UPU matters. Moreover, *by law, the UPU is not one of the international organizations for which the Office of International Conferences in the Department of State has the authority to make final decisions* on the composition and accreditation of U.S. Delegations. *In the case of UPU meetings, USPS has this authority*.[20]

From this reply and questioning of USPS, ACCA finally realized that there was no administrative machinery to control representations of the Postal Service at the UPU because the President had never authorized the Postal Service to represent the United States at the UPU in the first place. Last spring, in advance of the 1994 UPU congress, ACCA brought this anomalous situation to the attention of President Clinton and urged him to appoint someone from the Executive agencies to represent the United States at UPU meetings with international legislative authority. Four months later, on the eve of the 1994 UPU Congress, President Clinton appointed the U.S. Postal Service to represent the United States at the UPU without providing for any public input or Administration supervision of positions taken by USPS. Before making this delegation, the White House reportedly consulted with only the Postal Service and postal unions; in any case, the White House certainly did not consult with the private express industry.

ACCA submits that the present situation is intolerable. The United States is the world leader in the development of private international express services and international direct mail services, yet the policy of the United States

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[19]UPU, Draft "Report of the Private Operators-UPU Contact Committee, Berne, 7 February 1994" § 23.

[20]Letter from Douglas J. Bennet, Assist. Sec. of International Organization Affairs, Department of State, to Peter Farkas, counsel for ACCA, dated 15 November 1993.

towards international delivery services is controlled by a commercially competitive government agency with no public accountability. The governmental status of this agency does nothing to ameliorate the unfairness of the situation. It is as though the President had entrusted negotiations over international aviation policy to United Airlines and negotiations over international telecommunications policy to AT&T. The process by which U.S. international postal policy is developed is incompatible with the principle of due process (just as is USPS's administration of the postal monopoly law) and the best interests of the United States.

ACCA therefore respectfully asks the Subcommittee to consider an amendment to 39 USC 407 that would vest authority to represent the United States at meetings of procompetitive organizations with legislative authority in an Executive Department without a direct commercial interest in the resulting international agreements.

4. INTERNATIONAL RATES SHOULD BE SUBJECT TO THE SAME POSTAL RATE COMMISSION SCRUTINY AS DOMESTIC RATES.

ACCA has long suspected that international postage rates do not comply with the ratemaking principles of the Postal Reorganization Act as developed by the Postal Rate Commission. In 1989, ACCA asked a federal court to rule on whether the Postal Service is required to submit international postage rates for approval of the Postal Rate Commission in the same manner as domestic rates, a legal point which, in the view of ACCA, was unsettled. The court decided that, under 39 USC 407, international rates (although not international mail classifications) were exempt from the requirement of prior approval by the Postal Rate Commission.[21]

In 1992, ACCA sponsored an economic analysis of certain international postage rates based upon the concededly incomplete data available publicly. This study tried to explain why, for example, USPS offered international presorted mail a discount of more than 50 percent from retail rates even though the Postal Rate Commission allowed only a 20 percent discount for presorted domestic mail. The study concluded that certain international postage rates do not comply with the policies of the Postal Reorganization Act because the differences in cost coverage between rates for individuals, which are essentially non-competitive, and rates for business services, which compete with offerings by private express companies, are much greater than permitted for comparable domestic rates. In some cases (such as rates for International Surface Airlift), it hardly seemed credible that rates are covering attributable costs. On this basis, ACCA asked the Senate postal subcommittee to

[21]In *Air Courier Conference of America v U.S. Postal Service*, 959 F2d 1213 (3d Cir 1991), the Court of Appeals held that the International Mail rates are not subject to review by the Commission under 39 USC 3621-28.

investigate the matter further. The Senate subcommittee requested the Postal Rate Commission to prepare a special study on international mail rates and asked USPS to supply the necessary data. This study was thwarted because the Postal Service refused to cooperate.

In 1994, one ACCA member, UPS, and ACCA itself sued to enjoin a new international postal rate, International Customized Mail (ICM), that offered contract rates for large mailers. The District Court granted the injunction, holding that the ICM rates were discriminatory and were not approved by the President as required by law.[22] This case is now on appeal.

On December 22, 1994, the Postal Service announced that it had, on December 1, introduced a new series of international document and parcel services called International Package Consignment Service (IPCS).[23] IPCS offers large mailers discounts from normal international parcel rates of 40 to 65 percent. Initially, IPCS is to be offered to Japan. IPCS was intended to replace and remedy the legal defects in the ICM rate. To answer the legal finding of the District Court that international rates must be approved by the President, USPS persuaded President Clinton to delegate his approval authority to the Governors of the Postal Service.[24]

While the Constitution and laws grant the President broad authority to delegate tasks entrusted to him, this authority is not unlimited. ACCA believes that the President's attempted delegation to the Governors of USPS cannot be reconciled with his responsibility to review and approve international mail rates in a manner that protects the *public* interest and accords due process to all affected parties. The Governors of USPS are not impartial governmental officials. They are responsible for the operation of a Postal Service which competes directly against private industry and which is required by law to be run on a business-like basis. It is plainly inappropriate to vest Presidential review authority in the Governors.

In the most recent rate case, R94-1, one ACCA member, Federal Express, noted that the USPS's recent and proposed rates revealed a clear trend towards shifting a disproportionate level of institutional costs onto domestic mail, allowing USPS to price international mail as a whole at questionably low levels. This, in turn, exacerbated the problem of large differences among the

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[22] *UPS Worldwide Forwarding, Inc v United States Postal Service*, 853 F Supp 800 (D Del 1994).

[23] 59 FR 65961, 65962 (Dec 22, 1994) (emphasis added). The very low rates offered by IPCS suggest that USPS may be benefitting from special rates or services which Japan Post makes available to USPS but not to private express carriers. The possibility of USPS using its special status with foreign post offices to, in effect, resell their anticompetitive practices in the U.S. offers still additional reasons for scrutiny of international rates by the Postal Rate Commission.

[24] 59 FR 65471 (Dec 19, 1994). The President's December 22 delegation order states in part that: "by virtue of the authority vested in me by the Constitution and the laws of the United States of America, including section 301 of title 3 of the United States Code, I hereby delegate to the Governors of the United States Postal Service . . . any authority vested in me by section 407(a) of title 39 of the United States Code, with respect to mail matter conveyed between the United States and other countries."

rates for specific classes of international mail. Federal Express also pointed out that USPS had provided even less than its traditionally minimal explanation of projected costs for international mail. Even though a rate case only results in the setting of domestic rates, it is necessary for USPS to explain its international mail costs in sufficient detail so that the costs of international mail can be separated from the costs of domestic rates. In the past, errors in this process have led to material errors in the forecasting of the costs and revenues expected from international mail and thus in the anticipated cost coverages for domestic rates.

After extended procedural convolutions, the Postal Rate Commission agreed that USPS must provide basic supporting data to explain its separation of domestic and international costs. The Commission ordered USPS to disclose this information under cover of a protective order. USPS refused. Its legal authority for doing so remains a mystery since the Postal Reorganization Act clearly states that decisions of the Postal Rate Commission governing the conduct of rate cases "shall not be subject to any change or supervision by the Postal Service." 39 USC 3603.

ACCA submits that foregoing pattern of commercially aggressive, but wholly unreviewed, international ratemaking is inappropriate. As even the Postal Service has conceded, international mail rates, no less than domestic mails, are legally required to comply with the standards of the Postal Reorganization Act. The Postal Service has explained:

> The criteria of the Postal Reorganization Act (Act) that govern the Postal Service's international rate setting authority include 39 U.S.C. 101(d), which requires that *rates must apportion the costs of all postal operations to all users of the mail on a fair and equitable basis*; 39 USC 101(a), which provides that *rates may not apportion costs in a manner that would impair the overall value of the service to the people*; 39 U.S.C. 403(a), which requires that *rates be fair and reasonable* and 39 USC 403(c), which provides that *rates may not be unduly or unreasonably discriminatory or preferential*. *Implicit in these criteria is a requirement that international rates be set in a manner that covers variable costs and makes an appropriate contribution to fixed costs*.[25]

There is, however, no practical way to ascertain USPS's compliance with the Act if all relevant data is kept secret.

Without at this time taking a position on possible reforms to the rate regulation process generally, ACCA submits that there is no public policy reason why international mail should not be subject to the same scrutiny as domestic rates. USPS has no more won a place in the international delivery service market by thrift and entrepreneurship than it has in the domestic market. USPS's international business is due entirely to its domestic network, which in turn is the result of the postal monopoly and other public benefits, and

[25]57 FR 30652 (Jul 10, 1992) (proposing International Customized Mail) (emphasis added).

its role as the official U.S. participant in the Universal Postal Union. USPS's need for confidentiality of truly sensitive commercial data is no greater for its international mail services than for competitive domestic services and will be protected no less assiduously by the Postal Rate Commission.

Nor is there any technical reason why the Postal Rate Commission cannot oversee international mail rates in the same manner as domestic. International mail service consists of the collection and forwarding of outbound mail destined for other countries as well as the delivery of inbound mail received from other countries. In terms of domestic operations, international mail and domestic mail are two peas in the same pod. International mail and domestic mail are physically collected, processed, and delivered by the same postal systems. They make use of the same domestic transport systems. A single management team supervises domestic operations for international and domestic mail services using the same sampling and accounting systems.[26] Of necessity, there is a high degree of congruence between international mail classes and domestic mail classes. Furthermore, it is clear that the correctness, or the lack of correctness, with which USPS accounts for and prices international mail rates, affects the correctness of domestic rates.

The joint production of domestic and international postal operations also suggests the great value of a serious comparative study of domestic and international ratemaking since 1970. For 25 years, USPS has set international rates free of "interference" from the Postal Rate Commission, mailers, and private competitors, and without the "burden" of having to explain its costs and calculations. Has the Postal Service competed vigorously but fairly or has it unfairly loaded institutional costs on retail mailers who cannot protect themselves? Has the Postal Service been commercially successful or given in to the temptation to maximize market share regardless of cost? Answers to such questions would offer insight into the extent to which the Postal Service may be entrusted with special legal benefits and yet relieved of special regulatory oversight.

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[26]Domestic costs of international mail are accounted for by the same cost systems used for the development of domestic mail costs. The In Office Cost System (IOCS), for example, apportions the costs of mail processing according to about 85 activity codes which, in turn, correspond to the various rate categories of international mail. Similarly, the Transportation Cost System (TRACS) apportions most domestic transportation costs of international mail according to several various categories of inbound and outbound international mail. The Revenue, Pieces, and Weight (RPW) system reports the volume and weight of *outbound* international mail according to ten types of services essentially equivalent to the class and subclass division of domestic mail. The only physically unique aspect of international mail is that *outbound* international mail is sent to an international gateway and given to an international airline or shipping line and ultimately delivered by a foreign post office. USPS accounts separately, in cost segment 14.2, for payments to international carriers and payments to foreign post offices for foreign delivery or forwarding to third country post offices.

5. CONCLUSIONS

In light of the foregoing considerations, ACCA respectfully urges the Subcommittee to consider the four following changes in the postal laws:

- extending jurisdiction of the Postal Rate Commission to include supervision of international mail rates on the same basis as domestic rates;
- providing that the United States government, not the U.S. Postal Service, should represent the United States at procompetitive organizations, such as the UPU, which adopt or amend international agreements and conventions having general legal effect;
- divesting the Postal Service of any administrative authority over the postal monopoly laws; and
- legislatively establishing a reasonable price limit for the postal monopoly.

In addition, ACCA urges the Subcommittee to consider a careful comparative study of international and domestic ratemaking. Such a study would provide insight into possible dangers and benefits of a Postal Service still entrusted with special legal benefits but unchecked by independent regulatory oversight.

Again, I would like to emphasize that ACCA very much appreciates the opportunity to offer input to the Subcommittee's deliberations and will be pleased to provide the Subcommittee with additional information in regard to any aspect of this testimony.

Thank you for your consideration of our proposals.

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Federal Express Testimony on H.R. 3717 (1996)

H.R. 3717, the Postal Reform Act of 1996, is the most substantial and thoughtful proposal to reform the postal laws of the United States in 25 years or more. Postal reform is an important and difficult task, and I sincerely commend the Chairman, the members of the Subcommittee, and the Subcommittee staff, for their careful and craftsmanlike efforts to date. I am pleased to have this opportunity to present personally Federal Express's comments on H.R. 3717.

Federal Express believes H.R. 3717 offers an acceptable conceptual framework for reforming the 1970 act and adapting the Nation's postal laws to changing business conditions. On the other hand, we believe that the framework erected by H.R. 3717 needs to be filled out with a number of supplemental provisions that will prove critical to a fair and viable reform plan. Federal Express cannot support enactment of H.R. 3717 as is, but we are looking forward to working with the Subcommittee to help complete the task begun by H.R. 3717.

WHY SHOULD THE POSTAL SERVICE COMPETE WITH PRIVATE COMPANIES?

The basic direction of H.R. 3717 is to allow the Postal Service greater commercial freedom to compete against private companies while establishing new guidelines to ensure that the Postal Service is competing fairly. While Federal Express supports this basic approach, I believe it is important to make clear what it is we do and do not support.

As the Chairman of the Subcommittee has stated, postal reform is

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Frederick W. Smith, "Statement of Frederick W. Smith Chairman, President, and Chief Executive Officer, Federal Express Corporation" (Sep 26, 1996), published in *HR 3717, The Postal Reform Act of 1996: Hearings Before the Subcommittee on the Postal Service of the House Committee on Government Reform and Oversight*, 104th Cong, 2d Sess, 869 (1997).

necessitated by changing circumstances. New technologies and shifting business practices are placing more and more competitive pressure on commercial activities traditionally provided by the Postal Service in a more or less monopolistic manner. In the next few years, fax and electronic "mail" will become realistic alternatives for an increasing fraction of first class mail. Second and third class mail will also face stronger threats from alternative media, especially the Internet, as well as from private delivery services. For international mail, the competitive fray will be enhanced further by the appearance of foreign post offices in the U.S. marketplace.

The emergence of new competition does not, however, offer an obvious justification for allowing the Postal Service to compete vigorously with private companies. On the contrary, if private companies can now do some jobs better than the Postal Service, why not let them do so without government interference? Government participation in a competitive market is *always* disruptive. A government "corporation"—which does not need to make a profit, does not answer to shareholders, loads its fixed costs on a legal monopoly, and cannot go out of business—behaves so differently from private competitors that it distorts the entire market. All things being equal, the only good reason for government enterprise is to provide necessary services that would otherwise be unavailable from private companies. Yet, by definition, the Postal Service will not be providing unique public services if it is participating in competitive markets.

The Postal Service suggests the need to maintain unique public services provides an indirect justification for entry into competitive markets. Profits from new competitive products, it is said, will help defray losses incurred by non-competitive, public service products. This argument cannot withstand scrutiny. There is no reason to believe the Postal Service can earn supra-normal profits from competitive products. It is not doing so today. Indeed, Postal Service talk of large "profits" from forays into competitive markets raises unsettling issues. Abnormal "profits" from competitive services will almost certainly be impossible unless the Postal Service tries to take commercial advantage of special legal advantages available to it alone. Such revenues are not true profits at all. They are the cash value of unfair legal advantages, which in turn distort the competitive market and discourage efficiency and innovation among private companies competing with the Postal Service. As public policy, giving the Postal Service legal privileges so that it can extract abnormal profits from a nominally "competitive" market would be just as bad as giving the Postal Service an outright legal monopoly over that market, without the minor virtue of forthrightness associated with a legal monopoly.

So far as I can see, there is no *public* purpose to be achieved by letting the Postal Service offer services in competition with private companies. The only plausible rationale for allowing entry into competitive markets arises from the *private* interests of Postal Service managers and employees. It can be argued that it would be unfair and unworthy of the U.S. government to establish a

large commercial organization such as the Postal Service, employ hundreds of thousands of dedicated men and women, and then restrict this organization to a declining core business while denying its personnel a fighting chance to save their jobs by using their collective skills and expertise to compete in the market.

I have considerable sympathy with this argument. Federal Express itself employs thousands of men and women. I would not like to see them tied to a business with no future and abandoned without an opportunity to compete vigorously. Indeed, I would do everything I could to avoid such a fate.

Although the concern of the government, as a responsible employer, for the private welfare of its employees is commendable, it should not be confused with the public interest of the United States. The personal financial needs of the managers and employees of the Postal Service are *private* interests. The *private* nature of these interests underscores the need to ensure that Postal Service participation in competitive markets, must be, to the maximum possible extent, on the same terms as faced by private companies. This is the basic perspective in which I view the proposals in H.R. 3717.

NON-COMPETITIVE POSTAL PRODUCTS

For the foreseeable future, the bulk of Postal Service revenues will continue to be derived from markets that are non-competitive because of the legal or practical consequences of the postal monopoly law. H.R. 3717 proposes a basic change in the regulation of non-competitive products with the introduction of price caps for baskets of products.

The proposed price caps would address a fundamental flaw in the 1970 act. Under current law, the Postal Service has unfettered discretion to determine the overall level of revenues to be extracted from customers who cannot choose alternative suppliers. Such unchecked monopoly power is logically absurd and detrimental to the public interest. The Postal Service has had little reason to control its costs, and postal unions have had no incentive to moderate wage demands. An independently administered system of price caps is a necessary reform. Given the seemingly wide discrepancy between current levels of postal costs and the costs of efficient production, it also appears necessary to authorize an independent regulator to adjust any price index according to the light of experience. The basic approach proposed in H.R. 3717 thus seems to me to be correct, although I would like to reserve judgement on the technical aspects of particular price cap mechanisms.

H.R. 3717 would also mend another basic oversight in the 1970 act by submitting non-competitive *international* mail products to the same regulatory oversight as non-competitive *domestic* mail products. The reasons which require regulatory oversight of domestic mail—protection against abuse of monopoly power and control of predatory behavior—apply equally to international mail. The omission of international mail from the 1970 act was an unfortunate oversight. I strongly support this provision.

For non-competitive products, domestic and international, price caps would be set with reference to rates established in a "baseline rate case." This last old-fashioned rate case will not only set baseline rates for non-competitive products but also develop data necessary for later price cap rate cases and annual audits of competitive products (e.g., the determination of what costs are attributable to which products). Unlike the previous rate cases, therefore, the baseline rate case should address international mail rates as well as domestic mail rates. In addition, as the Chairman of the Postal Rate Commission has noted, it appears that the Commission will need new authority in the baseline rate case to disallow excess costs and adjust the overall revenue need claimed by the Postal Service since the Postal Service will have a strong incentive to exaggerate its revenue needs for that case. The provisions for the baseline rate case should be revised to address these two crucial points.

I cannot agree with the new prominence which H.R. 3717 would give to "value of service" as a factor in setting rates in the baseline rate case and price cap rate cases. "Value of service" is an approach to distributing "institutional costs" (i.e., overhead) among various classes of mail. The idea is that the more a mailer values a class of mail service (i.e., the more he is willing to pay for it), the more overhead cost should be included in the price of that class of mail. No doubt value of service is a legitimate consideration in setting postal rates, but it should not be the primary consideration. One flagrant problem is that the postal monopoly distorts the "value" that mailers are willing to pay for some classes of mail, for the simple reason that they have no alternatives. The Postal Rate Commission has, after long consideration, correctly rejected value of service as a primary guide in the allocation of institutional costs among classes of mail. In the future, the Commission should, as it does now, consider a range of factors in the allocation of institutional costs, including value of service.

More philosophically, I do not believe that the idea of a legal monopoly is compatible with over reliance on value of service considerations. When Congress last debated the postal monopoly (in 1845), it consciously opted for an inefficient, homogenous level of public service rather than differentiated services tailored to different demands, as a competitive market would have produced. If economic efficiency is now to be given greater weight in postal policy (as I think it should be), then the proper approach is to limit the scope of the postal monopoly and not to encourage the Postal Service to exploit its monopoly more efficiently by relating prices to inverse demand elasticities.

Once baseline rates and price caps are established, H.R. 3717 would allow the Postal Service greater pricing flexibility in adjusting rates for non-competitive products and the possibility of offering volume discounts. This approach seems acceptable within limits. It would seem unfair, for example, for the Postal Service to give very large discounts to only a very few large mailers. The bill should probably set limits on the range of discounts allowable under price caps or authorize the Postal Rate Commission to do so.

COMPETITIVE POSTAL PRODUCTS

The Postal Service has argued that in order to compete effectively, it must be able to manage with the same flexibility as private companies. On the other hand, it seems clear that, if the Postal Service retains access to the privileges of a government agency, then an independent regulator must ensure that the Postal Service does not use governmental powers for commercial ends. These policies pull in opposite directions. H.R. 3717 attempts to strike a balance between them by setting out basic rules for fair competition, allowing the Postal Service to offer competitive products without prior review by the Postal Rate Commission, and subjecting the Postal Service to a careful audit at the end of each year to determine whether the Postal Service has in fact abided by the rules.

In principle, this seems a reasonable approach, at least during a period of transition from effective monopoly to increased competition. Of course, an annual audit is not a perfect solution in the sense that no system of accounts and audits can truly duplicate the conditions of a competitive market. The Postal Service will not have all the commercial freedom of a private company. Nor will all unfair commercial advantages of the Postal Service be wholly eliminated. No private company ventures into a new market with the name recognition and resources the Postal Service can command, yet these precious commercial assets are the Postal Service's not by virtue of competitive enterprise but government office.

The task today is not to devise a perfect postal policy from scratch but to reform the current situation with reasonable fairness. H.R. 3717 addresses the task at hand, but I believe there are some crucial points that need further consideration.

First, the requirement that competitive products make a "*reasonable contribution*" to institutional costs is critical and needs to be clarified. Different definitions of "reasonable" can affect the selling price of postal products by 35 percent or more. Indeed, the possibility of volume discounts for competitive products, introduced in H.R. 3717, makes this issue more important still for a competitor. The concept of "reasonable contribution" can be, and should be, clarified in a manner that allows the Postal Service competitive freedom and yet provides the Postal Service with the same restraints as the competitive market places upon private companies. I urge the Subcommittee to consider an "*equal total markup* rule," that is, a principle that competitive products *as a group* should provide the same contribution to institutional costs as non-competitive products. Thus, the Postal Service, like a private company, would be free to price some competitive products more aggressively than others, but, in so doing, it would also run the risk of losing business in other competitive products whose prices would have to be raised to make up for lost contribution to overhead.

The Postal Service's standard argument regarding the allocation of

institutional costs to competitive products is that even if a competitive product makes only $1 in marginal revenue, it is helping to reduce the total institutional cost burden on the non-competitive products by $1. If the Postal Service were required to abide by an "equal total markup" rule, goes the argument, the price of the competitive product will have to raised and the customer will take his business to competitors. If the Postal Service loses the business entirely, it loses the $1 "profit" as well. Overall, requiring the Postal Service to live by an "equal total markup" rule will cost the Postal Service marginal revenues because it will raise the prices of competitive products.

This is an argument of the form "what is good for the Postal Service is good for the country"; it is not sound public policy. If the Postal Service undercuts prices in a given market by pricing at or near marginal costs, it may earn marginal revenues, but these revenues are not cost-free for society. Private companies competing with the Postal Service will lose some business, increasing the burden of their overhead costs on their remaining customers. Furthermore, the private companies will be forced to depress their prices to meet the Postal Service's artificially low prices which may cost them profits. Or they may lose economies of scale or reduce research and development. Or they may push up prices to other customers outside the sphere of Postal Service competition. Whatever the outcome, the Postal Service's gain is someone else's loss, and the long term economic costs due to market distortion almost certainly exceed the marginal revenues earned by the Postal Service. If the Postal Service is in fact the lowest cost producer in its range of competitive markets (i.e., if its marginal costs are lower than those of its competitors), then it should be able to include a full share of institutional costs in its prices, just as a private company must do, across the whole of its competitive product range. If, on the other hand, the Postal Service's marginal costs are high compared to its competitors, then it should be forced by the discipline of competition to reduce its costs in order to compete; it should not be able to escape this discipline by loading a disproportionate share of institutional costs on to non-competitive products and, in effect, masking its high cost structure.

Second, for a private company, product prices not only cover marginal costs and overhead, they must also generate a *profit*. Otherwise no one would invest in the company. The Postal Service's competitive products as a group should be required to earn a profit, over and above all costs, that is consistent with the operation of the market as a whole. Otherwise, the Postal Service has an automatic advantage over its competitors equivalent to several percent of the final selling price. As discussed below, these profits can be used to defray public service costs borne by the Postal Service or other delivery services.

Third, for the purposes of the annual audit and other investigations, it is essential that the Postal Rate Commission have authority to obtain necessary information and make final decisions regarding attribution of attributable costs to competitive products. It also essential that the other parties have the right to comment upon such accounting decisions, subject to protective orders deemed

appropriate by the Postal Rate Commission. Federal Express's experience in the last rate case makes clear that subpoena power is absolutely necessary. In that case, the Postal Service defied a Commission order to produce certain international mail data. In its final order approving the recommended rates, the Board of Governors made a special point of claiming a right to refuse requests for information if the Postal Service is "unconvinced" that the Commission put forth an "adequate explanation" why it needs the information in question. In light of this history, the bill should leave no doubt that the subpoena power applies to all Commission proceedings, including annual audits and Commission investigations of complaints against the rates of competitive products and that the Postal Rate Commission, not the Postal Service, will determine the conditions for public disclosure of data deemed confidential by the Postal Service. It should also be made clear that the Commission can extend statutory deadlines in case of Postal Service refusal to provide necessary data. This authority, which the Commission has currently, seems to be repealed by the bill.

Fourth, effective *administrative remedies* are absolutely necessary where the Postal Service has been found to engage in illegal competition. The Postal Rate Commission should be able to order illegal prices raised to legal levels and, in cases of deliberate misconduct, to award damages to parties injured by illegal pricing policies and/or to fine the Postal Service for illegal activities. H.R. 3717 offers the welcome prospect of an antitrust suit to discipline grave anticompetitive conduct by the Postal Service, but it must also be recognized that an antitrust case is an exceedingly slow and expensive process. In Europe, we are now in the eighth year of a major antitrust case against blatantly anticompetitive practices (price fixing and market allocation) by various post offices (including the U.S. Postal Service). Even though there is general agreement that these postal activities were inconsistent with the European competition laws, we still have obtained no relief.

Fifth, I believe the line between non-competitive and competitive sectors needs to be drawn more clearly by incorporating the concept of *effective competition*. Merely removing legal barriers to competition does not justify giving the Postal Service greater commercial freedom in a given market. There must be effective competition before the market can replace the regulator as a check on abuse of monopoly power. This is the lesson to be learned from deregulation of the telecommunications sector. A period of 17 years elapsed between the courts' deregulation of AT&T's legal monopoly on long distance telecommunications (1978) and the FCC's determination that effective competition could be relied upon to check the monopoly power accumulated by AT&T in the provision of retail long distance telephone service (1995). Similarly, I believe that H.R. 3717 should instruct the Postal Rate Commission to transfer Postal Service products from the non-competitive to the competitive sectors only if it finds "effective competition" has lessened the need for direct regulation.

The concept of "effective competition" points to a need to reconsider whether some of the products listed as competitive in H.R. 3717 should in fact be classified as competitive products. The most important case is Priority Mail. The Postal Service today earns extraordinary profits from Priority Mail. It restrains competition for Priority Mail by issuing postal monopoly regulations that declare private companies must charge at least twice as much as Priority Mail rates. The General Accounting Office has just completed a report that claims a $2 price limit on the postal monopoly will greatly increase the competitive threat to Priority Mail. All of these indications suggest that Priority Mail is not now facing effective competition, but is in fact, substantially protected by the postal monopoly. The introduction of a $2 limit on the postal monopoly (proposed by H.R. 3717) will likely subject Priority Mail to actual competition over time, but it will not introduce actual competition immediately. Greater commercial freedom for Priority Mail should await a Postal Rate Commission finding that Priority Mail rates are subject to effective competition. By the same token, the existence of effective competition for many "special services" also deserves more careful consideration. Some special services seem to be closely tied to non-competitive products and hence are non-competitive as well.

EQUAL APPLICATION OF THE LAWS TO COMPETITIVE PRODUCTS

What I feel most strongly about—even more strongly than about the precise scope of the postal monopoly—is the principle that the Postal Service should be subject to the same laws as everyone else where it competes with private companies. H.R. 3717 makes an important step in this direction by extending the antitrust laws to competitive products, and I applaud this reform. As in European law, however, it should be clear that the antitrust laws apply not only to the Postal Service per se but also postal agreements and activities undertaken in the name of the United States (usually represented by the Postal Service) and to foreign "public undertakings" (to use the term of the EC Treaty) engaged in postal activities. Otherwise, anticompetitive agreements between post offices, entered into directly or through the medium of the Universal Postal Union, may escape the ambit of U.S. antitrust law even though they are today amendable to European antitrust law.

Although most welcome, the single step of extending the antitrust laws to the Postal Service and its partners does not assure equal application of the laws to the Postal Service's competitive products. Again, it is helpful to consider European law in this regard. In 1991, several European post offices and Canada Post formed a joint venture with a large private express company (TNT) to provide international express services. The European Commission approved this agreement only after insisting that it include provisions explicitly denying the joint venture any legal privileges enjoyed by the post offices. In its order approving the joint venture, the Commission specifically noted that

it had considered

> whether the JVC [Joint Venture Company] would benefit from certain *legal privileges which are available only to postal administrations and not to private companies*. These legal privileges relate, inter alia, to VAT exemptions, customs privileges, exemptions from legal liability and special provisions for air or road operations such as night flights. *To the extent such privileges would be extended to the JVC they would distort competition between the JVC and the private operators*. However, insofar as such privileges continue to exist in relation to express delivery services, they cannot apply to the JVC since it will have the status of a private operator only. In addition, the *agreement now obliges the shareholders not to seek any postal privileges for the JVC* in the future. [TNT/Canada Post and Others, Case M-102 (Decision of 2 December 1991, pars 54-55 (emphasis added)]

The same spirit of equal application of the laws should apply in the United States to the Postal Service's competitive products. I urge the Subcommittee to address directly some of the clearest and most significant examples of unequal legal treatment and to require the Department of Justice to conduct a thorough review of remaining legal disparities. The specific legal disparities that the Subcommittee's bill should address include the following:

- *Mailbox access*. Competitive products of the Postal Service should have no greater access to the mailbox than products of private companies. If, for reasons unfathomable to me, private express companies are denied the ability to deposit urgent packages in the recipient's mailbox, then the Postal Service's Express Mail Service should likewise be denied this possibility.
- *Vehicle licenses and parking tickets*. The Postal Service owns and operates more than 200,000 vehicles, yet it does not obtain state license plates. Federal Express pays an average of more than $300 per state vehicular license. The Postal Service is not required to pay parking tickets. Parking tickets cost Federal Express $ 3.3 million per year (FY 1996). In the future, Postal Service vehicles offering competitive products should be required to obtain licenses and pay parking tickets like private companies.
- *Customs laws*. Customs laws are the single biggest impediment to the development of international trade. Under the bill, most international mail is classified in the competitive sector. Competitive inbound international products should therefore receive the same treatment from the U.S. Customs Service as similar products offered by private companies (assuming equivalent types of products and levels of document preparation). Similarly, for competitive outbound international products, the Postal Service should not be allowed to take advantage of special customs treatment from foreign customs authorities.

More generally, the Department of Justice should be instructed to undertake a general review of all federal and state laws and regulations which distinguish between the Postal Service's competitive products and similar products of private companies. Within a year, the Department of Justice should report back with a strategy for eliminating these legal differences.

IMPARTIAL ADMINISTRATION OF THE LAWS

Closely related to the matter of equal application of the laws is the problem of impartial administration of the laws. Not only should the Postal Service, in its competitive activities, play by the same rules as everyone else, the government should apply the rules equally and impartially to all. This will not be the case so as long as the Postal Service presumes to exercise governmental authority. Two particular problems in this area require attention: administration of the postal monopoly and negotiation of international treaties.

The Postal Service's efforts to administer and enforce the postal monopoly are fundamentally unfair and always have been. When Congress enacted the current postal monopoly law in 1872, it was understood throughout the government that authoritative rulings on the scope of the postal monopoly were the province of the Attorney General, not the Post Office Department. Given the direct financial interest of the Post Office in the scope of the monopoly, disinterested interpretation and enforcement of the law was not expected. When the postal function was separated from the administrative control of the Executive in 1970, Postal Service attempts to manipulate the scope and commercial impact of the postal monopoly crossed the line from improper to outrageous. The Postal Service suddenly claimed a monopoly over all first, second, and third class mail and the divine right to "suspend" the monopoly for politically powerful groups like newspapers and banks. Postal inspectors pushed into the offices of the customers of private companies with the threat of massive "back postage" fines, notwithstanding the fact that the Attorney General had ruled long ago that no such fine was ever sanctioned by Congress. Such use of government power for commercial ends is simply wrong. The Postal Service should have no role in the administration or enforcement of the postal monopoly. This authority should be vested in a disinterested agency such as the Department of Justice.

Similarly, U.S. law should be competitively neutral with respect to international delivery services. The Postal Service should not be authorized to represent the United States at procompetitive organizations with treaty making or policy making powers such as the Universal Postal Union. Representation should be handled by an Executive Department which is, by law, vested with responsibility for government policy regarding U.S. international delivery services. Procompetitive agreements should be "competitor-blind." If, for example, a foreign country is unwilling to permit the free exchange of delivery services, then the limited bilateral rights that can be agreed to should be awarded to U.S. delivery services by an impartial regulatory procedure based

on the application of public interest criteria in an open proceeding, just as limited international aviation and telecommunications rights are awarded. Presidential review of such designations should be limited to foreign policy and national security issues.

This is not to say that the Postal Service should be restricted in its ability to make commercial agreements with foreign post offices. On the contrary, the Postal Service should be free to negotiate and conclude any agreements pertaining to the collection, transportation, or delivery of international mail, or anything else. These agreements, however, should have the legal status of contracts, not international public law. They should be subject to the antitrust laws and other laws applicable to international business.

POSTAL MONOPOLY AND MAILBOX ACCESS

H.R. 3717 would introduce a $2 limit to the postal monopoly and require a test relaxation on restrictions to private company access to mailboxes.

In my view, a price limit on the postal monopoly that is fairly close to the cost of a first class stamp is long overdue in the United States. Many other countries—including the United Kingdom, Canada, Australia, and Germany—have introduced such measures without harming the ability of their post offices to maintain universal service. Two dollars is a reasonable proposal, although I do not think universal service would be endangered if the limit were half as much.

More important than the specific level of the new price limit is the need for an administrative mechanism for adjusting the monopoly when new evidence and changing circumstances make clear that the monopoly can be reduced without jeopardizing universal service. Indeed, the mere threat of administrative deregulation would help deter gross abuses of monopoly authority and disregard of price caps. I suggest, therefore, that the Postal Rate Commission be authorized to grant specific or general licenses for provision of services covered by the postal monopoly, especially where the Postal Service fails to provide an adequate and efficient service to a given set of customers.

There is also a crucial "missing link" in the monopoly provisions of H.R. 3717. While various postal products are declared to be "competitive," no provision in the bill actually declares these products to be outside the scope of the postal monopoly. Given the Postal Service's broad and variable claim of monopoly, it should be made explicit that a product in the competitive sector is, *ipso facto*, outside the postal monopoly.

The proposal for a limited three-year test relaxing restrictions in mailbox access is, I believe, unduly cautious. The mailbox access rule is a matter of great frustration to Federal Express. Enacted in 1934, it was certainly not intended to restrict the delivery of express parcels. There is no economic evidence—and there never has been—that mailbox access restrictions are necessary to maintain universal postal service. No other country has a mailbox

access rule like the United States. The mailbox access rule is not necessary to protect the security of mailboxes, since criminal and civil laws punish theft and trespass. Yet the mailbox monopoly persists, hampering the ability of Federal Express to make deliveries in suburban and rural areas.

Under these circumstances, I believe it is evident that the public interest would be served by an outright repeal of mailbox access rule subject to two safeguards. First, an individual mailer should be able to reserve his mailbox for the use of the Postal Service (or any specific set of delivery services) since it is, after all, his mailbox. Second, the Postal Rate Commission should be able to restrict access to mailboxes in particular areas or circumstances where, according to demonstrable evidence, the public interest so requires. In any case, as mentioned above, I feel strongly that any restrictions on mailbox access should apply equally to all competitive products, whether offered by the Postal Service or private companies.

MARKET TESTS

Under H.R. 3717, the Postal Service will be given freedom to offer "market tests for experimental products" without facing the regulatory audits designed for well-established products. Federal Express accepts the principle that the Postal Service should have a certain flexibility to test new competitive products. However, the openended nature of H.R. 3717's provisions on market tests merits further consideration. In particular, H.R. 3717 seems to imply that the Postal Service should *itself* "waive" application of all but a handful of laws to market tests. Such governmental power should not be vested in the Postal Service. Then, too, the limit on the size of market tests seems to take no account of the size of the market entered and the private companies affected. As the Chairman of the Postal Rate Commission has pointed out, $100 million is a lot of money to some people.

More fundamentally, it seems to me that the bill should probably distinguish between two types of new products. Some new products, such as International Package Consignment Service, are essentially new marketing packages for transportation and delivery systems that have been developed for and are intimately related to the basic operations of the Postal Service. The only thing fundamentally new about such products is the price. It seems to me that new products which make use of the Postal Service's basic transportation and delivery systems should be held to the same pricing standards which H.R. 3717 will introduce for the Postal Service's existing competitive products generally, regardless of whether the Postal Service calls them "new" or not. On the other hand, temporary relaxation of the remaining classification rules may be appropriate.

For other truly new products, caution should be the rule. As written, H.R. 3717 would apparently allow the Postal Service to enter any business at all earning less than $100 million in annual revenues after publishing notice of its intent to do so. In light of postal ambitions evident in other countries, one

could imagine the Postal Service entering such businesses as banking, insurance, book selling, publication and printing services, freight, and electronic mail. Nor is there any reason to stop the list there. As written, H.R. 3717 would apparently allow the Postal Service not only to sell packaging materials in post offices but also build a paper plant to manufacture its own supplies. It could not only sell refreshments to mailers waiting in postal queues, but also open a micro-brewery to add a little something extra to PostOBurgers and First Class Fries. Does the United States really want to allow the Postal Service to enter these markets while it still derives 90 percent of its income from non-competitive sources? Or is such expansion properly left to a second stage of postal reform? Such questions must be addressed explicitly. At a minimum, I suggest that Postal Service activities that lie outside the normal field of postal operations should be established as separate, arms-length subsidiaries so as to facilitate regulatory and congressional review

COSTS OF PUBLIC SERVICES

H.R. 3717 would require the Postal Service to bear certain additional public services costs, including "revenue foregone" and the pension costs of pre-1970 employees. Public subsidies would be terminated.

I am concerned that the unclear manner in which the Postal Service is required to underwrite these public service costs may confuse future discussions of postal policy. The great stumbling block to a more competitive postal policy has always been the vague claim by the Postal Service that greater competition would preclude it from covering the cost of its public service obligations, the cost of which never seems to be quantified. In theory, the Postal Service may argue, correctly, that it is unfair to expect it to compete like a private company and pay costs associated with public services.

I suggest, therefore, that funding of public services costs should be made more explicit. As part of the annual audit, the Postal Rate Commission should prepare a report on public service costs incurred by the Postal Service and possible savings to be derived from alternate means of supplying the same or similar public benefits. To pay for the public service costs, the Postal Rate Commission could be allowed to "tax" non-competitive postal services at a rate not to exceed the "profit" level charged to the Postal Service's competitive products (since the "tax" is an explication of existing cross-subsidies, it will have no effect on postage rates). Such "tax" revenues could be placed in a separate fund so that public service costs would be spread out over good years and bad years. In addition, "profits" earned on competitive products can also be placed in the same fund. In essence, the Postal Rate Commission would be responsible for spending the "profits" that the United States can expect to earn from its investment in postal services on the condition that the money is spent to support public services which Congress has declared must be pro vided.

Such an explicit approach would be preferable to a hidden, internal cross-subsidy in several respects. It would facilitate the transfer of products from the

non-competitive sector to the competitive sector. It would also simplify the process of licensing private companies to provide postal services now covered by the postal monopoly. As a condition of the license, they could be required to pay the implicit tax assigned by the Postal Rate Commission.

Ultimately, as the Postal Service becomes more and more of a competitive operator, responsibility for assuring universal service should be transferred from the Postal Service to the Postal Rate Commission, much as the ultimate responsibility for universal service was the province of the Civil Aeronautics Board and the Federal Communications Commission, not the aviation and telecommunications carriers. The Postal Rate Commission should identify what services require subsidy in order to sustain universal service and contract with suitable delivery services to provide such services. For a while, the Postal Service might have "first refusal" rights to such contracts, but it should not be obliged to provide competitive services that it deems unprofitable.

THE FUTURE: "INTENSE COMPETITION IN EVERY AREA OF OUR BUSINESS"

The Postmaster General has recently testified to this Subcommittee that "*we have intense competition in every area of our business.*" The Postmaster General exaggerates. In fact, the Postal Service enjoys substantial, if imperfect, protection from competition in most areas of its business. Nonetheless, the Postmaster General's vision of a day when the Postal Service faces intense competition across the range of its products is useful, for it helps to clarify the fundamental nature of the issues raised by the present bill.

As the Postal Service competes more and more with private industry—whether because of changing circumstances or its own business decisions—it must be allowed, and required, to compete on terms that are substantially identical to those faced by private competitors. If and when the Postal Service finds itself in competition in all aspects of its business, then it must, in all aspects of its business, face the same conditions as private competitors. In other words, it must become a private competitor. In short, on the day when the Postal Service truly faces intense competition in every area of its business, there will no longer be any public policy justification for a governmentally owned and operated Postal Service. The only viable public policy will be to repeal all postal laws and sell the Postal Service to the public. This may be the inevitable fate of the Postal Service; inevitable because of the logic of changing communications technology. I suspect that it is. However, it is too soon to predict the future of the Postal Service with certainty, and the Subcommittee's proposal wisely does not try.

The Subcommittee has made an excellent start on legislation that will allow the Postal Service to respond to presently foreseeable increases in competition and, at the same time, repair flaws in the 1970 act. There remains scope for improvements: some highly desirable and some, in my judgement, absolutely and logically necessary. I hope that my testimony will assist the

Subcommittee in the process of revision and improvement, and I look forward to working with the Subcommittee next year as it completes the important task of preparing a plan for modernizing the Nation's postal laws.

Thank you for your consideration of the views of Federal Express.

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FDX Testimony on H.R. 22 (1999)

H.R. 22, the Postal Modernization Act of 1999, is the most substantial and thoughtful proposal to reform the postal laws of the United States in 25 years or more. H.R. 22 charts a sound and balanced course for modernization and reform of U.S. postal law. FDX Corporation, including its subsidiaries Federal Express and RPS, will support enactment of H.R. 22 into law provided that Congress refrains from amendments that undermine the careful balance struck in the proposal.

At the outset, I would like to commend the Subcommittee, and especially Chairman McHugh and his staff, for their attention to public service in the best sense. Two and a half years ago, I testified on an earlier version of H.R. 22. In the intervening period, the Subcommittee has diligently sifted arguments and proposals advanced from many different points of view and incorporated into the bill not the views of the largest or loudest partisans, but the ideas that would, in the view of the Subcommittee, advance the public interest. H.R. 22 is a qualitatively more sophisticated bill than its earlier incarnation. This patient work has proceeded steadily even though, in all this time, "postal reform" has not once been featured on the Sunday talk shows. Balanced, nonpartisan postal reform may not be the stuff of political glory, but it is the sort of legislative work that will earn the long term gratitude of the delivery services sector and the American people.

SHOULD THE POSTAL SERVICE COMPETE WITH PRIVATE COMPANIES?

Critics of H.R. 22 have argued that a government agency like the Postal

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Service should not be allowed to compete with private industry. Philosophically, I agree with these critics. But, as events of the last six months—indeed, the last few days—have graphically demonstrated, at some point philosophy must yield to reality. The major post offices of the world, including the U.S. Postal Service, are in the process of launching a massive commercial attack on private industry. Commercial developments are threatening to overwhelm the incremental reforms of H.R. 22. In the foreseeable future, governments will confront still more fundamental policy choices in the postal field. If enacted promptly, I believe that H.R. 22 will provide Congress with a rational basis for further decisions. If not, in my judgement, Congress will have to move directly to more radical, and probably less well considered, legislation.

Basically, the only proper justification for a government Postal Service is to act as a provider of last resort for necessary public postal services that would otherwise be unavailable from the private market. A government Postal Service—which does not need to make a profit, does not answer to shareholders, loads its fixed costs on a legal monopoly, and cannot go out of business— behaves so differently from private competitors that it distorts the entire market. These dangers are compounded by the perverse tendency of the Postal Service to use governmental powers for commercial ends. The Postal Service has, for example, issued regulations which expand the definition of the postal monopoly far beyond anything Congress intended. As representative of the United States at the Universal Postal Union, the Postal Service has negotiated treaties that advance its commercial interests rather than those of the United States as a whole.

In the beginning of the Republic, the Post Office Department was established on exactly this basis. Given the undeveloped state of the national transportation system and financial markets, only the federal government could establish a national Post Office for distribution of letters and newspapers. In the early 1900s, the Post Office's mission was expanded to provide a rural parcel service that the private market was unable to provide.

Today, however, the Postal Service is inexorably losing its status as a provider of last resort. The financial and operational core of the Postal Service —the monopoly over the carriage and delivery of letters—will one day dissolve in a technological mist. Senders of letters and documents will have multiple alternatives to the Postal Service for delivery of their correspondence.

As competitive services replace the public services of the Postal Service, Congress must choose between two policy options. Either the Postal Service must be wound down in an orderly manner as competitors are able to take over its functions or the Postal Service must be allowed, *and required*, to compete on terms that are identical to those faced by private competitors.

Closing down the Postal Service, like any other government agency that has outlived its usefulness, is an option that ought to be considered seriously. However, the practical and political problems would be formidable. No matter how quickly technology and competitive alternatives advance, America will

be dependent on the Postal Service for some period of time. Managing an organization the size of the Postal Service through a long period of decline and diminution of function, while maintaining quality of service, be an extremely difficult task.

The alternative is to require the Postal Service to compete on a level playing field whenever it competes with private companies. If and when the Postal Service finds itself in competition in all aspects of its business, then it must, in all aspects of its business, face the same conditions as private competitors. In other words, it must become a private company. There will no longer be any public policy justification for a postal monopoly law or a governmentally owned and operated Postal Service. As in the aviation industry, minor market failures will be addressed by government contracts to remedy specific problems.

H.R. 22 moves towards clarification of these options. H.R. 22 restructures the Postal Service into two fundamental divisions: non-competitive and competitive. On the one hand, H.R. 22 preserves the ability of the Postal Service to perform its remaining non-competitive, public service missions. On the other hand, H.R. 22 gives the Postal Service freedom to offer competitive products on even terms with private industry. Accounts for the non-competitive and competitive products must be kept separately. In addition, non-postal products and joint ventures must be provided through a separate Corporation. Eventually, I believe, this discipline of structural separation should be extended to all competitive products.

In the foreseeable future, there will be no escaping a fundamental decision on the fate of Postal Service. The clear distinction between non-competitive and competitive products established by H.R. 22 will lay the proper groundwork for this decision. If, after a few years, it turns out that the Postal Service has learned to compete fairly and successfully, then Congress should move towards complete privatization and demonopolization. If not, then Congress can, with a clear conscience, act to spin off the Corporation and restrict the Postal Service to a shrinking pool of noncompetitive functions. In the long term, we can live with either outcome.

What we cannot live with is the current situation. The center of gravity of the Postal Service is shifting more and more towards a competitive posture, yet the Postal Service, operating under a 1970 law, is not required to abide by the same laws as private companies. There are no clear rules as to what businesses the Postal Service can enter or how its competitive ventures are to be financed. Only a couple of days ago, the Postal Service announced that it would provide international express service in conjunction with the German Post Office through a subsidiary, DHL, bought largely with public assets. In this way, the Postal Service is able to piggyback on the anticompetitive accomplishments of foreign post offices. Faced with such a situation, the Postal Rate Commission does not begin to have the tools to enforce even the vague rules that do exist.

H.R. 22 will clarify the rules for now and lays the groundwork for a more

fundamental decision on the long term final fate of the Postal Service. In my judgement, H.R. 22 is the right postal bill at this time.

UNIVERSAL POSTAL SERVICE

Postal Service competition with private companies is a two-sided coin. For many, the principal issue is not the difficulties faced by private companies but the threat that competition may pose to the Postal Service's ability to maintain universal postal service.

Let me be clear. I support universal postal service. Every citizen in every part of the Nation should have access to basic, affordable postal service. I do not want to see stamp prices increased unnecessarily. I recognize and respect the spirit of public service that motivates men and women in the Postal Service. "Should the United States assure universal postal service?" is not an issue so far as I am concerned. But "What is the most efficient way for the United States to guarantee a level of universal postal service consistent with our national needs?" is a legitimate question that proponents of universal postal service must address seriously and quantitatively, with more than knee-jerk calls for monopoly and postal privilege.

The role of the postal monopoly in the provision of universal postal service is frequently misunderstood. It is often argued that anything that allows the Postal Service to expand its business in a given market is desirable so long as revenues cover incremental costs and earn an additional dollar. This dollar, it is said, reduces the overhead costs borne by first class mailers. This logic would support extension of the Postal Service's monopoly into any business activity in which incremental costs are less than total costs. For example, granting the Postal Service a monopoly over air freight services could, by this reasoning, reduce the price of a first class stamp by several cents.

What's wrong with logic? What's wrong is that a monopoly not only generates economies of scale, it also breeds inflated costs, inefficiency, and lack of innovation. I can tell you from personal experience that no one in his right mind would suggest that the United States would have better or cheaper or more universal express service today if the Postal Service had succeeded in extending its monopoly to include express services in the 1970s. Suppose the Postal Service had participated in the early express business by pricing at marginal costs and loading overhead costs on to monopoly mailers? The result would have been to discourage investment in the development of the express industry. Either way, substantial Postal Service involvement would have retarded evolution of our current, universal express network. In regard to more traditional postal services, as well, a recent study by economists at the Postal Rate Commission suggests that inefficiencies due to the postal monopoly exceed economies of scale by several billions of dollars. While reasonable persons can dispute the exact figures, no one can deny that a postal monopoly implies huge costs as well as benefits. The truth is that the postal monopoly has probably *increased*, not decreased, the cost of universal postal service in the

United States.

A closely related issue is the cost of the Postal Service's universal service obligations. Here, too, there are many misunderstandings. Economic studies show that the cost of rural postal service is not much greater than the cost of urban postal service. Even if there were no legal mandate, the Postal Service would continue to serve all addresses in the United States, the same as Federal Express. The major costs of universal service lie elsewhere.

In place of misunderstanding and groundless assumptions, H.R. 22 offers several measures that would begin to develop necessary data and clear objectives.

Although the costs of legally mandated universal postal service are often said to justify the extra revenues supposedly generated by the postal monopoly, in fact no one knows the magnitude of such costs. Changing technology may or may not have the effect of increasing the cost of universal postal service. Lack of data has bedeviled postal policy discussions for decades. H.R. 22 would shed needed light on this topic. For the first time, the Postal Regulatory Commission will provide an annual estimate of the costs of universal service.

Another often overlooked element of universal service is the quality of service. The proper question is not whether postage rates are high or low, but whether the mailer is getting good value for his money. H.R. 22 will require the Postal Service to provide the Postal Regulatory Commission with regular reports on the quality of noncompetitive services. This, too, is a distinct advance over current law.

Cost and quality of service come together in the question, "What level of universal postal service should the government guarantee in the future?" As we develop more and more ways to communicate, this is a policy question that deserves more careful consideration. In this respect, as well, H.R. 22 makes a contribution by requiring the Postal Service to begin the process of identifying specifically what level of universal postal service is suited to national needs.

In sum, H.R. 22 will move us towards a more efficient, more cost-effective universal postal service, better tailored to the needs of the Nation. These measures are not only desirable; they are overdue.

FIREWALLS: THE LYNCHPIN OF H.R. 22

Given the bill's dual focus on the rules of competition and protection of universal service, the core reform of H.R. 22 is the division between noncompetitive and competitive products. This division provides the framework for other reforms, including all provisions giving the Postal Service greater commercial freedom in competitive markets. Division is enforced by what the Chairman has dubbed H.R. 22's "firewalls." The firewalls consist of several types of provisions:

- reliance upon objective factual criteria (degree of effective competition), administered by the Postal Regulatory Commission, to define noncompetitive and competitive categories;

- separation of accounts, both operating accounts and capital assets;
- requirement of an allocation of common overhead costs proportional to the distribution of attributable costs (equal cost coverage rule);
- structural separation for Postal Service participation in joint ventures and non-postal markets;
- an end to legal privileges favoring the Postal Service in the provision of competitive products.

Without strong firewalls, H.R. 22 is a dead letter. Mailers will never accept greater commercial freedom for the Postal Service if they will be forced to underwrite the Postal Service's competitive adventures. Competitors —including not only companies like Federal Express but also newspapers, messenger companies, and private post offices—will oppose H.R. 22 unless assured that the Postal Service's competitive activities will not derive substantial financial, legal, or commercial benefits from its noncompetitive activities. Just as importantly, H.R. 22 will fail as a modernization measure if the Postal Service is not required to operate with true private sector efficiency. Subsidized Postal Service participation into competitive markets will not raise the Postal Service's operations to the level of private enterprise; it will bring down the competitive market to the false economies of the Postal Service.

I cannot emphasize too strongly the importance of these firewalls in our evaluation of H.R. 22.

Because of our concern for the integrity of the firewalls, we cannot support a number of amendments proposed by the Postal Service. For example, we oppose amendments which assign various products to the competitive category regardless of whether they in fact face effective competition. Similarly, we cannot support amendments that would give the Postal Service exclusive authority to initiate re-assignment of noncompetitive products to the competitive category. Both types of amendments are inconsistent with firewalls erected by H.R. 22. Commercial freedom for the Postal Service should be coterminous with effective marketplace discipline.

Still more damaging to the firewall protections is the Postal Service amendment that would replace the Competitive Products Fund with an uncertain and unpredictable alternative accounting scheme. To implement this new accounting scheme, the Postal Service proposes to scrap accounting practices worked out by the Postal Rate Commission over thirty years and devise a new method for assigning operational costs and revenues. Separation of accounts would be part of a larger exercise to assure the Postal Service's ability to obtain financing for competitive products. For five years, the Postal Service proposes to continue use of the full faith and credit of the United States to borrow money to compete against private companies. Lemming Express may support additional commercial flexibility for the Postal Service's competitive activities under such circumstances, but Federal Express will not.

Another Postal Service amendment that would remove a firewall element crucial to the bill is the proposal to sunset the equal cost coverage rule after

five years. The Postal Service says the equal cost coverage rule will be "unnecessary" after five years. I cannot understand this argument. Manifestly, this principle will remain a critical element of postal policy so long as the Postal Service has the ability to shift overhead costs of competitive products on to users of noncompetitive products. The Postal Service also suggests that the equal cost coverage test might become more difficult to satisfy if bill payment migrates to email. While this possibility supports a provision, already in H.R. 22, authorizing the Postal Regulatory Commission to adjust application of the equal cost coverage rule for special circumstances, it does not in any way justify sunsetting the rule itself.

In sum, Postal Service amendments which attack the firewalls in H.R. 22 would loose a government-subsidized monster in the delivery services sector and other segments of the American economy. Rather than see creation of such a monster, we would join with those who believe that the Postal Service must be confined to noncompetitive markets and dismantled as these markets shrink.

NONCOMPETITIVE POSTAL PRODUCTS

For the foreseeable future, the bulk of Postal Service revenues will continue to be derived from markets that are noncompetitive because of legal or practical consequences of the postal monopoly. H.R. 22 proposes a basic change in the regulation of noncompetitive products with the introduction of price caps for baskets of products.

The proposed price caps would address a fundamental flaw in the 1970 act. Under current law, the Postal Service has unfettered discretion to determine the overall level of revenues to be extracted from customers who cannot choose alternative suppliers. Such unchecked monopoly power is logically absurd and detrimental to the public interest. The Postal Service has had little reason to control its costs, and postal unions have had no incentive to moderate wage demands. An independently administered system of price caps is a necessary reform.

Details of the price cap mechanism are of greater concern to other parties, so I will leave it to them to make specific comments. However, I would like to offer a couple of general observations. Price caps essentially allow the Postal Service two types of pricing freedom. First, the Postal Service would be authorized to raise the *overall level* of postage rates within specified limits. This type of freedom has gained a substantial measure of acceptance in the mailing community. Second, the Postal Service would be allowed to adjust rates of individual products, thus "de-averaging" or "re-balancing" the distribution of overhead costs among different products. This type of freedom is much more controversial. Each mailer of noncompetitive products fears that he will pay a higher share of overhead costs and the other fellow will pay a lower share. In response to such fears, H.R. 22 limits this second type of rate flexibility with tightly drawn rate bands. The Postal Service has proposed amendments that would allow it greater flexibility to re-balance tariffs. While

I suspect that the Postal Service may need somewhat greater flexibility than permitted in H.R. 22, the politically feasible path probably lies closer to H.R. 22 than the Postal Service's proposal.

At the same time, limiting the ability of the Postal Service to rebalance tariffs restricts its ability to adjust tariffs to reflect changes in underlying cost structures. Without such pricing flexibility, the level of overhead costs borne by individual products could drift substantially from the standards set in the baseline rate case. For this reason, the Postal Rate Commission has suggested H.R. 22 provide for cases to "realign" baseline rates. This proposal is worth serious consideration. The frequency of realignment cases might be limited to ensure that they do not become a substitute for price cap mechanisms provided in the bill.

H.R. 22 also introduces a new concept into the pricing of noncompetitive products: negotiated service agreements. Under this provision, the Postal Service will be allowed to more closely integrate its operations with major mailers and pass on a portion of the cost savings. At the same time, negotiated service agreements must be structured so other mailers will not be disadvantaged. This concept represents a major advance over the unlimited discounts contemplated in an earlier version of H.R. 22.

COMPETITIVE POSTAL PRODUCTS

H.R. 22 would grant the Postal Service essentially the same commercial freedom in the pricing of competitive postal products as enjoyed by private companies. The Postal Service would be allowed to price any product down to attributable costs. The Postal Service would be able to negotiate contracts with major customers and introduce volume discounts. In a market test of a new product, the Postal Service would not be constrained to cover attributable costs, although losses would have to be made up from competitive product revenues in the future.

Pricing freedom is not unlimited, however, any more than it is for a private company. Like a private company, the Postal Service would be free to price some competitive products more aggressively than others, but, in so doing, it would also run the risk of losing business in other competitive products whose prices would have to be raised to make up for lost contribution to overhead. If Postal Service fails to cover overhead costs in a given year, it will be forced to make up losses in succeeding years. This is the discipline imposed by the equal cost coverage rule, a firewall provision described earlier. In administering the equal cost coverage rule, the Postal Regulatory Commission would be authorized to make allowances for intrinsic differences in the cost structures of noncompetitive and competitive products. In addition, the Commission is authorized to phase-in this requirement over five years to allow the Postal Service a fair chance to raise its efficiency to market levels. While the discipline of the equal cost coverage rule is flexible, it is also indispensable. Without it, pricing freedom for competitive products is out of

the question.

As always, an important element of the regulatory framework is the mechanism for enforcing the rules. H.R. 22 provides that the Postal Regulatory Commission will annually audit the books of the Postal Service. These accounts will be available to the public in sufficient detail so that interested parties can check the Commission's conclusions. If necessary, any party, or the Commission on its own motion, can initiate a complaint proceeding which can result in an order resetting competitive rates to lawful levels. H.R. 22 further provides that the Postal Regulatory Commission can require the Postal Service to discontinue a competitive product that persistently fails to cover attributable costs.

As I have always said, we are ready, willing, and able to compete with the Postal Service on equal terms. If the disciplines and controls provided in H.R. 22 are not significantly weakened, we can accept the commercial freedom for the Postal Service's competitive postal products granted by H.R. 22. My only suggestion in this area is to ask the Subcommittee to reconsider the standards which the Postal Regulatory Commission would apply in resetting rates after a complaint proceeding. In our view, these standards are not sufficiently clear, so we have proposed a technical amendment on this point.

EQUAL APPLICATION OF LAWS TO COMPETITIVE PRODUCTS

H.R. 22 takes great strides in advancing the simple, but fundamental principle that the Postal Service should be subject to the same laws as everyone else when it participates in competitive markets. In brief, the Postal Service's competitive products would be subject to antitrust law, tort law, unfair competition law, and zoning law in the same manner as a private company, and the Department of Justice is directed to report on other differences in legal treatment. I strongly support these reforms.

In this part of my testimony, I would like to touch briefly on the application of this principle to three areas highlighted in my 1996 testimony: mailbox access, vehicular licenses, and customs laws.

Mailbox access. Under the mail box access rule (18 USC § 1725), private companies are prohibited from placing items in curbside mailboxes even though a GAO study has found that a clear majority of Americans (58 percent) believe this restriction should not apply to companies like Federal Express. This rule is the product of Depression-era concerns. In the mid-1960s, the Post Office announced it would henceforth deliver only to curbside boxes in new residential areas, citing studies showing that curbside delivery was half as expensive as delivery to the door. This policy has greatly increased the commercial importance of the mailbox access rule. Today, more than 70 percent of residential deliveries are made to curbside mailboxes, cluster boxes, apartment boxes, and similar Postal Service-only receptacles.

In 1996, I urged the Subcommittee to repeal the restriction on mailbox access. Unfortunately, the Subcommittee concluded that even a limited

experiment in opening the mailbox access was too controversial to include in H.R. 22. Without seeking to revisit that decision in this bill, I would ask the Subcommittee to consider the fairness of allowing the Postal Service to use the mailbox system for delivery of competitive products while denying this right to competitors. After all, the Nation's system of mailboxes was built and paid for by mail recipients, not by the Postal Service. Unless the law on mailbox access applies equally to all competitive products, the law will perpetuate a tremendous bias in favor of the Postal Service in lawfully competitive markets. I urge the Subcommittee to provide that the mailbox access rule applies equally to all competitive products.

Vehicular license fees. H.R. 22 provides that the Postal Service shall comply with Federal and State laws regulating the operation of vehicles if such vehicles "are primarily and regularly used for the transport or delivery" of competitive products. In reality, this vehicle-by-vehicle test means that the Postal Service will almost always escape license fees. In contrast, another provision of H.R. 22 imposes tort liability on the Postal Service vehicles depending on the proportion of non-monopoly mail being carried by the vehicle at the time of an accident. In one of its amendments, the Postal Service argues that pro-rata application of tort liability is impractical under such circumstances. We agree with the Postal Service on this point. By the same token, however, pro-rata application should be used wherever it is practical. In the case of license fees, it would be perfectly feasible to require the Postal Service to pay license fees based on the overall proportion of competitive products delivered by its vehicular fleet in a given State. I urge the Subcommittee to consider these practical modifications to the principle of equal application of the laws.

Customs laws. Customs laws are the single biggest impediment to the development of international trade. H.R. 22 provides that the Postal Service, in the provision of competitive products, may not take advantage of discriminatory foreign customs procedures designed exclusively for postal shipments. Implementation of this provision is delayed for five years, however, to avoid imposing burdens on U.S. shippers who have invested in Postal Service products that make use of foreign customs preferences. I accept the fairness of a five-year grace period for existing products, but I do not think the Postal Service should be able to take advantage of this grace period to develop *new* international products and services that take advantage of such discriminatory foreign customs procedures. Therefore, I ask the Subcommittee to consider limiting this grace period provision to *existing* international postal services.

IMPARTIAL ADMINISTRATION OF THE LAWS

Closely related to the matter of equal application of the laws is the problem of impartial administration of the laws. Not only should the Postal Service, in its competitive activities, play by the same rules as everyone else, but the government should apply the rules equally and impartially to all. This

obviously will not be the case if the Postal Service itself is entrusted with exercising governmental authority. H.R. 22 addresses this issue in two important areas.

First, H.R. 22 divests the Postal Service of authority to issue regulations administering the postal monopoly. Current administrative suspensions of the postal monopoly are preserved by statute. I strongly support these necessary reforms. Not only will they give legal certainty to the scope of the postal monopoly, but they will also go a long way towards improving relations between the Postal Service and private operators. The Postal Service has proposed an amendment that would, among other things, resurrect the Postal Service's rulemaking authority over the postal monopoly. Although the Postal Service has assured us that this was an unintended consequence of this amendment, we urge the Subcommittee to scrutinize this amendment with extreme care.

Another provision of H.R. 22 would generally bar the Postal Service from competing in an area that it regulates or regulating an area in which it competes. This principle is very important and must be retained. We do not object to a Postal Service amendment that would, as we understand it, require the Postal Regulatory Commission to follow antitrust precedents developed by the Department of Justice and Federal Trade Commission rather than concocting its own unique brand of "postal antitrust" law.

POSTAL MONOPOLY

H.R. 22 would limit the scope of the postal monopoly to letters transmitted for less than six times the basic stamp price, that is, less than $1.98 at today's stamp price. In addition, letters weighing more than 12.5 ounces could be carried out of the mail even if priced less than six times the stamp price. This approach to limiting the postal monopoly is similar to that adopted in many countries, including the European Union, although it is not as procompetitive as reforms adopted by countries such as Sweden, New Zealand, and Germany, which have abolished their postal monopolies altogether (in 2003 in the case of Germany). The practical effect of H.R. 22's new limits on the postal monopoly will be to repeal the monopoly over two-pound Priority Mail shipments that can legitimately be considered "letters," less than 4 percent of total Postal Service revenue.

While I support these provisions of H.R. 22, I would to go further. Over the long run, the only tonic that can enhance the vigor of the Postal Service is competition, and I would recommend a larger dose. While H.R. 22 is clearly moving in the right direction, I encourage the Subcommittee to consider the wisdom of adding more stringent limits on the postal monopoly, to be phased in after a few years. For example, a price limit of double the stamp rate would still protect more than a third of Postal Service revenue from competition. Given the pace of change, such a prescription is not too strong medicine for the Postal Service.

In addition, we have submitted to the Subcommittee a number of technical amendments to the postal monopoly provisions of H.R. 22. These will clarify without changing the intent of H.R. 22. For example, H.R. 22 plainly intends that bulk outward international mail should be considered outside the postal monopoly because such mail is placed in the competitive category. Nonetheless, no provision in H.R. 22 actually permits private carriage of such mail. We have suggested an amendment that would do so. Similarly, although a provision in H.R. 22 provides for grandfathering the current administrative suspensions of the postal monopoly, in many cases the precise legal results of this provision will be unclear. We therefore suggest that the Postal Regulatory Commission issue regulations that would set out specifically the scope of the administrative suspensions grandfathered by H.R. 22. Given the extreme importance of the postal monopoly provisions for all parties, I urge the Subcommittee to consider these technical amendments carefully.

PRIVATE LAW CORPORATION

H.R. 22 authorizes the Postal Service to establish a private law Corporation. The Corporation can offer non-postal products as well as postal products and engage in joint ventures with private companies. Financing for the Corporation would be limited to the funds and assets of the Corporation itself and the funds and assets of the Competitive Products Fund, as well as such money as the Corporation can borrow on its own credit or attract in the form of contributions from joint venture partners and new shareholders (in subsidiaries). I support this provision of H.R. 22 because it will place clear and reasonable restrictions on the Postal Service's ability to use public assets and monopoly revenues to gain a competitive edge in such markets.

For the Postal Service, the Corporation offers an alternative organizational structure for providing competitive products. Because of structural separation, the Corporation will also allow the Postal Service to escape the detailed oversight by the Postal Regulatory Commission necessitated by joint costs. The Postal Service will be able to move some competitive postal products to the Corporation, although the inherent advantages of the Corporation may be offset by losses in economies of scale. If the Corporation is commercially successful, its enhanced value will improve the balance sheet of the Competitive Products Fund. If it is unsuccessful, it should be allowed to fail like any other private company.

As a means of preventing cross-subsidy and other distortions due to the postal monopoly, structural separation is manifestly superior to accounting separation of joint costs. As proposed, H.R. 22 requires the Postal Service to carry on new activities, which are separable from traditional postal activities, in a structurally separate Corporation. Indeed, after a suitable transition period, the Postal Service should be required to spin off its competitive postal products to the Corporation to the maximum feasible extent. Structural separation should be the rule, rather than the exception, for all competitive postal

products.

Another benefit of the manner in which H.R. 22 establishes the Corporation is to serve as an international precedent. In Europe, the European Commission has utterly failed to devise the sort of standards set out in H.R. 22. European post offices have freely sold public assets, like real estate, to underwrite purchases of private companies like DHL. A clear U.S. policy will help us to make the case for adoption of similar rules in Europe.

Some critics of the Corporation have argued that it should be deleted from H.R. 22 because it allows the Postal Service to enter non-traditional businesses. I believe these critics are missing the point. The Postal Service has already begun to experiment with non-traditional postal products, joint ventures, and non-postal products. In other developed countries, post offices have gone further down this road than the Postal Service. If Congress is not ready to stop this trend in its tracks, then it is highly desirable to require that such activities be placed in a separate corporate structure. After a few years, Congress will have a rationale basis for deciding whether the Postal Service can and should be allowed to compete like a normal company. If Congress decides the Postal Service should be divested of such activities, a corporate form will facilitate sale.

Plainly, the Corporation should not serve as an end run around the restrictions of the Competitive Products Fund and the equal cost coverage rule. If the Postal Service places assets into the Corporation, these assets must be independently evaluated and the Competitive Products Fund should receive payment for such assets in the form of bonds or stock issued by the Corporation. In addition, the Postal Regulatory Commission will have to adjust the application of the equal cost coverage rule if competitive postal products are shifted to the Corporation. Similarly, the pricing of transactions between the Postal Service and the Corporation will have to be subject to scrutiny by the Postal Regulatory Commission.

It is certainly true, as pointed out by the Postal Rate Commission, that the Corporation should not be able to "play" with its assets without financial consequence. The law must never lose sight of the fact that these assets belong to the people of the United States, not to the Postal Service itself. Accounting rules should be devised to make sure that the Corporation is motivated to act like a normal, profit-oriented company and the Postal Service is barred from shifting monopoly rents to the Corporation. Perhaps Congress should provide for the sale of a substantial portion of the Corporation to the pubic within a definite time frame. Public ownership would provide an independent evaluation of the value of the Corporation and ensure that the Corporation's Board of Directors makes realistic business decisions since "real" money of "real" investors will be at stake. This may be the only way to ensure that the Corporation acts like a normal company. At a minimum, Congress should provide for a comprehensive review of the operations of the Corporation after a fixed time period. This review should include appraisals by the Treasury

Department, the Department of Justice, and the Postal Regulatory Commission.

ROLE OF THE BOARD OF GOVERNORS

H.R. 22 proposes to redesignate the Board of Governors as the Board of the Directors "to convey the business responsibility of the Directors for ensuring effective and efficient operations of the Service on behalf of the American public. "H.R. 22 also requires that new Directors of the Postal Service be chosen on basis of experience in managing organizations or corporations "similar in size in scope to the Postal Service." At the same time, H.R. 22 retains the statutory duty of the Board to "*represent the public interest generally*."

The proposed changes in the title and qualifications for the Board of Governors highlight the inherent conflict in the mission of the Postal Service. Is the Postal Service supposed to pursue its commercial self interest or the general welfare? As the Postal Service becomes an ever more competitive entity, this conflict is exacerbated. Worse, it may become blurred; public interest responsibilities may be invoked to justify commercial decisions. For these reasons, I suggest that the Subcommittee consider clarifying the role of the Board by making its primary focus *either* management of the commercial interests of the Postal Service *or* representation of the public interest, not both.

INTERNATIONAL POSTAL POLICY

H.R. 22 would correct a basic flaw in the 1970 act by submitting international mail to the same regulatory oversight as domestic mail. The reasons which require regulatory oversight of domestic mail—protection against abuse of monopoly power and control of predatory behavior—apply equally to international mail. I strongly support this reform.

H.R. 22 would also vest authority for international postal policy in the Department of State and set procompetitive objectives for the Department of State to pursue. This provision would extend and clarify amendments to the postal law adopted last fall, and I support it.

Since last fall, Ambassador Michael Southwick and his staff in the International Organizations office at the Department of State have worked diligently to master complex issues quickly. Urgency is required because the Universal Postal Union (UPU) convenes a general congress in August in Beijing to negotiate the legal framework for international postal services during the period 2001 to 2005. The deadline has already passed for submitting certain types of proposals for consideration at the Beijing Congress. Under Ambassador Southwick's leadership, the United States has recently proposed that the UPU convene an Extraordinary Congress in 2001 to reorganize the organization along commercially neutral lines. This is an extremely important and responsible initiative for which the Department of State deserves commendation.

On the other hand, the Department of State has failed to develop

procedures to open development of U.S. policy to all interested parties, including the Postal Service, private carriers, and mailer groups. The Postal Service continues to enjoy exclusive access to key policy proposals and policymaking meetings. I am hopeful that the Department of State will move rapidly to reform these procedures. If it does not, the United States Government will not have the benefit of a public dialog on possible U.S. proposals to amend the Universal Postal Convention. The deadline for submission of such proposals is April 22 (with the co-sponsorship of two other countries). I urge the Subcommittee to oversee these developments with vigilance and, if necessary, to add to H.R. 22's provisions on international postal policy to ensure that the U.S. policymaking is as open and transparent as possible.

TIMETABLE FOR IMPLEMENTATION

In one amendment, the Postal Service proposes acceleration of H.R. 22's reforms by doing away with the baseline rate case and using instead rates from the last general rate case.

I agree with the Postal Service that the reforms of H.R. 22 can be and should be introduced more quickly, and I urge the Subcommittee to look into ways to do so. Most reforms can take effect when baseline rates are effective and the Competitive Products Fund is established. Whether or not a baseline rate case is needed immediately depends in large part on whether realignment cases are allowed. A baseline rate case for international rates will be needed in any case since these rates have never been reviewed by the Postal Rate Commission.

CONCLUSION

With the changes I have proposed, H.R. 22 represents a very sound approach to necessary modernization of the Nation’s postal laws. I hope that you will give serious consideration to our suggestions for improving the bill.

Thank you for your consideration of the views of FDX Corporation.

Part 9

UPU Reform

CHRONOLOGY

Sep 1979	UPU's Rio de Janeiro Congress orders study of postal monopoly to combat couriers.
Jul 1984	Hamburg Congress urges use of postal monopoly to combat couriers; adopts Hamburg Declaration.
1 May 1986	President Reagan signs 1984 Convention in Tokyo and instructs USPS to apply procompetitively.
1 Dec 1989	IECC urges reform outside Washington Congress.
13 Dec 1989	U.S. government rejects general reservation recommended by government departments.
14 Dec 1989	Washington Convention condemns remail and supports active UPU role against private competitors.
15 Oct 1990	ACCA seeks membership in U.S. delegation to UPU.
15 Apr 1991	U.S. rejects ACCA as member in delegation to UPU.
19 Oct 1992	UPU-Private Operators Contact Committee (1st).
3 May 1993	Contact Committee (2d). UPU rejects request for working party on UPU reform.
18 Oct 1993	Contact Committee (3d). IECC 6-point reform plan.
7 Feb 1994	Contact Committee (4th). UPU rejects discussion of UPU reform in committee.
Sep 1994	Seoul Congress supports commercial role for UPU; limits Contact Committee to operational issues.
10 Oct 1997	IECC proposes dissolution of Contact Committee.
30 Apr 1998	Contact Committee. UPU presents progress report on UPU reform initiatives.
14 Oct 1998	Contact Committee. IECC supports UPU reforms; U.S. moves to block Dutch proposal on observers at UPU.
21 Oct 1998	U.S. transfers UPU policy authority from USPS to Department of State (Northup Amendment).
18 Nov 1998	ACCA proposes rulemaking on UPU issues.
14 Jan 1999	Draft U.S. amendments to UPU acts submitted to Department of State by Federal Express.
Feb 1999	UPU invites IECC as observer at Beijing Congress.
14 Apr 1999	U.S. proposes UPU Extraordinary Congress 2001.
Aug-Sep 1999	Beijing Congress. IECC excluded from key meetings; UPU rejects reforms, creates High Level Group.
7 Apr 2000	IECC submission to High Level Group calls for separation of commerce and government.

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Overview: UPU Reform

The charge that the Universal Postal Union is engaging in a conspiracy is no more than theatrics. If this is a conspiracy, then we are conspiring to provide the best possible service to the world's mailers.

- T. Leavey, UPU Chairman-designate (1989)

Since the mid 1980s, the international legal framework established by the Universal Postal Union has become increasing incompatible with the evolution of modern global delivery services. Rules of the UPU—international laws binding on member countries—reinforce balkanization of the sector into national operations. While global services are being developed by private sector companies and, more recently, by private-public alliances and hybrids, the UPU perpetuates legal discrimination between public and private operators. Worse, as public postal services have become more commercial and competitive, the UPU has increasingly employed governmental resources to aid one set of competitors against another. For more than a decade, private express companies have intermittently urged member governments to reform the Universal Postal Union by separating commercial and governmental functions. To date, little progress has been made.

COMMERCIALIZATION OF THE UPU, 1979-1999

The Universal Postal Union is an intergovernmental organization headquartered in Berne, Switzerland. In 1874, twenty-two nations met in Berne and agreed to form a "single postal territory" among "civilized countries." Membership in the Universal Postal Union has grown from 22 to 189 countries and now includes virtually every nation on earth. Within the Union, international commerce in documents and parcels is facilitated by uniform rules governing the exchange of items between national post offices. Even

though the Universal Postal Convention and related agreements have been revised and readopted twenty-one times since 1874, the underlying premises of the Union have remained largely unchanged. The Union implicitly assumes that each post office is owned by the government of a member country and operated as a public service sustained (in almost all cases) by monopoly rights.[1]

The supreme authority of the Union is the Congress, a meeting of plenipotentiary representatives of member countries that convenes every five years. The UPU refers to each Congress by the city where it meets. The five most recent congresses have held in the following cities:

- Rio de Janeiro, Brazil (1979)
- Hamburg, Germany (1984)
- Washington, D.C., United States (1989)
- Seoul, Korea (1994)
- Beijing, China (1999)

On September 15, 1999, the Beijing Congress adopted the 1999 Universal Postal Convention (or "UPU Convention"), effective for the period January 1, 2001 to December 31, 2004.

Between congresses, the work of the UPU is carried on by permanent institutions that have grown significantly more important in recent decades. For most of the long history of the UPU, the work between congresses was essentially ministerial. Prior to World War II, the permanent staff of the UPU consisted of a small secretariat of less than two dozen employees headed by a Swiss national. In 1947, a permanent Executive Council[2] was established to direct the activities of the UPU between congresses and maintain liaison with the United Nations. In 1969, a permanent technical committee, the Consultative Council for Postal Studies (CCPS), was added and charged with the study of "technical, operational, and economic questions concerning the postal service."[3] Both committees were dominated by postal officials. In 1974, the Director General of the International Bureau became an elected official instead of a staff appointment of the Executive Council, and oversight of the International Bureau by the Swiss government was ended.

The twenty-year period 1979 to 1999 saw a marked commercialization of UPU activities without a corresponding separation of commercial and governmental functions. Broadly speaking, governmental authority once administered by governmental officials responsible for postal affairs came to be exercised

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[1]*See* G. A. Codding, Jr., *The Universal Postal Union*. *See also* J.I. Campbell Jr., "The Future of the Universal Postal Union," in Crew and Kleindorfer, *Regulation and the Nature of Postal and Delivery Services.*

[2]Originally established as a 19-member "Executive and Liaison Committee," the Executive Council grew in steps to 40 member countries attained in 1974.

[3]The CCPS evolved from a 20-member Management Council for the Consultative *Committee* for Postal Studies, established in 1957 as a loosely defined committee composed of all UPU members interested in technical matters that functioned in a committee during congresses. In 1969, the CCPS became a formal body which, after 1974, included 35 member countries.

by executives of quasi-independent commercial post offices to gain or protect competitive advantage. A brief review of the competitively inspired decisions of each congress will clarify this trend and the reforms sought by the private express industry.

RIO DE JANEIRO CONGRESS, 1979

In 1979, the Rio de Janeiro Congress instructed the Consultative Council for Postal Studies to study use of national postal monopoly laws to combat competition from private express companies. Initiated by delegates from France, Indonesia, Malaysia, United Kingdom, and West Germany, the study was to address the following points:

- threats to existing monopoly business;
- means of combating competition;
- activities of private operators;
- explanation of the historical legal basis and delineation of the present of applications;
- consistency in the definition of postal monopoly. . . [and]
- customs authorities' cooperation in enforcing the postal monopoly law.[4]

This study provided a forum for postal officials to pool intelligence on the activities of private expresses and consult on use of postal monopoly laws to restrain commercial rivals. Intervention by customs authorities to enforce the postal monopoly against international couriers was taken up with the Customs Cooperation Council, the intergovernmental organization composed of customs officials. The study resulted in a proposal by the Executive Council for an official resolution calling on UPU member governments to enforce the postal monopoly laws against private couriers.

HAMBURG CONGRESS, 1984

The 1984 Hamburg Congress convened during a period of growing concern over competition from international couriers. The Hamburg Congress considered three measures aimed at this competition. The first was a resolution by Argentina that would have required the post office in country A to obtain permission of the post office in country B before authorizing an international courier to provide A to B service. Although overwhelmingly defeated, this draft resolution reflected the deep suspicion of couriers felt by postal officials in many developing countries.[5]

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[4]*See* "Postal monopoly. Ways and Means of Combating Competition from Private Undertakings in the Conveyance of Documents, Etc.: Study 522 of the Consultative Council for Postal Studies," §§ 1.2, 1.3 (1984). Coincidentally or not, the 1979 Congress was convened just as the United States was concluding a long public policy debate over whether the postal monopoly law should prohibit the carriage of urgent letters by private express companies. See Part 1, above. The U.S. Postal Service, as representative of the United States, was an active participant in the committee studying the use of postal monopoly laws to combat private competition.

[5]1984 Hamburg Congress, Proposal 2006.91. The vote was 11 for, 90 against, 10 abstentions. It appeared to observers at the Congress that some votes against the resolution were cast in

A second anticompetitive measure was the product of the postal monopoly study initiated by the Rio de Janeiro Congress. It was a resolution calling on member countries to enforce postal monopoly laws against national and international couriers. Under the resolution, the Hamburg Congress unanimously agreed that the UPU

> Considering . . . the serious consequences for the postal services and, ultimately, for national and international postal communications networks which would result from the elimination or weakening of the postal monopoly.
>
> Appeals to the governments of the Union member countries:
>
> a. to maintain the postal monopoly in order to ensure that all of their citizens have equal access to a universal service;
> b. to define clearly the items which fall within the scope of the postal monopoly; and
> c. where appropriate, to instruct Customs and other national authorities to assist the postal authorities in enforcing the postal monopoly.[6]

A third resolution related to development of "international high-speed mail service." The Hamburg Congress instructed the Consultative Council to develop plans for such a service "with the utmost urgency" in order "to meet the competition from certain companies specialized in the transport and delivery of documents and small parcels."[7]

The Hamburg Congress also approved a short statement, the "Declaration of Hamburg on the role of the UPU in the integration of national postal networks." The Declaration of Hamburg is notable because it was the first occasion in which the UPU announced an explicit commercial role for itself.

> Congress, . . . considering the growing competition which administrations have to face particularly in sectors not protected by the postal monopoly; . . . formally declares that the UPU must actively participate in strengthening the international postal service as a whole and in improving the standard and speed of international mail circulation and postal exchanges.

WASHINGTON CONGRESS, 1989

The 1989 Washington Congress met in the shadow of the European Remail Case, under investigation since July 1988.[8] The Washington Congress carried forward the antiremail efforts of the Remail Conference by adopting a new terminal dues system designed to decrease incentives for remail and by encouraging "preferential rates to major users" of international mail to "contribute to increasing postal service competitiveness in order to retain or regain its market share in the letter-post sector which is particularly threatened

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confusion over the wording of the resolution. For an explanation of types and numbering of UPU documents generally, see the note in the Bibliography at the end of this book.

[6]1984 Hamburg Congress, Resolution C 26.

[7]1984 Hamburg Congress, Resolution C 25.

[8]See Part 6, above.

by the competition."[9]

Expanding on the Hamburg Declaration, the Washington Congress adopted an elaborate commercial plan of action, the "Washington General Action Plan."

> Congress . . . considering . . . the increased intensity of competition on postal markets . . . ; exhorts administrations to make every effort to . . . know the market better and to monitor the competition with a view to increasing the competitive position of postal products; approves the attached Washington General Action Plan . . . ; instructs the Executive Council (EC), the Consultative Council for Postal Studies (CCPS) and the International Bureau to take without delay . . . appropriate measures to prioritize, to achieve the objectives set and to implement the activities contained in the Washington General Action Plan . . . .[10]

The actual plan of action was prepared by the Executive Council and appended to the resolution; it was a list of program titles and general objectives too detailed to receive specific attention by the Congress. In this manner, the Washington Congress delegated broad authority to the permanent institutions of the UPU to act between congresses to aid post offices in their competition with private delivery services.

At the same time, the Washington Congress took the first step towards shifting legislative authority from Congress to the UPU's permanent committees. According to historic practice, acts and agreements of Congress were considered acts of government, signed in Congress by plenipotentiaries and subsequently "ratified or approved by member countries according to their constitutional provisions.[11] Implementing regulations were drafted and approved by representatives of postal administrations also acting in Congress.[12] Departing from this practice, the Washington Congress authorized the Executive Council to "draw up" a final version of the Detailed Regulations after preliminary consideration by Congress and to approve amendments to the Detailed Regulations between congresses.[13]

SEOUL CONGRESS, 1994

The 1994 Seoul Congress was faced with still greater and broader threats to the old order. In 1991, the post offices of Canada, France, Germany, Netherlands, and Sweden abandoned the International Post Corporation as a

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[9]Convention § 19(12bis) (1989). *See* 1989 Washington Congress, Proposal 3019.11; Doc 56, "Remailing" § 19 (Jul 7, 1989) ("In Proposition 3019.11, the EC [UPU Executive Council] aims expressly to authorize post offices to grant preferential rates to their large mailing customers so that they can compete better with remail firms for the most lucrative traffic.").

[10]1989 Washington Congress, Resolution C 91.

[11]Constitution § 25 (1989).

[12]According to the plan of the original UPU congress in 1872, provisions of a permanent governmental nature were to be included in the Universal Postal Convention and provisions of a more operational nature were to be included the Detailed Regulations. In fact, this scheme was never followed, and provisions of different legal weight appeared in both sets of provisions.

[13]General Regulations §§ 102.6.2, 121.2 (1989).

mechanism for developing international express mail service and formed a joint venture with a major international private express company, TNT. In 1992, the European Commission announced its Postal Green Paper, calling for liberalization of international postal services and separation of governmental and commercial functions. In 1993, the European Commission ruled preliminarily that the tactics of the Remail Conference violated European competition law.

The Seoul Congress extended the delegation of broad commercial and governmental authority to the UPU's permanent bodies. Congress abolished the Executive Council and Consultative Council for Postal Studies and replaced them with a Council of Administration (CA), composed of delegates from forty-one governments, and a Postal Operations Council (POC), composed of delegates from forty post offices. Under the new arrangement, the Council of Administration became responsible for general principles and policies, primarily for mandatory services. The Postal Operations Council became responsible for operational and commercial aspects of all services and activities, mandatory and optional. The new arrangement represented a largely symbolic gesture towards separation of governmental and commercial functions. More substantially, the new organization confined the role of Congress to general oversight.[14] Texts of the Convention and Detailed Regulations were "recast" or reorganized so that only major principles were retained in the Convention; the bulk of legal provisions were moved to the Detailed Regulations. While Congress remained legislator of the Convention, authority to revise, approve, and amend the Detailed Regulations was vested in the Postal Operations Council with limited oversight by the Council of Administration.[15]

While increasing the governmental authority of the UPU's permanent committees, the Seoul Congress also increased their commercial and competitive roles. The Seoul Congress adopted a "Seoul Postal Strategy" comparable in detail and organization to the Washington General Action Plan.[16] In addition, Congress approved "in principle" draft versions of a strategic plan, operational plan, and financial plan and authorized the permanent committees of the Union to implement the plans "in the manner they consider most appropriate."[17] The permanent committees of the Union were instructed to address such competitive activities as postal parcels ("to serve postal customers better and to combat competition"), electronic mail, express services ("to maintain the competitiveness of EMS [express mail] in the marketplace"), and financial services ("if they are to remain

[14]1994 Seoul Congress, Resolution C 46.

[15]Constitution §§ 22, 25 (1994); General Regulation § 122 (1994). A few Detailed Regulations were approved by Congress. 1994 Seoul Congress, Resolution C 94.

[16]1994 Seoul Congress, Resolution C 95; Doc 87.

[17]1994 Seoul Congress, Resolution C 76; Doc 74 (45-page description of draft plans).

competitive").[18]

BEIJING CONGRESS, 1999

The 1999 Beijing as discussed below, continued the process of commercializing the Universal Postal Union by further reducing the role of Congress and combining governmental and commercial powers in the Postal Operations Council.

EARLY RELATIONS BETWEEN UPU AND COURIERS

Interest in UPU policy developed gradually among international couriers. Although DHL was aware of a UPU inquiry into its activities as early as 1979. it could not and did not try to affect this investigation. Likewise, DHL followed with concern the UPU study on use of postal monopoly laws to restrict activities of international couriers and other anticourier proposals brought before the 1984 Hamburg Congress but lacked resources to oppose them. In 1985, DHL urged the United States government to examine potentially anticompetitive elements of the 1984 Universal Postal Convention before ratification. When senior officials in the Reagan Administration raised the possibility of a reservation against antiremail provisions, the U.S. Postal Service and governmental allies bypassed doubters in Washington by submitting the convention to the President on May 1, 1986, when the President was attending an economic summit in Tokyo.[19]

Courier attention towards UPU policy increased after 1986 as a result of two forays into public policy. The first was the effort of the International Express Carriers Conference at the Customs Cooperation Council to encourage faster and simpler customs treatment of express shipments. Noting the UPU observer at CCC meetings, the IECC sought UPU support for customs reforms. As it turned, the UPU was unwilling to support a principle of similar customs treatment for similar shipments because it jeopardized special privileges for post offices enshrined in the Universal Postal Convention. The second policy activity was the IECC's effort to defend international remail. As the post offices' antiremail campaign unfolded in 1987 and 1988, it became apparent that full liberalization of remail required changes in the Universal Postal Convention, particularly in provisions relating to terminal dues and interception of remail.

By November 1989, when the UPU Congress met in Washington D.C., the International Express Carriers Conference and Air Courier Conference of America had resolved to call public attention to the growing tendency of the UPU to employ governmental means to achieve commercial ends. On December 1, in a joint press conference held outside the building where the

[18]1994 Seoul Congress, Resolutions C 10, C 47, C 48, and C 61, respectively.

[19]The Postal Service implemented the Convention without presidential ratification on January 1, 1986.

UPU was meeting, IECC Chairman Gordon Barton demanded separation of commercial and governmental functions at the UPU:

> The Universal Postal Union is a multilateral organization which has lost touch with the public it is supposed to serve. Far from serving "the noble aims of international collaboration in the cultural, social, and economic fields" (as stated in the UPU Constitution), the UPU has become a secretive conspiracy of commercial interests which misuses governmental power for narrowly selfish and anticompetitive purposes. . . . Instead of neutral regulatory policy, the focus of the 20th Congress of the UPU has been: (i) to devise methods to intervene in the market on behalf of their own commercial interests and (ii) to discourage competition between post offices for the business of the international mailing public and to strengthen an international cartel of postal service.

Couriers hoped that such publicity would be effective with the United States government, host of the 1989 Congress, because U.S. government officials were largely ignorant of policy positions being advocated by the U.S. Postal Service in the name of the United States. As U.S. government officials belatedly compared the proposed postal convention with the principles of U.S. trade policy, they concluded that further review was needed before ratification. ACCA urged the government to file a general reservation to the 1989 Universal Postal Convention at the signing ceremony on December 14. Under the proposed general reservation, the United States would reserve the right to review the Convention and related agreements and later register additional, specific reservations.[20] On December 12, 1989, a high level meeting of officials from the U.S. Departments of Justice, Commerce, and State, the Office of Management and Budget, the U.S. Trade Representative, and the U.S. Postal Service recommended (with the Postal Service dissenting) inclusion of a general reservation in signing the Convention. On December 13, the eve of the signing, the Postal Service persuaded the President's chief of staff, John Sununu (an avid stamp collector) to overrule the government departments and instruct the U.S. delegation to sign the UPU agreements without general reservation.

On January 31, 1990, Postmaster General Tony Frank wrote to members of the U.S. Congress and implied that ACCA and IECC had misled the public in order to maintain an unfair competitive edge over post offices:

> The lobbyists for the remailers are criticizing, falsely in my view, that the UPU decision on terminal dues threatens private competition. Since the new terminal dues structure will require large volume administrations to make payments on a more cost related basis, remailers will also find it more difficult to offer services at below cost prices.[21]

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[20]Use of a general reservation was required because, under the terms of Constitution § 22(6) (1989) a reservation must be set out at the time of signing the Convention. After signing, a member country may only ratify or not ratify the agreements as a whole.

[21]Letter from Anthony M. Frank, Postmaster General, to the House of Representatives, dated

Thomas Leavey, head of the Postal Service's international affairs division and chairman-designate of the UPU's Executive Council, was dismissive, suggesting the IECC's charges were no more than "theatrics."[22]

The response of the Postal Service was disingenuous. As noted in Part 6, above, since 1988 the IECC had been prosecuting a complaint before the European Commission that would have required post offices to align terminal dues with domestic postage, eliminating the possibility of unfair advantage and below cost pricing for all parties.[23] In June 1987, IECC counsel had met with Mr. Leavey and urged Postal Service support for this approach. Thereafter, the Postal Service played a leading role in defending the UPU terminal dues scheme and its distortions, from which the Postal Service benefitted financially. In April 1993, in the Statement of Objections adopted in the Remail Case, the European Commission confirmed the obvious: that the terminal dues arrangements of the 1989 Convention were not based on costs, distorted competition, and deviated from principles of fair competition. Far from supporting cost-based terminal dues, the U.S. Postal Service was the chief opponent of such reform.

The Postal Service's response spurred the Air Courier Conference of America to seek a more active role in addressing UPU policy. On October 15, 1990, ACCA asked President Bush to include an ACCA representative in the U.S. delegation to the Universal Postal Union.[24] On April 15, 1991, the Department of State denied ACCA's request, citing provisions of the UPU's General Regulations which it interpreted as prohibiting the U.S. delegation from including nonpostal officials. As an alternative, the Department of State suggested the express industry apply for observer status at the UPU.[25]

PRIVATE OPERATORS-UPU CONTACT COMMITTEE

In April 1991, the International Express Carriers Conference and regional express associations applied to the Universal Postal Union for observer status. These requests were denied by the UPU Executive Council, now chaired by Mr. Leavey of the U.S. Postal Service. As an alternative, the Executive Council established a "Private Operators-UPU Contact Committee" meeting outside the course of UPU proceedings.

The Contact Committee met four times prior to the 1994 Seoul Congress. An introductory meeting was held on October 19, 1992. At the second meeting,

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January 31, 1990, at 2.

[22]"USPS Comments on Announcements of International Express Mail Couriers: Statement by Thomas E. Leavey, Assistant Postmaster General, International Postal Affairs; Chief of Staff, 20th Universal Postal Congress." (Press release, Dec 1989).

[23]The U.S. Postal Service appears to be immune from U.S. antitrust law so a corresponding case in U.S. courts was impossible.

[24]Letter from J.I. Rhodes, President, ACCA, to President Bush, dated Oct 15, 1990. ACCA renewed its request in a second letter on March 6, 1991.

[25]Letter from John Bolton, Assist. Sec. of International Organization Affairs, Department of State, to Peter Farkas, counsel for ACCA, dated April 15, 1991.

on May 3, 1993, the express industry proposed establishment of a working party to consider jointly ideas for reform of the UPU and the international legal framework for transportation of documents and parcels. Although these subjects were under active review by the UPU internally, the Executive Council refused to form a working party with the couriers. Undeterred, at the third meeting of the Contact Committee, held on October 18, 1993, the express industry tendered a Six-Point Reform Plan. These proposals were dismissed by the UPU Executive Council in a paper presented at the same meeting. At the fourth meeting of the Contact Committee, held on February 7, 1994, the IECC presented a paper explaining why it believed the UPU's reasons for rejecting the Six-Point Reform Plan were unpersuasive. The Chairman of the UPU Executive Council criticized the IECC at length for its presumption and declared:

> this forum is not an appropriate one in which to discuss—in effect—the fundamental principles on which the UPU is based as an inter-governmental organization. It is—I repeat—for governments to decide what arrangements are in the interests of their citizens in the postal sphere. I do not feel, therefore, that any useful purpose would be served by further discussion of "UPU Reform" in this Committee.[26]

Chapter 28 reproduces the Six-Point Reform Plan presented by the IECC in the third meeting of the Contact Committee and the IECC's response to the critique of the UPU secretariat, presented in the fourth meeting of the Contact Committee.

The 1994 Seoul Congress reconstituted the Contact Committee but limited its mission to operational issues without policy import. On April 26, 1996, the Contact Committee met with little to discuss. On October 10, 1997, the IECC suggested dissolution of the Contact Committee by mutual agreement and again declared its interest in observer status at UPU meetings of a legal or governmental nature. The new Chairman of the Council of Administration, a Korean postal official, replied by encouraging the IECC to attend a meeting of the Contact Committee in April 1998. The IECC agreed reluctantly.

In the meeting on April 30, 1998, it transpired that the UPU had effectively decided to resume meetings of the Contact Committee while ignoring limitations on the role of the committee agreed in the Seoul Congress. In this meeting, UPU officials summarized several reform studies underway in the UPU. The two most important were initiatives by the German and Dutch ministries with authority over postal affairs. After a review of the UPU concept of the "single postal territory," the German ministry proposed that the role of the UPU should be redefined along commercially neutral lines. The UPU, proposed the Germans, should establish a framework of laws applicable to the international transmission of documents and parcels by all types of operators,

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[26]UPU International Bureau, Draft "Report of the Private Operators-UPU Contact Committee, Berne, 7 February 1994" at § 23.

postal and private. The Dutch ministry proposed that in future interested observers should generally be admitted to UPU meetings, ending the historic rule of secrecy surrounding UPU deliberations. In addition, the Italian ministry reported on proposed changes in the UPU terminal dues system and the French ministry proposed amending the Convention to impose a universal service obligation of undefined scope on member countries.

On October 14, 1998, private operators met again with the UPU in Berne. The IECC expressed strong support for the German proposal for a redefinition of the single postal territory and the Dutch proposal for admission observers at future UPU meetings. There was, however, little opportunity for dialog; much of the meeting was occupied by prolonged argument between post offices, some post offices objecting to "invasion" of their national markets by other post offices. The United States, prompted by the Postal Service, moved to block the Dutch proposal on admission of observers by offering an alternative proposal to create an Advisory Group without observer rights.

On February 11, 1999, the Contact Committee met for the last time before the Beijing Congress. The focus of this meeting was a paper by the IECC, "Suggestions for UPU-IECC Co-operation." Although, by mutual agreement, the paper avoided controversial topics, no decisions were taken. During this meeting, the IECC renewed its request for observer status at UPU meetings. The following week, the Council of Administration granted the request of the IECC for observer status at the Beijing Congress due to the insistence of the United States, now led by the Department of State.

U.S. POSITION AT THE BEIJING CONGRESS

In late 1998, there appeared to be a possibility, however slim, that the Beijing Congress could be induced to move towards basic reform, i.e., separation of commercial and governmental functions and commercially neutral conventions. The key factor suggesting this possibility was the October 1998 law transferring authority to represent the United States at the UPU from the Postal Service to the Department of State.[27] Since the Washington Congress in 1989, support for diverse reform measures had been expressed by northern European countries, by Australia and New Zealand, and by certain developing countries, but UPU reform had effectively been blocked by hostility from the United States. Few reform-minded governments were willing to waste political capital in pursue of liberalization of the UPU if the United States, champion of deregulation and home of the largest private express companies, was opposed. If the Department of State were willing to take a stand in favor of genuine reform, progress might be feasible.

Chapter 29 reproduces a petition by Air Courier Conference of America to the Department of State filed on November 18, 1998. ACCA asked the Department to initiate an open, public inquiry into the goals of U.S. policy at

[27] See Part 8, above.

the Beijing Congress and prepare a formal statement of position. The ACCA petition identified several issues that, in ACCA's view, should be addressed by the proposed statement of position. ACCA further asked the Department of State to adopt transparent procedures for distributing UPU documents and policy submissions by interested parties and to treat all interested parties in an evenhanded manner in selecting the U.S. delegates to the Beijing Congress. The purpose of the ACCA submission was twofold: to educate Department of State officials on issues presented by UPU reform and to begin the process of developing a U.S. position as soon as possible in light the imminence of procedural deadlines which required UPU member countries to submit proposals for amendments well in advance of the Beijing Congress.

The Department of State did not grant the ACCA petition nor adopt an evenhanded approach towards development of U.S. policy. Without responding to ACCA explicitly, the Department allowed time to pass without initiating an open, on the record inquiry into the goals of U.S. policy towards to the UPU. Likewise, the Department refused to adopt transparent procedures for distribution of relevant documents and submissions. On the contrary, it granted access to intragovernmental policymaking meetings to one interested party, the U.S. Postal Service, excluding private operators and mailers. When official credentials were handed out, the U.S. delegation to the Beijing Congress included one representative from the private express industry, one representative from mailers, and more than 30 representatives from the U.S. Postal Service. The overwhelming preponderance of Postal Service delegates contrasted sharply with the fact that, according to Postal Service market surveys, private express companies accounted for more than half of the U.S. international mail market.

Nonetheless, the Department of State did respond to the ACCA request in significant respects. The Department consulted with the private express industry and other non-postal parties to unprecedented degree. Addition of a representative from the private express industry to the U.S. UPU delegation was unprecedented. The Department urged private express companies to prepare draft amendments which the United States might propose in the Beijing Congress. The Department also gave interested U.S. parties access to documents posted on the UPU's internal internet web site, thus allowing access to official proposals for the Beijing Congress although not to submissions to the Department of State by interested U.S. parties.[28]

Accepting the Department's invitation for suggestions, on January 14, 1999, Federal Express submitted a set of draft proposals which it urged the Department to sponsor for consideration by the Beijing Congress. Most took the form of amendments to drafts of the Universal Postal Convention and associated regulations prepared in advance of the Beijing Congress by the

[28]*See generally*, General Accounting Office, "Postal Issues: The Department of State's Implementation of its International Postal Responsibilities" (Jan 2000).

Council of Administration and the Postal Operations Council. The Federal Express proposals, later endorsed by the Air Courier Conference of America, were revised several times in attempts to meet objections of the Postal Service. In the end, the Department of State declined to offer any of the private express companies' amendments to the acts of the Beijing Congress.[29]

Although the Department declined to endorse specific amendments advocated by private express companies, it was persuaded to launch a major reform initiative, Proposal 033. This proposal was the most important and far reaching reform on the agenda of the Beijing Congress. It called upon the Council of Administration to make the UPU more open and transparent and to convene an Extraordinary Congress in 2001 to reconsider the fundamental principles of the Union. As drafted by the Department of State, Proposal 033 would have instructed the Extraordinary Congress to address most issues raised by the private express industry.

THE BEIJING CONGRESS, 1999

The Beijing Congress met for almost four weeks in August and September 1999. From the beginning the Congress was characterized by a sharp clash between governments sympathetic to reform and those opposed. The vision of a competitively neutral legal framework was supported by a small but important minority of countries. Germany articulated this view as follows:

> Germany would like to propose to re-organize the Universal Postal Union's responsibilities into tasks to be fulfilled by member states and tasks that are the responsibility of the public postal operators. It would for instance be the responsibility of the *member states* to guarantee the smooth functioning of international postal services through national legislation. The states would also have to decide on postal services for which there are obligations for conveyance in international postal services. The *public postal operators* are responsible for their own operational matters. . . . In order to define these responsibilities more clearly it is necessary in our view to establish a specific form of participation for public postal operators in the Universal Postal Union. . . . to react to the trends on global postal markets, *new* suppliers of postal services should must [sic] also be involved, and a mode for their participation in the Universal Postal Union should be found.[30]

In addition to the United States and Germany, proponents of UPU reform included the Netherlands, United Kingdom, Nordic countries, Australia, New Zealand, and some developing countries. Votes on key issues suggested a group of about thirty countries supported this position in whole or substantial part.

In contrast, most countries in the Beijing Congress opposed reform. The

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[29]The Department also declined to sponsor two anticompetitive proposals drafted by the Postal Service based on objections by private express operators, although these two proposals represented but a miniscule part of the Postal Service's input into the Beijing Convention.

[30]1999 Beijing Congress, Doc 63 Add 2 Ann 1.

antireform faction was led by Canada, France, Japan, and the UPU Director General. For example, Canada trenchantly summarized its position as follows:

> The Canadian Delegation strongly believes that it is ill advised to move towards opening up the Union more widely to other stakeholders at this juncture. Doing so could jeopardize the successful adaptation of services in a constructive and well-planned environment. The proposal to confer consultative status to other stakeholders raises real issues of commercial confidentiality and of an ability to chart out strategies.
>
> Furthermore, the Canadian Delegation strongly believes that an Extraordinary Congress in the period prior to the 2004 Congress is both unnecessary and likely to detract from full focus on postal improvement initiatives. We should not play into the hands of private competitors who want to promote their own agenda.
>
> We need to ensure that the Union does not rigidly divide into regulator and operator camps. UPU should follow the evolution at the national level and not take the lead on it.[31]

The battle between pro and antireform forces focused on three issues: (i) admittance of the IECC to UPU proceedings, (ii) the Dutch proposal to permit observers at future UPU meetings, and (iii) the U.S. proposal to convene an Extraordinary Congress in 2001. The well-organized antireform countries won each issue.

The question of admission of the IECC to UPU proceedings was based on a technicality. Although the Council of Administration invited the IECC to be an observer at the Beijing Congress, the work of Congress was conducted in committees of the whole Congress, and UPU rules provided that admission to committee meetings was subject to approval by the committees themselves. Opponents of reform were successful in blocking IECC admission to all key committee meetings by interposing such arguments as "the Committee [on General Matters and Structure of the Union] dealt with the internal issues of the Union, which did not have any relevance with the work of the IECC; these issues were of sensitive and strategic nature, where the presence of the IECC was not desirable."[32] The IECC was not even admitted for the purpose of making a statement on why it should be admitted (the Director General read a statement prepared by the IECC). Objection to attendance by the IECC focused on the fact that IECC members are commercial competitors of post offices rather than on the non-governmental status of IECC members; other non-governmental observers were admitted. Since the gravamen of reform was separation of commercial and governmental functions, barring the IECC from discussion of governmental policy on the grounds that such discussions were commercially sensitive was tantamount to a decision to reject reform.

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[31]"Canadian Delegation Position Statement" at 1-2 (emphasis added) (distributed at the Beijing Congress but not published as an official document).

[32]Doc C 3 Rapp 1 at 2 (objection to IECC attendance in Committee 3 dealing with the institutional organization of the UPU).

The Dutch proposal to admit observers to future UPU meetings was likewise a test of openness and commercial impartiality. The 1994 Seoul Congress had instructed the Council of Administration to consider a change in UPU rules to allow admission of observers to meetings of UPU bodies. The Netherlands, reporting country for this study, recommended establishment of a new "consultative status" that would permit admission of non-governmental observers to all UPU meetings under certain restrictions. This proposal contemplated admission of groups such as consumer associations, mailer groups, private operators, and employee organizations "whose interests and activities are directly related to the objectives and activities of the Universal Postal Union and which are able to contribute to the work of the Union." After considerable debate, the Beijing Congress rejected the Dutch proposal and accepted instead a proposal to create an "Advisory Group" composed of non-governmental organizations and a range of postal officials. A proposal to permit the Advisory Group to send observers to UPU meetings was also rejected; the Advisory Group was no more than a diffuse contact committee.[33]

The final and most important reform issue was the American proposal to convene an Extraordinary Congress in 2001. This proposal was the subject of intense backroom maneuvering during the entire Beijing Congress. Antireform forces prevented the U.S. proposal from ever coming to a vote. Instead, an ad hoc working party developed a compromise proposal. In lieu to the Extraordinary Congress, the working party recommended creation of a powerless committee called the "High Level Group," to study "the future mission, structure, constituency, financing, and decision-making of the UPU." This "compromise" was accepted by the Beijing Congress, and twenty-four countries were appointed to the High Level Group. The High Level Group was placed under the Council of Administration and staffed by the International Bureau. The Beijing Congress directed the High Level Group to prepare an interim report in October 2000 and a final report in 2001. The Council of Administration, if it considered proposals of the High Level Group meritorious, would be authorized to convene "a High Level Meeting of all UPU members" to consider changes in the UPU's legal framework. The Council of Administration was further directed to decide whether this meeting is to have "the necessary plenipotentiary status, consistent with the Constitution, in order to take decisions."[34]

Rather than relying more on the marketplace, the Beijing Congress grandly proclaimed "The right to communicate has been recognized as a fundamental human right" and adopted a document called the "Beijing Postal Strategy" authorizing the permanent bodies of the UPU to advance this right over the following five years. The Beijing Postal Strategy broadly instructed the UPU to fashion post offices into a successful competitor in the global

[33]1999 Beijing Congress, Resolution C 105.
[34]1999 Beijing Congress, Resolution C 110.

marketplace through coordination, legal prescription, market research, and developmental aid.[35] The UPU was also directed to scout out new sources of revenue for post offices, such as email, hybrid mail, logistics, joint ventures with customers, financial services, and freight services.[36] In legal terms, the Beijing Congress moved to combine further commercial and governmental functions. As in 1994, the acts of the UPU were recast. As a result more than 80 percent of binding legal texts (Letter Post Regulations and Postal Parcels Regulations) were placed under the exclusive legislative jurisdiction of the Postal Operations Council.[37]

Although proreform efforts of the United States met little successful on the floor of the Beijing Congress, the United States did, as urged by private express companies, offer limited protest by resort to formal declarations and reservations. In response to the decision of the Beijing Congress to perpetuate provisions of the Universal Postal Convention that provided for discrimination in customs treatment of postal and private shipments, the United States declared:

> The United States of America urges the Universal Postal Union to collaborate with the World Customs Organization on development of principles and standards for non-discriminatory customs clearance for both public and private operators. These principles and standards should respect the needs of both public and private operators to move goods expeditiously and without undue impedance and the needs of customs administrations to maintain border controls required to protect the public interest. The United States of America is further of the view that nothing in the Acts of the Union precludes member countries from establishing customs clearance procedures for private operators that are comparable to the procedures for public postal operators.[38]

With respect to remail and terminal dues, the Beijing Congress reenacted provisions which tended to allocate international postal markets and distort international commerce. In response to the terminal dues provision of the 1999 Convention, the United States declared:

> The United States of America supports the terminal dues system as adopted by the Beijing Congress, acknowledging it as a significant but incomplete measure that moves the system toward a sound economic basis for compensating postal administrations. It is the policy of the Government

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[35]1999 Beijing Congress, Resolution C 103 and Doc 64.

[36]Resolutions of Beijing Congress directing the permanent bodies of the UPU to undertake work of a commercial or competitive nature include the following: C 36 (development of postal markets), C 39 and C 40 (postal financial services), C 44 (quality of service by public postal operators), C 45 (international reply service), C 50 and C 80 (postal parcels service), C 52 (postal telematics), C 61 (product mix of post offices), C65 and C68 (market and competitive analysis), C 66 (postal marketing in developing countries), C 69 (measurement of customer satisfaction), C 71 (best practices in direct marketing), C 75 (international postal air freight service), C 76 (electronic and hybrid mail), and C 79 (global package service for direct marketers).

[37]*See* 1999 Beijing Congress, Doc 36.

[38]1999 Beijing Congress, Declarations Made on Signature of the Acts VII (1999).

> of the United States of America to pursue vigorously further terminal dues reform, which will maintain a viable, efficient and universal international mail service, provide proper compensation to postal administrations for the delivery costs they incur and review the need for Article 40 restrictions. Further, the United States anticipates that such a system should be adopted no later than the year 2005, and substantially earlier for exchanges of mail between industrialized countries.[39]

The United States also filed a legally binding reservation to the provision in the Convention authorizing post offices to intercept remail. The United States insisted on the primacy of principles of the General Agreement on Trade in Services, as follows:

> with respect to members of the World Trade Organization, the United States of America reserves the right to implement these terminal dues agreements in accordance with the provisions adopted in future negotiations involving the General Agreement on Trade in Services.[40]

In explaining its reasons for this reservation, the United States noted the "the growing blur between private delivery services and competitive services of the postal operators" and potential application of GATS principles:

> Some member countries of the World Trade Organization are considering the inclusion of postal services and express delivery services in the new round of General Agreement on Trade in Services (GATS) negotiations that will be launched in Seattle in November 1999. Because of the growing blur between private delivery services and competitive services of the postal operators, the exact scope of the talks is still unknown. In the view of the United States of America, its negotiators participating in the Seattle meeting need flexibility to negotiate without being limited by the decisions on terminal dues taken at the Beijing Congress.
>
> Should the next round of GATS negotiations require different terminal dues arrangements from those adopted by the UPU, in the view of the United States of America such new arrangements will apply only to members of the World Trade Organization that have accepted them. . . .
>
> It is also the view of the United States, however, that the UPU must monitor closely developments in WTO and in GATS and take these developments into account as it continues with its own further examination of the terminal dues system. It believes that important steps have been taken at the Beijing Congress toward the introduction of a more economically sound and cost-based terminal dues system. Nevertheless, further work is urgently needed to help developing countries participate in economically sound terminal dues arrangements and in eliminating market distortions and compensation inadequacies still inherent in the new UPU terminal dues structure.[41]

Despite its seemingly limited nature, the U.S. reservation provoked a

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[39]Ibid.
[40]Convention, Final Protocol XXIV.10 (1999) .
[41]1999 Beijing Congress, Proposal 23.20.914.

strong reaction from other countries. Forty-four countries—including Canada, France, Mexico, but not including the United Kingdom or Japan—filed a "counter reservation" against the U.S. reservation reserving the right to "the right to fully apply the provisions approved by the Beijing Congress regarding terminal dues" regardless of the U.S. reservation.[42] In effect, such countries took the position that they will not accept any effort to bring terminal dues into conformance with principles of GATS prior to the effective date of the next Universal Postal Convention, 1 January 2006. Several other important reservations and counter reservations relating to terminal dues and remail were also filed.[43]

After almost of decade of pleas by the private express industry, the Beijing Congress was the first in which concepts of genuine reform were articulated and discussed. Although the Congress registered emphatic opposition to reform on every key issue, divisions with within the Congress served to highlight the anticompetitive purposes of the Union and may yet stimulate future reform work in the World Trade Organization or other forum.

HIGH LEVEL GROUP

The High Level Group established by the Beijing Congress convened in Berne on December 1, 1999, and organized itself to work towards the interim report due in October 2000. The Group chose Young-su Kwon of the Republic of Korea, outgoing chairman of the Council of Administration, as chairman. A major outcome of the first meeting was a decision to distribute a questionnaire to stakeholders asking views on the future of the UPU. This questionnaire was finished at the Group's second meeting, held on February 17-18, 2000. The U.S. Department of State, in particular, urged private express companies "to take the questionnaire seriously and to take advantage of the open-ended questions to more fully explain their views on the operation of the UPU."

Chapter 30 reproduces the response of the International Express Carriers Conference to part 6 of the questionnaire of the High Level Group, submitted on April 7, 2000. Most of the questionnaire sought comment on the specific activities of the UPU which did not affect the IECC directly. Part 6, however, was an openended question: "How would you like to see the UPU develop in the future?" In its comment, the IECC sought to present a durable vision of a commercially neutral international legal framework for provision of global, as well as nationally based, delivery services in the hope of raising the level of policy discussion within and without the High Level Group.

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[42]Convention, Final Protocol XXIV.11 (1999).

[43]*See* Convention, Final Protocol XXIII.6 (1999) (reservation of Germany relating to remail); XXIV.7 and XXIV.8 (reservations of Germany, United States, Netherlands, and United Kingdom relating to terminal dues).

28

IECC Six-Point Plan for UPU Reform (1993)

A Six-point Plan for Reform of the Universal Postal Union

1 Separate Regulatory and Commercial Functions

Problem. The Universal Postal Convention and other Acts of the Universal Postal Union (UPU) have the force of international law. The UPU is controlled by an Executive Council of forty member governments which are exclusively represented by postal officials. In 1989, the Executive Council gained legislative authority to revise UPU Acts between Congresses, held every five years. The exercise of regulatory authority by postal officials who are also engaged in commercial competition has led to an anti-competitive legal regime which distorts trade at national and international levels. These distortions inhibit healthy development of international delivery services.

Proposed reform. The UPU should completely separate regulatory and commercial functions. Regulatory activities should be open to public participation; membership in the regulatory council should be limited to governmental officials who are not associated with national postal administrations. The UPU Director-General should be impartial, and the UPU itself should be commercially neutral, serving the broader needs of international commerce and society rather than the limited, special interests of

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International Express Carriers Conference, "A Six-Point Plan for Reform of the Universal Postal Union" (Private Operators-UPU Contact Committee meeting of Oct 18, 1993) *and* "Reply of the International Express Carriers Conference to Comments of the Universal Postal Union on the Private Operators' Six-point Reform Plan" (Jan 26, 1994) (Private Operators-UPU Contact Committee meeting of Feb 7, 1994). The first paper was jointly presented on behalf of the IECC, the Association of European Express Carriers, the European Express Organisation, and the Air Courier Conference of America (International Committee).

postal administrations.

2 SEPARATE EXPRESS AND POSTAL MARKETS

Problem. In several developing countries, express services are subject to the postal monopoly and either prohibited outright or heavily taxed. There appears to be no economic justification for such treatment.

Proposed reform. The UPU should adopt guidelines that give official, worldwide recognition to the legal approach adopted in many countries that distinguishes between express and postal services and limits traditional postal monopoly laws to the latter.

3 ADOPT SOUND ECONOMIC PRICING PRINCIPLES

Problem. Article 20, paragraph 15, added in 1989, encourages postal administrations to protect market share by giving major customers "preferential" prices that can be as low as the lowest domestic rate applicable to similar mail. Given the differences between domestic and international postal costs and the absence of controls on postage rates in many countries, this standard could imply UPU approval of a pricing scheme whereby high rates on some postal services are used to cross-subsidize below cost pricing of others. At the same time, the Convention is conspicuously silent on the elementary principle of economic justice that all services should cover long term marginal costs.

Proposed reform. The UPU should delete article 20, paragraph 15 and replace it with guidelines requiring international postage to cover long-term marginal costs and, in developed countries, a reasonable share of institutional costs.

4 EQUALIZE LEGAL TREATMENT OF POSTAL AND PRIVATE SHIPMENTS

Problem. The UPU fosters preferential customs treatment of postal shipments, compared to private shipments, by officially requiring countries to provide special treatment for postal items and by issuing simplified "customs" forms. This retards the growth in private parcel shipments and reduces the political pressure for across-the-board customs simplifications. Numerous other legal advantages are enjoyed by postal administrations in areas such as transport law and taxation. Such legal distinctions between public and private delivery services do not appear to be justified by economic or law enforcement considerations.

Proposed reform. The UPU should adopt a principle of equal legal treatment for all operators, public and private.

5 REPEAL ARTICLE 25 OF THE UPU CONVENTION

Problem. Article 25 authorizes each postal administration to refuse to forward or deliver mail that is posted in a country other than the country in

which the mailer resides. Article 25 is a market allocation agreement by which postal administrations act collectively to protect each others' home markets. It affects all mail, not only postal monopoly mail. Article 25 reduces the market for international delivery services by:

i restricting remail;

ii hindering the conduct of international direct mark eting; and

iii penalizing multinational business generally.

Proposed reform. The UPU should delete article 25 from the next Convention.

6 ALIGN TERMINAL DUES AND DOMESTIC POSTAGE

Problem. "Terminal dues" are what postal administrations charge each other for the delivery of international mail. Traditionally, terminal dues are based on worldwide averages, not on the cost of delivery by a specific postal administration. This cost-insensitive approach distorts trade; moreover, to protect the UPU terminal dues structure, still further distortions are urged such as a cross-border postal monopoly and article 25.

Proposed reform. Revise the UPU Convention so that each postal administration pays other postal administrations the same price for the delivery of mail as paid by a large domestic mailer in the destination country.

REPLY OF TO COMMENTS OF THE UNIVERSAL POSTAL UNION ON THE PRIVATE OPERATORS' SIX-POINT REFORM PLAN

INTRODUCTION

1 In the 18 October 1993 meeting of the Private Operators-UPU Contact Committee, the Private Operators proposed a Six-Point Reform Plan for the Universal Postal Union. The Private Operators also renewed their request for observer status at UPU meetings dealing with governmental issues. At the same meeting, the Executive Council of the Universal Postal Union (UPU) rejected most of the proposals of the Private Operators, for reasons set out in a memorandum prepared by the UPU's International Bureau, "Comments on the views of the Private Operators on the subject of reforms in the UPU Acts." CC OP/UPU 1993/2 - Doc 5.3. In this document, the Private Operators respond to the various issues raised by the UPU to justify rejection of the proposals of the Six-Point Reform Plan of the Private Operators (references in this paper are to Doc 5.3 unless otherwise indicated).

2 In response to the Private Operators' reform plan, the UPU begins by suggesting that the Private Operators misconceive the role of the UPU:

> They appear to assume that the UPU has a role in determining the scope of postal monopolies and in making decisions on actions to enforce these monopolies, thereby regulating the activities of private as well as public

> operators. . . . [N]either the UPU nor its bodies determines national enforcement policies. The UPU Acts contain no prescriptions with regard to the concept or the nature of the postal monopoly. [¶¶ 1-2]

3 Nothing in the Private Operators' Six-Point Reform Plan, however, is based upon the premise that the UPU has a role in "determining" the scope of national postal monopolies. On the other hand, much of the Private Operators' reform plan is based upon the fact that the UPU establishes rules which, because they have the force of international law, affect the market for all public and private international delivery services and their customers. The two concepts are not equivalent.

4 Since the UPU has raised the issue, the Private Operators agree with the overall correctness of the position outlined in the UPU's remarks. That is, since the Acts of the UPU do not grant the UPU any authority with respect to national postal monopolies, the UPU should maintain a strict neutrality on the "concept or the nature of the postal monopoly."

5 Unfortunately, the Private Operators must also note that the UPU has not always abided by this ideal standard of conduct. The Private Operators would recall to the UPU such activities as the following:

- In the 1979 congress, the UPU instructed the CCPS to undertake a five-year study of the postal monopoly as a "means of combating competition from private undertakings" and as a "common defense strategy against rival undertakings."[1]
- In a 1984 report, the UPU published the results of this five-year study in a report, "Postal monopoly, ways and means of combating competition from private undertakings in the conveyance of documents, etc." that clearly indicated UPU support for the postal monopoly as a competitive weapon.[2]
- At the 1984 Hamburg Congress, the UPU adopted Resolution C 26 that "appeals to the governments of the Union member countries (a) to maintain the postal monopoly . . . [and] (c) . . . instruct the Customs and other national authorities to assist the postal authorities in enforcing the postal monopoly."
- In 1993, the UPU's International Bureau commented to the European Union on the *Postal Green Paper*. The UPU's comments cited Resolution C 26 as authority and raised a number of objections to proposed liberalisations of the postal monopoly.

6 In addition, the Private Operators would note postal administrations and the UPU have justified Article 25 as a means of enforcing the postal monopoly.[3]

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[1]1979 Rio de Janeiro Congress, Resolution C 78, CCPS work programme for 1979-1984, Annex 1.

[2]International Bureau, "Postal monopoly, ways and means of combating competition from private undertakings in the conveyance of documents, etc.," study 522 of the CCPS (Berne, 1984).

[3]See paragraph 42, below.

7 The Private Operators submit that these acts and activities are inconsistent with a position of neutrality towards "the concept or the nature of the postal monopoly." Yet, as the UPU itself suggests, a strict neutrality towards the postal monopoly appears to be the only appropriate position for the UPU since member governments have not authorized involvement in postal monopoly matters.

8 To clarify its neutrality towards the postal monopoly, the Private Operators suggest that the UPU adopt a resolution at its next Congress that:

- repeals Resolution C 28/1984;
- declares that the UPU has no official position on the "concept or the nature of the postal monopoly"; and
- clarifies that none of the Acts or Resolutions of the UPU should be interpreted as indicating support for or opposition to the concept or the nature of the postal monopoly.

1. THE UPU SHOULD SEPARATE COMMERCIAL AND REGULATORY FUNCTIONS BY CREATING A TEMPORARY "GOVERNMENTAL COUNCIL."

9 In response to the Private Operators' suggestion that the UPU should strictly separate commercial and regulatory functions, the UPU suggests that

> As the UPU has a modest role in terms of regulatory functions, the scope for separating regulatory and commercial functions also appears modest. . . . The real issue here appears to be less a matter of separating regulatory and commercial functions than of separating activities supporting government or universal or reserved service obligations from activities which could be considered commercial or competitive in nature. [¶¶ 4-5].

10 The Private Operators, however, submit that dividing the UPU into an Administrative Council and Operations Council in no way responds to the "real issue" underlying the principle of separation of commercial and regulatory functions.

11 In the *Postal Green Paper*, the European Commission described the concept of separation of commercial and regulatory functions in the following terms:

> *[I]t is essential that the regulatory body be separated from any operational function.* It would seem preferable if the regulatory body was a completely separate institution from the reserved service provider (so that, for example, it was not common for individuals' careers to move frequently from one to the other). However, *the more important point is that all concerned (the consumers, the reserved service provider(s) and the private operators) are all convinced of the regulatory body's impartiality*. . . .
>
> Enforcement of special and exclusive rights is also a significant function. It is important that the responsibilities of the regulator and reserved service operator in this regard are clearly defined. The reserved service operator may initiate action. . . . *It is then for the regulator actually to take the*

> *appropriate action against the operator that breached the special rights*. [emphasis added][4]

12 A commitment to economic systems undistorted by governmental support for one competitor or another is the foundation of Articles 90 and 92 of the Treaty of Rome. Article 90 applies the competition rules to public undertakings as well as private companies. Article 92 prohibits the use of

> any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings. . . .

13 The concept of separation of commercial and regulatory functions is not confined to Europe. In the United States, separation of powers is a fundamental pillar of the Constitution. Under the American legal concept of "due process" of government, separation of administrative rulemaking and commercial functions is especially important where there is a danger that the rule maker might have a financial interest in the proceedings. As the U.S. Supreme Court has written:

> It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. . . . [T]he financial stake need not be . . . direct or positive. . . .[5]

14 Nor is the principle of separation of commercial and regulatory functions merely a recent fashion in governmental reform. The importance of separating legislative and executive functions has long been stressed in Western political thought as a necessary safeguard against the self-interested exercise of governmental power. The European and American formulations just quoted are virtually identical to that of the great English political theorist, John Locke, who wrote in 1690 that executive and legislative power must be separated because:

> . . . it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, *whereby they may exempt themselves from obedience to the laws they make, and suit the law both in its making and execution, to their own private advantage*, and thereby come to have a distinct interest from the rest of the community, contrary to the ends of society and government. [emphasis added][6]

15 The "real issue" in the concept of separation of commercial and regulatory

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[4] *Postal Green Paper*, chapter 8, section 12, pages 212-13 (English version).

[5] *Gibson v Berryhill*, 411 U.S. 564, 579 (1973). See also *In re Murchison*, 349 U.S. 133, 136 (1955) ("No man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome"). The "interest" required is that which is sufficient to offer "a possible temptation to the average man." *Tumney v Ohio*, 273 U.S. 510, 532 (1927). An official's interest in the revenues of his agency is sufficient. *Ward v Village of Monroeville*, 409 U.S. 57 (1972).

[6] *Second Treatise on Government* ¶ 143. To the same effect, the French philosopher Charles de Montesquieu cautioned in 1748, "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty." *The Spirit of Laws*, Book XI, chapter 6.

functions is thus ensuring that those that make the laws are not affected by the possibility of particular advantage. In the case of the proposed Administrative Council, the UPU is proposing that a single committee should

> retain responsibility for supervising the affairs of the Union between Congresses . . . for general principles and broad policies, primarily for mandatory (letter post) services . . . [and] governmental policies with respect to competition, deregulation, and trade-in-services issues for international postal services. [CC OP/UPU, Doc 5.1, ¶ 12.]

16 The Administrative Council would thus be responsible for the UPU's activities in regard to most postal services (i.e., the letter post[7]) as well as the implementation and revision of broad commercial strategies such as the Washington General Action Plan, the basic strategic plan adopted at the 1989 Washington Congress. As a practical necessity, therefore, public postal officials will figure prominently in each member country's delegation to the Administrative Council. The same Administrative Council would have authority to implement, amend, or propose amendments for the legally binding provisions of the Convention and the Detailed Regulations. In this second capacity, the Administrative Council could make laws that will affect legal issues such as:

- Whether postal administrations must negotiate arms-length prices for services exchanged among postal administrations, and between postal administrations and other suppliers, in the same manner as private commercial undertakings or be allowed to fix prices collectively by means that are generally prohibited by competition laws?
- Whether postal administrations may define and enforce procedures designed to allocate delivery service markets according to national territories or be required to abide by the general principles of competition laws?
- Whether postal administrations must price their services according to the general principles of competition law or be able to continue to employ unfair pricing?
- Whether postal administrations must comply with customs laws and procedures in the same manner as other international delivery service companies or be able to devise preferential procedures for the customs treatment of postal articles?

17 These are not merely academic questions. In the past, the UPU has employed such legal powers to overcome competition by private carriers and to suppress growing competition among postal administrations. In the last UPU congress, the fixing of terminal dues, the use of Article 25, and the authorization of low preferential rates for large users were all identified by the Executive Council as part of a *commercial* plan to restrict remail competition

[7]The "letter post" includes all letters, printed papers, and small packets weighing up to 2 kilograms.

and protect postal revenues.[8] Differentials in customs treatment, perpetrated by the "customs" forms adopted in the UPU Convention, can produce further trading distortions.

18 The Chairman of the Executive Council has suggested that the acts of the UPU apply only to postal administrations. If the acts of the UPU carried no more legal authority than private law contractual agreements among private companies, Private Operators could have no objection. The commercial importance of the UPU's law making power lies in the ability of postal administrations to "exempt themselves from obedience to the laws . . . and suit the law both in its making and execution, to their own private advantage" (borrowing the words of John Locke). In regard to each of the legal issues discussed, postal administrations in Europe and the United States are today involved in litigation in which they are invoking acts of the UPU to exempt themselves from obedience to other laws.

19 Today, in the international market, postal administrations are commercial undertakings seeking to operate in a competitive manner, yet they find it difficult to resist the temptation to use the power of government to manage the results of competition. Thus, the Washington General Action Plan begins by citing increased competition, urging freedom for "market-led" activities, and then demanding *governmental* action to ensure the quality of the competitive, "market-led" postal services:

> The Washington Congress, recognizing the increasing competition in the communications market . . . agrees that the following actions are essential for the future survival of efficient postal services: . . . Governments are urged to ensure that the Post has a legal status and an independent management system and resources . . . Postal administrations must create market-led cultures . . . *member countries of the UPU must give the highest consideration to providing service excellence in all postal services.* . . . The UPU must do everything in its power to encourage Governments and administrations to achieve these objectives. [WGAP ¶¶ 1-4 (emphasis added)]

20 Replacement of the Executive Council by an Administrative Council does not satisfy the principle of separation of commercial and regulatory functions. On the contrary, the Administrative Council preserves a *combination* of commercial and regulatory functions at international level.

21 The proposed combination of commercial and regulatory functions at international level not only ignores fundamental political principles but also decades of postal law reforms at national level. Led by the United Kingdom in 1969, country after country has substantially separated commercial and regulatory postal functions, primarily for the good of the postal administration.[9] Indeed, the UPU itself has urged other member countries to separate

[8] 1989 Washington Congress, Document 56.

[9] A partial list would include the United States (1970), Australia (1975), Canada (1981), Ireland (1983), New Zealand (1987), the Netherlands (1989), Germany (1989), and France (1990).

commercial and regulatory functions at national level so that postal administrations may better meet the needs of competition and efficiency. The May 1991 UPU Executive Council approved a developmental action plan sponsored by the UPU Consultative Council for Postal Studies, which concluded:

> It is now accepted by postal professionals that the Post's current status of government department is no longer in tune with the realities of the present competitive market. Changes in status, structures and management methods are therefore essential to enable the Post to adapt to the present competitive situation.[10]

Thus, the proposal to create an Administrative Council with both governmental and commercial authority is not even consistent with degovernmentalization urged by the UPU at national level.

22 The Private Operators submit that, as we enter the twenty-first century, the UPU must be reformed so that the present law-making powers of the UPU are exercised by an agency that is distinct and separate from the agency that has responsibility for the quality and competitive success of public postal services. The international airline industry provides an example of such a separation at international level. The ICAO/IATA model and the postal reforms already enacted by many member countries at national level must now be adapted to the needs of the international deli very service sector.

23 Given the imminence of the Seoul Congress and the context of current restructuring plans, the Private Operators suggest that the most logical way to separate commercial and regulatory functions would be to create a temporary third council, to be called a "Governmental Council." During the 1996-2000 period, the Governmental Council would be the only UPU council authorized to amend the Acts of the UPU. It could exercise this authority based upon the representations of the member governments, the Administrative Council, individual public or private operators, corporate users, or the general public. The Governmental Council would have no responsibility for managing the international network of public postal services or improving the competitive position of public operators. Its membership would be limited to governmental representatives and its deliberations would be conducted with the degree of transparency appropriate to any intergovernmental policy body. Its primary function would be to facilitate international trade by preparing a comprehensive revision and modernization of the legal framework for international delivery services. The work of the Governmental Council could be enacted in the 1999 UPU congress.

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[10] "Action Plan for Implementing the Resolution on Enhancing the Effectiveness of Aid and Increasing Resources for Modernizing the Postal Services of Developing Countries," § 8, *adopted by* the Executive Council on 7 May 1991 as part of the report of the CCPS (emphasis added). *See also*, 1989 Washington Congress, Resolution C 91 ("Washington General Action Plan").

2. THE UPU SHOULD ADOPT GUIDELINES FOR THE SEPARATION OF POSTAL AND EXPRESS MARKETS.

24 In the second item in the Six-Point Reform Plan, the Private Operators urged the UPU to "adopt guidelines that give official, worldwide recognition to the legal approach adopted in many countries that distinguishes between express and postal services and limits traditional postal monopoly laws to the latter." The UPU rejected this proposal because:

> This proposal again demonstrates a basic misunderstanding of the role and purpose of the UPU as an intergovernmental institution which must respect the sovereign rights of its members when it comes to adopting legislation or taking action to enforce national legislation in areas such as the postal monopoly. The UPU simply has no role whatsoever in defining the scope of any country's postal monopoly. [¶ 7]

25 As noted above, the Private Operators agree that the UPU, as currently constituted, *should* have "no role whatsoever" in defining or enforcing the national postal monopolies. However, as demonstrated, the UPU has, in fact, encouraged member governments to enforce the monopoly and even to restructure their domestic postal laws. To the extent that the UPU persists in such pronouncements, the Private Operators submit it is appropriate for the UPU to *recommend* to member governments postal monopoly concepts which have proven workable and desirable in the developed countries. If, as urged by the Private Operators, a Governmental Council is established by the 1994 Seoul Congress, all such policies should be subject to review by the Governmental Council.

3. THE UPU SHOULD REPEAL ARTICLE 20.15 AND REQUIRE THE APPLICATION OF SOUND ECONOMIC PRINCIPLES TO INTERNATIONAL POSTAGE RATES.

26 In the third item of the Six-Point Reform Plan, the Private Operators urged the UPU to replace Article 20.15 with a requirement that international postage rates cover long-term marginal costs and, in developed countries, a reasonable share of institutional costs. The UPU responded that this "could well be included in future work" but suggests the current Article 20.15 does not create any public policy problem because:

> implementation of article 20, paragraph 15, depends upon decisions at the national level where administrations are subject to national oversight. The UPU does not require administrations to implement this provision, which is optional. [¶ 9]

27 The UPU thus expresses willingness to study the possible applicability of sound economic principles for international postal rates but rejects the Private Operators' call for repeal of Article 20.15 on two grounds:

- Article 20.15 is voluntary and not required of postal administrations;

and

- Article 20.15 can be limited by contrary national legislation.

28 While the Private Operators appreciate the UPU's acknowledgement that application of sound economic principles to pricing of international postage rates might be worthy of study, the Private Operators submit that the UPU's defense of the current Article 20.15 fails to address the anticompetitive effects of that article.

29 Whether Article 20.15 is mandatory is irrelevant. Article 20.15 may, in some countries, establish a legal defense for postal administrations that set international postage rates below long term marginal costs but above the lowest domestic rate applicable to similar mail. This provision thus authorizes potentially anticompetitive pricing by postal administrations.

30 Nor is Article 20.15 justified by the fact that it may be nullified by contrary national legislation. Few countries have legislation which specifically addresses every potential anticompetitive activity of postal administrations. In any case, the inclusion of apparent legal authority in an Act of the UPU renders it substantially more difficult to invoke national law.[11]

31 Apart from questioning the anticompetitive potential of Article 20.15, the UPU offers no further public policy justification for Article 20.15, nor can the Private Operators conceive of any. Article 20.15 is unnecessary to permit postal administrations to provide bulk international rates, which many postal administrations provided before adoption of Article 20.15. The *only* legal effect of Article 20.15 seems to be anticompetitive. The case for repealing Article 20.15 in the Seoul Congress is clear and convincing.

32 The Private Operators believe that the case for application of sound economic principles to the international postage rates is likewise clear and convincing. Given the regulatory nature of this proposal, it is obviously inappropriate for postal administrations, meeting in an Administrative Council, to act as the final arbiter of whether such a provision should be included in the Acts of the UPU. It may be appropriate, however, for the proposed Governmental Council to give further study to this principle as part of a general review of the legal framework for international delivery services.

4. THE UPU SHOULD ADOPT THE PRINCIPLE OF EQUAL LEGAL TREATMENT FOR ALL PUBLIC AND PRIVATE OPERATORS.

33 In the fourth item in the Six-Point Reform Plan, the Private Operators urged the UPU to adopt a principle of equal legal treatment for all operators, public and private. The UPU rejected this proposal, stating:

> This proposal is based on a misconception in considering the UPU as a

[11]This effect may be seen clearly in the current competition law case involving terminal dues before the European Commission. In that case, five and half years of litigation have still not resulted in the application of the competition rules of the Treaty of Rome to certain activities of postal administrations. This delay has been caused, at least in part, by the fact that postal administrations have been able to cite certain provisions of the UPU Convention in their defense.

> regulatory body with responsibility for both public and Private Operators. The UPU is an organization which exists to facilitate close cooperation between postal administrations so that they may better fulfill their public service obligations which their governments have assigned to them. The UPU is not responsible for Private Operators who have no responsibilities under UPU agreements. [¶ 12]

34 In effect, the UPU argues that the UPU has been established by member governments and bestowed with public resources not to serve the needs of their citizens but to serve the needs of postal administrations. The UPU, it is said, "is not responsible" to citizens—such as Private Operators, users, and the general public—"who have no responsibilities under UPU agreements." If the UPU were merely a trade association established by postal administrations without the power to make public international law, there might be something to be said for this position. Since the UPU is an inter governmental organization, however, the best that can be said for such a claim is that it is an anachronism from the nineteenth century that has no relevance to the conduct of governmental affairs at the end of the twentieth century. In the view of the Private Operators, this claim of independence from public responsibility constitutes conclusive evidence of the need to establish the proposed Governmental Council so that member governments, rather than postal administrations, can review the whole legal framework for international delivery services.

35 The UPU suggests that it is justified in supporting the *unequal* or *discriminatory* application of non-postal laws by virtue of the fact that postal administrations have "responsibilities under UPU agreements" and private operators do not. The Private Operators submit that this distinction in no way justifies advocacy of a discriminatory application of non-postal laws, such as customs laws. It certainly does not justify an inter governmental organization in so advocating, however much postal administrations, as commercial undertakings, might hope for favorable legal treatment.

36 Further, Private Operators question whether there are any meaningful "responsibilities under UPU agreements" beyond those which would normally be expected between commercial undertakings that are reciprocal agents for each other. Unlike domestic postal laws, the UPU Convention does not require any particular scope of geographic coverage by postal administrations. The UPU requires no given level of service by postal administrations. The UPU does not limit pricing discrimination by postal administrations. Nor does the UPU provide for any rights for users or consumers. The UPU's reference to "responsibilities under UPU agreements" mistakenly ascribes to the UPU public service obligations that are, in fact, established at national level by national law.

37 As an inter governmental organization with authority to enact public international law, the UPU must respond to the needs of the world's citizens, not the commercial needs of particular undertakings, whether publicly owned

or not. In so doing, the UPU must adhere to the most basic responsibility of any governmental body, to apply the law equally to all parties.

5. ARTICLE 25 SHOULD BE REPEALED.

38 In the fifth item in the Six-Point Reform Plan, the Private Operators called for repeal of Article 25. The UPU rejects this proposal for the following reasons:

> Article 25 does not require postal administrations to take any action against remail. It simply acknowledges the right of postal administrations to take action to continue to cover the costs incurred in maintaining a universal delivery service as prescribed by their governments. If there is a problem with how a particular postal administration applies article 25, the redress for that problem lies primarily with national government authorities. Article 25 is being kept in the Acts because it meets a real need of the postal administrations. [¶ 15]

39 Thus, the UPU raises the same points to defend the anticompetitive aspects of Article 25 as it did to defend the anticompetitive aspects of Article 20.15, viz:

- Article 25 is voluntary and not required of postal administrations; and
- Article 25 can be limited by contrary national legislation.

40 In response, Private Operators would offer the same points in rebuttal. First, the anticompetitive effect of Article 25 arises from the fact that it may provide a legal shield for anticompetitive conduct by postal administrations in some countries, an effect that is obtained regardless of whether the article is mandatory or voluntary. Second, the fact that a UPU provision can, in theory, be negated by explicit national legislation does not justify the UPU's use of international law for anticompetitive purposes.

41 In addition to challenging the anticompetitive effect of Article 25, the UPU offers the following implicit policy justifications for Article 25:

> to the extent that remail, international direct marketing, and multinational business activities are carried out in compliance with national postal monopoly legislation and to the extent that postal administrations are adequately compensated for the costs of services supporting these activities, article 25 should pose no threat to the Private Operators. [¶ 16]

42 The UPU thus suggests that two positive needs are met by Article 25. First, Article 25 is needed to support the national postal monopoly laws.[12] In response, the Private Operators would recall the analysis of the *Postal Green Paper*:

> it seems inappropriate for one postal administration to turn back mail posted by a private operator who is competing with another postal administration,

[12]As noted above, the UPU's defense of Article 25 as a means of ensuring compliance with national postal monopoly legislation seems to be inconsistent with the UPU's disclaimer that "The UPU Acts contain no prescriptions with regard to the concept or the nature of the postal monopoly." See paragraph 2, above.

> 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 to seek assistance from another administration whose exclusive rights are not infringed.[13]

43 As the European Commission has stated, the basic flaw in Article 25 is that it authorizes postal administrations to take the law into their own hands. This violates the principles of separation of commercial and regulatory functions. The national postal monopoly, if any, should be enforced by the means, and with the procedural safeguards, authorized by the national legislator and by no other means.

44 The UPU further implies that Article 25 is necessary to protect postal administrations that are not adequately compensated for inward delivery costs. Postal administrations in the European Union made this argument as well, but the *Postal Green Paper* rejected this suggestion:

> This, however, does not seem correct for two reasons. Firstly Article 25 long predates terminal dues in the UPU rules. Secondly, Article 25 has been applied in the past even when the compensation received by the delivery administration would have been the same, regardless of whether the mail came directly from the administration in the country of origin or indirectly through another administration.[14]

45 More fundamentally, the Private Operators would point out that the charges for inward compensation are set by the UPU itself, with the possibility of alternative bilateral agreements agreed by postal administrations. Thus, it is the UPU and the individual postal administrations that determine compensation rates for inward delivery of international mail. If the UPU or the individual postal administrations fail to set appropriate rates, this failure plainly does not, the Private Operators submit, justify adoption of anticompetitive measures by the UPU. The proper remedy is to adjust the compensation rates.

6. THE UPU SHOULD ALIGN TERMINAL DUES WITH AN APPROPRIATE FRACTION OF DOMESTIC POSTAGE RATES.

46 The sixth item in the Six-Point Reform Plan offered by the Private Operators was a suggestion that "terminal dues" should be aligned with an appropriate fraction of domestic postage. By this alignment, a postal administration will charge the same amount for the delivery of international mail as it charges for the delivery of similar quantities of domestic mail. In reply, the UPU suggests that, while a minority of postal administrations agree with the proposal of the Private Operators, there are a number of considerations which prevent UPU agreement:

> this is not a majority view, particularly in view of the fact that the domestic postage rates in many UPU member countries are below their costs, and the

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[13]Chapter 8, section 11, page 210 (English version).
[14]Ibid.

> UPU therefore must consider and balance a number of factors in developing a satisfactory mechanism for postal administrations to reimburse each other for services provided.
>
> UPU members must balance concerns about maintaining public service obligations with concerns about the commercial implications of their decisions. In addition to concerns about compensation for costs, UPU members are concerned about equity in exchanges between developed and developing countries, about maintaining the international connection between national public service obligations, and about accommodating a multiplicity of products and services while keeping international accounting systems as simple, affordable, efficient, and effective as possible. [¶¶ 17-18]

47 The Private Operators would suggest, however, that none of these difficulties outweigh the advantages, to the entire international delivery service system, of rationalizing terminal dues charges and eliminating concomitant distortions in commerce.[15] With goodwill, the problems identified by the UPU can be resolved one by one.

48 If a postal administration in a developing country subsidizes the cost of domestic postage, it seems reasonable that, in principle, foreign mailers should pay the true cost of postal delivery rather than the subsidized price. The true delivery cost may be obtained by adding the per item cost of subsidy to the postage rate. Absolute precision in calculating the cost-based delivery rate seems unnecessary.

49 If a businessman located in a developing country sends bulk mail to a developed country, the Private Operators believe that there is no consideration of "equity" or "public service" that justifies the destination post office charging less for the delivery of such international mail than for the delivery of comparable domestic mail. The businessman in the developing country is, by definition, competing in this market with other domestic and international businessmen, and postal delivery is merely a cost of doing business.

50 If these two basic principles are accepted, it should be possible to develop alternatives to other aspects of the current terminal dues system. The Private Operators accept that personal, non-bulk correspondence sent from developing countries to developed countries may require special consideration. Private Operators also recognize that it may be necessary for developed countries to provide additional, developmental aid for the postal administrations of developing countries. The Private Operators would submit, however, that the financing of such programs is a matter of public policy that should be addressed by appropriate governmental authorities of the developed countries, possibly in the proposed Governmental Council, rather than by postal administrations acting alone.

51 In summary, Private Operators continue to believe that terminal dues

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[15]The current terminal dues system not only distorts trade by introducing charges that are unrelated to cost, it also penalizes developing countries by artificially raising the cost of importing documents from developed countries.

should be aligned with domestic postage, with an additional allowance for public subsidies of postal services, if any, in developing countries. Other social goals should be identified and dealt with explicitly, with the costs borne in the manner decided most appropriate by the national governments in the developed countries.

7. THE UPU SHOULD ADMIT USERS, PRIVATE DELIVERY SERVICES, AND OTHERS AS OBSERVERS AT MEETINGS OF THE PROPOSED GOVERNMENTAL COUNCIL.

52 In a separate document submitted at the last meeting of the Private Operators-UPU Contact Committee, Private Operators renewed their request for observer status at those UPU meetings that deal with "regulatory" or "legislative" functions of the UPU. The Chairman of the Executive Council read a statement explaining that the UPU rejected this request because, according to the draft minutes,

> the UPU existed fundamentally to help postal administrations to agree on procedures for cooperation. . . . It would not be appropriate for Private Operators, who were not bound to honour any obligation under the UPU agreements and who did not even share any responsibility with the postal administrations, to attend meetings of the UPU internal decision-making bodies. [Draft minutes ¶ 21]

53 The Private Operators accept, of course, that they should have no right to participate in normal commercial dealings between postal administrations, whether they take place in the UPU or elsewhere. Any operator, public or private, should be able to negotiate contractual matters with any other operator without intrusion by potential competitors. As we have demonstrated above, however, those aspects of the UPU's deliberations which result in public international law do affect private operators and users, because the legal framework shapes the entire market.

54 In requesting a more open, transparent legislation of UPU measures with legal effect, the Private Operators suggest that they are seeking no more than a degree of transparency that is already deemed appropriate in other specialized agencies of the UN, such as the International Civil Aviation Organization and the International Telecommunication Union. The Private Operators continue to advocate such transparency.

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ACCA Petition to Department of State (1998)

1. SUMMARY

The Air Courier Conference of America (ACCA) is a trade association of private express carriers. Its members include the major global express companies DHL, FedEx, TNT Postal Group, and United Parcel Service as well many smaller companies.[1]

The Universal Postal Union (UPU) is an procompetitive organization founded in 1874 to provide for the exchange of mail between member countries. The UPU today has approximately 189 member countries. On August 23, 1999, the Universal Postal Union will convene its twenty-second general congress in Beijing, China. The Congress is scheduled to conclude treaties and agreements that will shape the development of international delivery services, public and private, during the five-year period 2001 through 2004.

On October 21, 1998, Public Law 105-277 vested primary responsibility for development of U.S. policy towards the Universal Postal Union in the Department of State, and U.S. policy towards international postal and delivery services was added to the responsibilities of the Department of Commerce and the Office of the U.S. Trade Representative. The Department of State, supported by the Department of Commerce and U.S. Trade Representative, must act quickly to develop a U.S. policy position towards the 1999 Beijing Congress of the UPU that will serve the interests of all Americans. *Under the rules of the Universal Postal Union, the deadline for submitting (i) all*

Air Courier Conference of America, "Petition for a Rulemaking to Develop a Statement of Policy of the United States Towards the Universal Postal Union" (Nov 18, 1998) (submitted to U.S. Department of State).

[1]A complete list of members and other details may be found at the ACCA's web site, http://www.aircour.org.

proposals for revision in the basic legal framework of the UPU and (ii) proposals relating to the rules governing the exchange of mail submitted without cosponsorship by other member countries is six months prior to the start of the 1999 Congress or February 23, 1999.

For these reasons, as more fully explained below, the ACCA hereby *urgently* petitions the Department of State to develop, by means of a public rulemaking, an open and progressive Statement of Position towards the 1999 Beijing Congress of the UPU. ACCA specifically requests that the Statement of Position include both a statement of the principles that will guide American policy and specific proposals for amendment of the acts of the UPU.

2. BACKGROUND

The Universal Postal Union (UPU) is an procompetitive organization founded in 1874 to provide for the exchange of mail between member countries. The United States was a founding member of the UPU. On October 9, 1874, representatives of the United States signed the Treaty concerning the formation of a General Postal Union negotiated in Berne, Switzerland. On March 8, 1875, President Ulysses S. Grant approved the treaty. In addition to the United States, the original General Postal Union included 21 European countries and Egypt. In 1878, the union was renamed the Universal Postal Union.

Establishment of the Universal Postal Union was a byproduct of the emergence of national postal monopolies. Prior to the eighteenth century, international postal service was provided by private services that dispatched messengers traveling on foot or horseback across foreign lands. At periodic relay stations ("posts"), the messenger would pick up a fresh mount or hand over the pouch (or "mail") of letters to the next messenger. For reasons of security and revenue, European governments gradually established legal monopolies over the carriage of letters and put a stop to international messenger services. Bilateral postal treaties regulated the exchange of mail between national postal monopolists. Postal reforms, introduced in England in 1840 and soon copied around the world, greatly enlarged the demand for international postal service. More traffic meant more treaties, and more variations among treaties. In 1863, the Postmaster General of the United States, Montgomery Blair, initiated a conference in Paris attended by fifteen nations to agree on standard, uniform principles for all bilateral agreements. Uniform principles paved the way for a still more uniform postal convention in 1874.[2]

Modern developments in technology and economic policy now suggest the need for a fundamental review of the role and organization of the UPU. Today, unlike in 1874, international postal service is provided by private as well as public operators. Indeed, it has often been private operators that have

[2]The best history of the UPU is G.A. Codding, Jr., *The Universal Postal Union* (New York: New York Univ. Press 1964).

initiated basic improvements in international delivery services, notably in their development of worldwide express service networks. Not to be left behind, several national post offices have entered into direct international operations by acquiring interests in private operators and opening offices in other countries. Last year, faced with similar trends in the international telecommunications sector, the World Trade Organization, led by the United States, abandoned the legal paradigm which had been the basis of international telecommunications law for more than a century. In the future, international telecommunications service will be provided by global end-to-to end service providers rather than by interconnection between national monopolists. The need for a similarly thorough reconceptualization of the legal framework for international postal services is evident, but the basic direction of reform is not settled. Should international postal law evolve into a neutral set of rules governing competition among all types of global operators or do public service obligations imply that the national postal administrations should be given greater authority to adapt international law to changing times?

Responding to such trends, on October 21, 1998, Public Law 105-277 revised the procedures for establishing U.S. international postal policy.[3] The major legal vehicle for U.S. international postal policy is the position of the United States at the Universal Postal Union. Under the new law, primary responsibility for development of U.S. policy towards the Universal Postal Union was transferred from the Postal Service to the Department of State, and U.S. policy towards international postal and delivery services was added to the responsibilities of the Department of Commerce and the Office of the U.S. Trade Representative. It is evident from the legislative history of these provisions that they were rushed through Congress by amendment to an appropriations bill—instead of awaiting enactment of as part of general postal reform legislation—precisely because Congress recognized the urgent need for the United States to reassess its position in advance of the Beijing Congress.[4]

Formally, the U.S. position must be expressed in the form of proposed amendments to acts of the UPU. Within the Universal Postal Union, the supreme legislative authority is the Congress, a body composed of pleni-

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[3]Section 101(h) of Public Law 105-277 enacted the Treasury and General Government Appropriations Act, 1999. Section 633 of this measure amended section 407 of the postal law, 39 USC 407, and section 305(a) of the Trade and Tariff Act of 1984, 19 USC 2114b.

[4]A recent report by the General Accounting Office, "U.S. Postal Service: Postal and Telecommunications Sector Representation in International Organizations" at 27 and 31-33 (Oct 1998), implies that under prior law private parties and government departments such as the Department of Justice and Department of Commerce were able to participate meaningfully in development of U.S. international postal policy. This implication is incorrect. Despite repeated expressions of concern by ACCA and such government departments going back to the 1984 UPU Convention, ACCA is unaware of a single instance in which the Postal Service significantly modified the U.S. position at the UPU to accommodate such concerns or consulted such parties in advance about the specifics of a U.S. position in regard to important policy questions such as those raised in this petition.

potentiary representatives of member countries.[5] The UPU Congress meets every five years to revise and agree upon several "acts," that is, agreements accepted in accordance with the rules of the Constitution, the UPU's basic charter. There are four basic acts of the UPU. The Constitution is itself an "act." It is a permanent multilateral treaty, adopted in 1964 and ratified by member countries.[6] The Constitution is amended by each UPU Congress with a new "protocol." The Constitution is implemented by the General Regulations, also an "act" of the Union. The General Regulations are reenacted as a whole by each Congress. International letter post service is regulated by two further acts: the Universal Postal Convention[7] and the Detailed Regulations of the Convention. This two-part structure was adopted by the original UPU Congress in 1874 and was supposed to separate permanent provisions, to be revised by governmental congresses every three years, from transient provisions that could be revised as necessary by agreement among post offices. The distinction between permanent and transitory provisions has not been applied consistently, however. Under Article 22 of the Constitution, the four basic acts of the UPU—the Constitution, the General Regulations, the Universal Postal Convention, and the Detailed Regulations of the Convention—are "binding on all member countries." In addition to these major acts, there are four additional acts called "Agreements" that govern parcel posts, money orders, postal banking services, and cash-on-delivery.

In the 1994 UPU Congress in Seoul, Korea, the UPU was restructured and the Universal Postal Convention and its Detailed Regulations comprehensively revised. These changes generally limited the Congress to matters of general policy and delegated greater administrative authority to new two permanent bodies. The first is the *Council of Administration (CA)*, a committee composed of representatives of 41 member countries chosen by Congress on the basis of "an equitable geographic distribution." The CA is responsible for policy issues and, in particular, revisions to the Universal Postal Convention. The Convention itself was pared back to include only provisions deemed to be of a general nature requiring the attention of plenipotentiaries and ratification by governments; other provisions were transferred to the Detailed Regulations. The second body created by the 1994 reforms is the *Postal Operations Council (POC)*, a committee composed of representatives "appointed by the postal administration"[8] from 16 developed countries and 24 developing countries. Legislative authority over the enlarged body of Detailed Regulations was transferred from the Congress to the POC. In addition, the POC was charged with supervision of "operational, commercial, technical, economic and

[5]UPU Constitution, Article 14. In all cases, references to acts of the UPU refer to current acts.

[6]UPU Constitution, Article 1.

[7]Prior to 1964, institutional and operational provisions were combined in a single document called the Convention.

[8]UPU Gen. Reg. 104.2 and 104.3.

technical cooperation" matters, including terminal dues, restrictions on remail, and development of the UPU Strategic Plan. The *International Bureau (IB)* of the UPU is the common secretariat of the CA and POC; its Director General is chosen by the Congress for a five-year term.

On August 23, 1999, the Universal Postal Union will convene its twenty-second general Congress in Beijing, China. Acts adopted by this Congress will shape development of international delivery services, public and private, during the five-year period 2001 through 2004. Under the rules of the UPU, the deadline for submitting (i) all proposals for revision in the basic legal framework of the UPU and (ii) proposals relating to the rules governing the exchange of mail submitted without cosponsorship by other member countries is *six months prior to the start of the 1999 Congress* or February 23, 1999.[9]

For these reasons, the Air Courier Conference of America (ACCA) hereby *urgently* petitions the Department of State to develop, by means of a public rulemaking, an open and progressive Statement of Position on the 1999 Beijing Congress of Universal Postal Union. ACCA specifically requests that the Statement of Position include both a statement of principles that will guide American policy and specific proposals for amendment of the acts of the UPU.

3. ELEMENTS OF A PROPOSED STATEMENT OF POSITION

3.1 STATEMENT OF GOALS

ACCA submits that the Statement of Position should address the overall goals of U.S. policy towards international postal and delivery services.

Although, in the recent amendment to 39 USC 407, Congress did not include a statutory statement of goals for U.S. international postal policy, it did adopt a sense-of-Congress resolution rejecting U.S. participation in international agreements that would give undue or unreasonable preference to the Postal Service or any other operator.[10] Additional, generally accepted principles may be gleaned from a comprehensive postal modernization bill now under consideration by Congress.[11] In this manner, the following tentative statement of goals was derived and is proposed for the Statement of Position.

> (1) to promote and encourage communications between peoples by efficient operation of international postal services and other international delivery services for cultural, social, and economic purposes;

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[9]General Regulations, Article 120.

[10]"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."

[11]H.R. 22, the Postal Modernization Act of 1999, technically died without enactment at the close of the 105th Congress in October 1999. However, it appears likely that H.R. 22 will serve as the basis for a general revision the Nation's postal laws in the 106th Congress.

(2) to promote and encourage unrestricted and undistorted competition in the provision of international postal services and other international delivery services—without undue or unreasonable preference to the Postal Service, a private provider of postal services, or any other person—except where provision of such services by private companies may be prohibited by law of the United States;

(3) to promote and encourage a clear distinction between governmental and operational responsibilities with respect to the provision of international postal services and other international delivery services by the Government of the United States and by intergovernmental organizations of which the United States is a member; and

(4) to participate in multilateral and bilateral agreements with other countries to accomplish these objectives.

3.2 SEPARATION OF COMMERCIAL AND REGULATORY FUNCTIONS

Constitution: Articles 20, 22, 25, 29, 30; General Regulations: Articles 102, 104, 105, 110, 112, 114, 120-22 125; Universal Postal Convention: passim; Detailed Regulations of Convention: passim; UPU Strategic Plan 2000-2004

ACCA submits that, *first and foremost*, the Statement of Position should address the issue of separation of governmental and operational functions in the UPU. This is the most fundamental public policy issue presented by the acts of the UPU and is reflected in numerous provisions.

Although creation of the Council of Administration and the Postal Operations Council in 1994 was intended as a step in the direction of separation of governmental and operational functions, the 1994 reforms do not in fact achieve a clear separation of functions. Under the 1994 reforms, the Postal Operations Council, a committee of postal officials, is vested with legislative authority in areas in which its members have a direct commercial interest. Such a conflict of interest would be unacceptable in the United States and other developed countries. Similarly, membership in the Council of Administration is limited to persons "competent in postal matters," assuring a predominance of postal officials in that committee as well. The relationship between the Council of Administration and Postal Operations Council is not the arm's length relation that should characterize impartial regulators and commercial operators. Instead, the two committees closely coordinate their activities and share a common secretariat. Public observers, who might lend a degree of transparency to governmental decisions, are not permitted. The lack of separation between governmental and operational functions is also evident in the texts of the Universal Postal Convention and the Detailed Regulations. The revised Universal Postal Convention does not mention the public interest nor the possibility of private international postal services, yet it refers to postal administrations 224 times. On the other hand, the Detailed Regulations address such governmental issues as exemption of postal administrations from liability

under customs laws.

While failing to separate fully governmental and operational functions, the UPU has steadily become more commercially partisan. This trend began in 1984 when the Hamburg Congress, "considering the growing competition," formally declared that the UPU "must actively participate in the strengthening of the international postal service as a whole" by "promoting solidarity and cooperation among all administrations." The short Declaration of Hamburg was followed by a more comprehensive "Washington General Action Plan" in 1989 and a "Seoul Postal Strategy" in 1994. The Beijing Congress will consider a draft UPU Strategic Plan 2000-2004 that continues commingling of governmental and commercial functions.[12] Objective 1, for example, declares that the UPU will seek to ensure universal service, a governmental function, while Objective 4 declares that the UPU will "carry out market and product research aimed at producing better postal products [and] leveraging the assets of the postal network," purely commercial functions.

UPU members from the European Union have objected to this combination of governmental and commercial functions. A 1992 survey of European UPU members revealed that a "majority preferred separation into two distinct organizations."[13] As a representative of the CERP (the organization of European postal regulators) declared,

> reform of the UPU should place in a better position with respect to its responsibilities as an intergovernmental body, *responsibilities based on a clear definition of the respective roles and powers of regulators and operators*.[14]

Similarly, a representative of the Dutch Post Office wrote:

> A separation between the regulatory and operational functions is one of the conditions for enabling postal services to comply with the demands of the market and to stand up to competition because we are no longer the only players in the market. *Some tasks, particularly the regulatory ones, cannot be fulfilled by the postal administrations any longer!*[15]

In 1997, Germany proposed that the UPU amend the Convention so that it provides commercially neutral rules for the inward delivery of international mail.

> *The UPU should seek to facilitate cooperation between all operators forwarding international mail*. . . . This means postal administrations and private operators will be granted access on the same terms, the same quality standards and the same price. In addition, they should be placed on the same footing in respect to customs formalities.[16]

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[12]UPU CA 1998-Doc 9d (Aug 20, 1998).

[13]UPU CE 1993/C3 - Doc 2a/Add 1, paragraph 11 (Working Party WP 3/3: Report of the 11 September 1992 Meeting).

[14]Ibid, paragraph 12 (emphasis added).

[15]Ibid., Annex Add 1 (emphasis added).

[16]Federal Ministry of Posts and Telecommunications of the Federal Republic of Germany,

The Netherlands has proposed that UPU adopt rules to allow observers to attend meetings of a legislative character.[17]

It is proposed that the Statement of Position should follow the lead of the European Union and declare the United States in support of a general revision of the acts of the UPU to establish a clear distinction between governmental and operational functions. The Statement of Position should make reference to specific changes needed in the acts of the UPU, including the following:

(1) limit the Universal Postal Convention to issues of governmental policy which require the force of international public law and which strictly eschew undue or unreasonable preferences for public postal operators, including provisions relating to aid to developing countries;[18]

(2) limit the Council of Administration to governmental representatives and limit its responsibilities to questions of policy under principles of commercial neutrality specifically set out in the Convention; introduce greater transparency in CA procedures;

(3) establish a separate secretariat for the Council of Administration composed primarily of experts in matters of international law and trade policy, rather than employees of operators;

(4) authorize postal operators to establish a Postal Operations Council to develop rules relating to the commercial and operational exchange of mandatory[19] letter post mail provided that decisions of the Council generally should have the legal status of contractual arrangements, not the status of international public law; and

(5) amend procedures relating to the development of proposals for new acts and amendments to existing acts to clarify the primary role of governments.

Furthermore, it is proposed that the Statement of Position should make clear in advance of the 1999 Beijing Congress that, in the light of the sense-of-

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contribution to the UPU High Level Meeting, Postal Vision 2005, 13-14 October 1997, page 3 (emphasis added).

[17]UPU CEP AOP-UPU 1998 - Doc 4 (April 29, 1998).

[18]It should be noted that the UPU is planning another comprehensive revision of the Universal Postal Convention and Detailed Regulations in the 1999 Beijing Congress. As now planned, this revision will move more provisions from the Convention to the Detailed Regulations based on the principle of retaining in the Convention only "what was fundamental for the letter post: freedom of transit, etc. The other aspects, however important they might be, were fundamental not necessarily at governmental level but only at postal administration level." UPU CEP 1997-Doc 17a, paragraph 13. This principle is consistent with the approach suggested in the text for the Statement of Position ; however, to achieve separation of governmental and operational functions, it is also necessary to distinguish between the legal status of Convention provisions and the legal authority of inter-administration agreements in the POC. *If greater legislative authority is delegated to the POC under the guise of "cleaning up" the Convention, the effect is to exacerbate substantially the problem of commingling governmental and operational functions.* Morever, delegation of legislative authority to one set of international postal operators appears inconsistent with the sense-of-Congress resolution included in Public Law 105-277.

[19]Wholly competitive, non-mandatory services should be developed by postal operators outside the scope of the UPU in the same manner as the services of private operators.

Congress resolution in Public Law 105-277, the United States will seriously consider taking a reservation to any provision of any act of the UPU that fails to comply with the above principles.

3.3 ALLOCATION OF POSTAL MARKETS

Universal Postal Convention: Article 25.

ACCA submits that the Statement of Position should address the provisions in the Universal Postal Convention which tend to allocate national markets to public postal operators.

Article 25 of the Universal Postal Convention authorizes postal administrations to protect each other's "home market" by allowing post offices to refuse to forward or deliver international mail that is posted in a country other than the country where mailer resides. In 1994, the UPU expanded this provision by making clear that the postal administrations could intercept such mail if the mailer is considered to "reside" in one country and uses electronic means to produce mail in a second country.

The anticompetitive nature of Article 25 has long been a concern of U.S. and European authorities. In 1986, President Reagan instructed the Postal Service to "make sure that the [UPU] Acts, particularly [Article 25], are not used to stifle healthy competition."[20] In 1993, the European Commission condemned postal resort to Article 25 to intercept mail.[21] In 1998, the European Court of Justice declared the interception of mail under Article 25 was not justified either as a means of enforcing a national postal monopoly or as a means of defending an ill-considered agreement on terminal dues. [22]

In view of the anticompetitive nature of Article 25, it is proposed that the Statement of Position declare that the United States is opposed to renewal of Article 25 and will take a reservation against this article if it is included in the 1999 Convention.

3.4 TERMINAL DUES

Universal Postal Convention: Article 49; Detailed Regulations of Convention: Articles 4901-05.

ACCA submits that the Statement of Position should address provisions in the Universal Postal Convention which fix changes between post offices in a manner that distorts international trade.

Rates that post offices charge each other for the delivery of international mail are called "terminal dues." Terminal dues are not aligned with domestic postage rates; instead, terminal dues are set at uniform rates (i.e., at rates that do not vary by destination post office) as part of the Universal Postal

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[20]Letter from Ronald Reagan, President, to Albert Casey, Postmaster General, May 1, 1986.

[21]European Commission, Statement of Objections, Case IV/32.791 - Remail.

[22]Court of First Instance, Cases T-133/95 and 210/95, *International Express Carriers Conference v Commission*, §§ 98-99 (Sep 16, 1998).

Convention.[23] Terminal dues were first introduced in the Universal Postal Convention of 1969.

Discrepancies between terminal dues and domestic postage rates distort international trade, affecting not only the services of public operators but also services of private operators and mailers that make use of such services. As the U.K. Post Office explained in May 1998:

> It is widely recognized that the UPU terminal dues system needs major reform. . . . The UPU system depends on a national world average cost, which has no basis in economic reality. *This produces distortions in the international postal market which can have serious effects on the traffic flows and income of both developed countries and developing countries, which in turn has adverse effects on the customer*.[24]

Moreover, both the U.S. government and the European Commission have recognized that post offices have used terminal dues agreements in an anticompetitive manner, to restrict competition among post offices and between post offices and private carriers.[25]

It is submitted that the Statement of Position should endorse the swift implementation of policies that will correct distortions caused by terminal dues agreements that are not aligned with domestic postage rates. Specifically, terminal dues provisions of the Convention should be based on the following principles:

- For exchanges of mail between developed countries, the Statement of Position should take the position that each post office should set terminal dues in a manner consistent with domestic postage rates, so that each post office delivers foreign mail for the same rate as domestic mail under the same conditions. In addition, bulk domestic rates should be available to foreign mailers. The same rates should be available to all persons providing similar tenders of incoming mail. UPU provisions should be limited to the minimum necessary to facilitate this scheme.
- For mail sent from developed countries to developing countries, the Statement of Position should recognize that the foregoing scheme may have to be modified where a government subsidizes development of the local post office. In such case, the effective domestic "postage" rate should be considered to be the actual local postage rate plus the per piece subsidy paid by the government. The Universal Postal

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[23]Terminal dues may also be the subject of special agreements outside the UPU.

[24]"Reforming the governance of international posts: a discussion document and call to action," Second Strategic Planning Forum of the UPU, May 4, 1998, paragraphs 17-18 (emphasis added).

[25]Memorandum from C.F. Rule, Assistant Attorney General, Antitrust, to U.S. Dept. of Justice, to Carol T. Crawford, Associate Director for Economics and Budget, Office of Management and Budget (May 1, 1988); Memorandum from R. David Luft, Deputy Assistant Secretary for Services, U.S. Dept. of Commerce, to Carol T. Crawford, Associate Director for Economics and Budget, Office of Management and Budget (May 3, 1988); European Commission, "Statement of Objections, Case IV/32.791 - Remail (1993).

Convention should permit such a developing country to tax inbound mail in an amount equal to the per piece subsidy supplied by local taxpayers, but no more.

- For mail sent from a developing country to a developed country, the Statement of Position should support application of terminal dues aligned with domestic postage coupled with a recognition of the foreign policy implications of such policy. Foreign policy implications arise from the fact that aligning terminal dues to domestic postage rates may work a hardship on mailers in some developing countries because they cannot afford to pay the full postage rate on mail sent to a developed country. The remedy, however, should not induce distortions in international trade. If the United States considers it desirable to underwrite some or all of the costs of posting mail to the United States from a given developing country, it should make appropriate payments or credits available to the developing country. Such foreign aid should be administered as an element of U.S. foreign policy. It should no longer be used as a justification for distorting terminal dues payments.

In summary, it is proposed that the Statement of Position should support an amendment to the Universal Postal Convention that will require terminal dues to be aligned with domestic postage rates for all mail exchanges, with added provisions that (i) developing countries that subsidize domestic postage rates may tax incoming mail in an amount equal to the subsidy granted (ii) developed countries should address issues arising from the receipt of mail from developing countries in the context of their respective foreign policies.

3.6 CUSTOMS LAWS

Universal Postal Convention: Article 31; Detailed Regulations of the Convention: Articles 3101; Universal Postal Union - World Customs Organization Contact Committee

ACCA submits that the Statement of Position should address the issue of customs treatment of items transported by public and private operators.

Article 31 of the Universal Postal Convention and the associated Detailed Regulations provide simplified forms and procedures for presentation to customs of items transported by public postal operators. Most significantly, Article 3101(7) declares that postal administrations "shall accept no liability for the customs declarations." Customs provisions of the Universal Postal Convention and Detailed Regulations are incorporated in the Annex F 4 of the Kyoto Convention,[26] the international convention on application of customs laws. The Kyoto Convention is now being revised by the World Customs Organization. At the World Customs Organization, the UPU has opposed

[26]International Convention on the Simplification and Harmonization of Customs Procedures (1973).

efforts by the private operators to obtain agreement on the principle that similar customs treatment should be provided for similar items without regard to the identity of the operator.[27]

As a result of UPU acts and their incorporation in the Kyoto Convention, in many countries customs laws are applied substantially differently to identical shipments depending upon whether the carrier is a public postal operator or private operator.[28] Since Customs formalities present one of the most significant impediments to international postal and express services, differences in customs procedures materially distort trade.

As noted above, in Public Law 105-277, Congress explicitly declared U.S. policy in opposition to international agreements that "grant any undue or unreasonable preference to the Postal Service, a private provider of postal services, or any other person." Hence, it is proposed that the Statement of Position should (i) propose amendment of the relevant acts of UPU to extend simplified customs procedures to similar shipments carried by all operators and (ii) propose UPU support for revision of Annex F.4 of the Kyoto Convention in a similar manner.

3.6 PREFERENTIAL PRICING BY PUBLIC OPERATORS

Universal Postal Convention: Article 11.

ACCA submits that the Statement of Position should address the appropriate principles for pricing of international postal services by public postal operators

Article 11 of the Universal Postal Convention, added in 1989, encourages postal administrations to protect market share by giving major customers "preferential" prices that can be set as low as the lowest domestic rate applicable to similar mail. Given the differences between domestic and international postal costs and the absence of controls on postage rates in many countries, this standard could imply UPU approval of pricing schemes whereby high rates on some postal services are used to cross subsidize below-cost pricing of others.

It is proposed that the Statement of Position declare United States support

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[27]UPU, CEP C1 1998-Doc 4a Annex 1. This annex reprints World Customs Organization, "Report on the 20th Meeting of the WCO UPU Contact Committee, 4 February 1998), paragraphs 6-7, which states: "The IECC had also asked that the review of Annex F.4 to the Kyoto Convention apply the same Customs treatment to items presented by both postal administrations and private operators. . . . [The UPU representative replied] Postal administrations, particularly with their obligation to provide a public and universal service, could not be placed on the same footing as private operators. Postal administration believed that Annex F.4 to the Kyoto Convention was very important and reflected the agreement between the WCO and UPU working as partners. As such, they considered that some its provisions which contained specific responsibilities for postal operators could not be applied to private operators."

[28]U.S. Customs Service, "A Review of U.S. Customs Treatment: International Express Mail& Express Consignment Shipments" (July 13, 1998) (prepared for U.S. Congress); U.S., General Accounting Office, *Competitive Concerns about Global Package Link* (June 1998).

for development of UPU guidelines that encourage economically sound pricing of international postal products by public postal operators. In general, such guidelines should support the principle that international postage rates should cover incremental costs and an appropriate share of overhead costs. Such guidelines should also encourage the adoption of accounting principles to prevent cross-subsidization from monopoly services to competitive services. The Statement of Position should propose revision of Article 11 in a manner consistent with these principles.

3.7 EXTENSION OF THE UPU'S JURISDICTION INTO DOMESTIC POSTAL POLICY

ACCA submits that the Statement of Position should address the proposed extension of the jurisdiction of the Universal Postal Union into domestic postal policy.

Currently, the acts of the UPU deal only with the exchange of mail between countries. In Article 1 of the Convention, member countries pledge that they will provide transportation for international mail across their territories to adjacent countries. This is the fundamental issue which gave rise to the UPU and seems to be the only explicit undertaking which UPU member countries must give in regard to the handling of international mail. The Universal Postal Convention does not, for example, explicitly oblige member countries to deliver international mail or refrain from discrimination between international and domestic mail services.

The 1999 Beijing Congress will consider a proposal by France to add an article to the Convention that states "member countries shall ensure that all users enjoy the right to a universal postal service involving the permanent provision of quality basic services at all points in their territory, at affordable prices." Although the quality of universal service to be ensured would be left to the legislation of member countries, the UPU would seek to influence this legislation through official recommendations. The effect of this proposal would be to extend the scope of UPU concerns to include domestic as well as international postal services.[29]

The public interest in such an extension of the UPU's jurisdiction is unclear. In most developed countries, international mail is a small percentage of domestic mail; in the United States, international mail accounts for less than 0.5 percent of domestic mail volume.[30] Thus, international mail is necessarily delivered by systems which are designed for, and paid by, by domestic mailers. A legal commitment to ensure universal postal services and the quality of such services appear to be decisions properly left to national governments.[31] Moreover, to create a legal right to universal postal service as a matter of

[29]UPU CA C1 1998-Doc 2a.

[30]In 82 percent of countries, international mail is less than 10 percent of total mail. UPU CEP C1 1997-Doc5.Annex 5.

[31]Few of the original members of the UPU provided universal postal service; the United States did not achieve a semblance of universal service until about 1915.

international law may subject future Americans to a moral or legal obligation to support development of such services, by financial contribution or otherwise.

For these reasons, it is submitted that the Statement of Position should declare opposition to any proposal to extend the mandate of the Universal Postal Union to include domestic postal services.

4. PROCEDURAL ISSUES

4.1 TIME FRAME FOR PROPOSED RULEMAKING

Given the deadline of February 23, 1999, for proposing amendments to certain UPU acts, it is obvious that the public consultation and rulemaking proposed by ACCA must be implemented with extraordinary speed. Therefore, ACCA respectfully suggests that the Department of State should act quickly and take full advantage of the possibilities of the internet to facilitate this rulemaking. Specifically, ACCA proposes that:

- a notice of proposed rulemaking, setting out the basic issues, should be issued not later than December 1, 1999;
- the notice of proposed rulemaking should strongly encourage submission of comments in PDF format and indicate that all comments will be posted on the internet as soon as they are received;
- the notice of proposed rulemaking should encourage the public to file specific legislative proposals with comments;
- the notice of proposed rulemaking should indicate that draft portions of the U.S. Statement of Position will be posted on internet and amenable to immediate public comment as they become available.

4.2 DISTRIBUTION OF UPU DOCUMENTS

Prompt circulation of documents is necessary to enable affected parties to consult with the Department of State concerning UPU policies. ACCA therefore proposes that the Department of State should, in the Statement of Position or in a separate document, set out specific procedures for the distribution of UPU policy documents to all interested parties, preferably by publication in PDF format on the internet. Indeed, posting of key documents on the internet on the date of the notice of proposed rulemaking should be considered.

4.3 ORGANIZATION OF ADMINISTRATION EFFORTS

As noted above, reform of the global framework for delivery services presents legal and organizational issues that are fundamentally similar to those which the U.S. government dealt with in connection with reform of the global framework for telecommunications services during the last few years. In both sectors, the same technological advances are producing the same types of changes: new services, new entry, and globalization. Among foreign

governments, it is common for telecommunications and postal policy to be dealt with by the same ministry. For these reasons, and in view of the short period available for development of a U.S. position, ACCA encourages the Department of State to make maximum use of officials in Department of State and other government agencies who are familiar with reform of the international telecommunications framework. In particular, officials in the Bureau of Economic and Business Affairs and the Bureau of International Organizations in the Department of State are already familiar with many of the issues that will arise in development of a U.S. position towards the Universal Postal Union.[32]

4.4 U.S. DELEGATION TO THE BEIJING CONGRESS OF THE UPU

The makeup and functioning of the United States delegation to the Beijing UPU Congress will necessarily be different from previous U.S. delegations to the UPU. In respect to policy issues, the delegation will be led by the Department of State, not the Postal Service. For reasons of fairness and governmental efficiency, it will be necessary to include in the policy delegation representatives of operators (including the Postal Service and private operators) and users who are affected by the acts of the UPU and expert in postal policy issues. Procedures need to be specified to ensure that all parties have a fair chance to respond on any given issue. Given the unprecedented nature of the U.S. delegation to the Beijing UPU Congress, ACCA submits that the Department of State should, in the Statement of Position or in a separate document, set out specific plans for the selection and functioning of the U.S. delegation. Such plans should, of course, be consistent with the operation of U.S. delegations to procompetitive meetings in other sectors.

For the reasons given above, ACCA respectfully requests the Department of State to address promptly the foregoing petition.

[32]*See* General Accounting Office, "U.S. Postal Service: Postal and Telecommunications Sector Representation in International Organizations" at 23 (October 1998). In this report, GAO summarizes differences in the manner in which the United States has developed policy in the telecommunications and postal sectors. The manifest intent of Congress in transferring authority to represent the United States at the UPU for policy issues is to narrow such differences.

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IECC Submission to UPU High Level Group (2000)

1. The International Delivery Services Market of the Future

1 Delivery services for documents and parcels form an important part of the infrastructure of every national economy and of the global economy as a whole. The economic role of delivery services appears to be increasing because of the confluence of several important trends.

- an increase in high-tech and high-value-added goods as a percentage of economic activity;
- emergence of regional and global markets for production and sale of goods;
- introduction of fast-cycle logistics throughout the entire supply chain; and
- application of e-commerce capabilities that add velocity and visibility of goods in transit.

2 The international delivery services market is today a competitive commercial market occupied by many types of operators. International Post Corporation estimates that the international mail and express market in 1998 was worth US$ 41 billion. The revenue share of public postal operators was estimated to be about US$ 12 billion, or 30 percent of the total.

3 Of the share of the international market held by public postal operators, approximately 60 percent is provided by operators in industrialized countries. In virtually all industrialized countries, the public postal operator is a commercial entity acting much like a private business. That is, the public

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International Express Carriers Conference, "Submission of the International Express Carriers Conference to the High Level Group of the Universal Postal Union" (Apr 7, 2000). Only Part 6 is reproduced.

postal operator covers its costs from revenues, pursues revenue making opportunities in competitive markets, and answers to its "customers." While in virtually all countries the public postal operator is obliged to provide certain types of postal services and other public services—often called "universal services"—it is unclear how much such obligations exceed the scope of what the public postal operator would offer in its own commercial self-interest. In general, it is fair to say that public postal operators in industrialized countries are commercial operators owned (in whole or in part) by governments rather than non-commercial services provided by government. In developing countries, as well, this trend is increasingly evident.

4 In summary, today no more than 10 percent of the international delivery services market is provided as a government service. The vast majority of the international delivery services market is provided by private and public operators acting on a wholly commercial basis.

5 Not only is the international delivery services market commercial and competitive in nature, it is undergoing rapid evolution as well. Three major parameters of change are evident. First, delivery services are becoming organized into supra-national, even global, operating entities. A graphic illustration of this trend is the recent formation of a joint venture pooling the international business mail services of TNT Post Group, U.K. Post Office, and Singapore Post.

6 Second, types of delivery services which were once distinct from one another (letter, parcel, express, logistics) are now merging. The leading edge of this trend is the evolution of the public postal operator in Germany into a regional parcel company and global logistics company, with subsidiary businesses in e-commerce and finance.

7 Third, governments are loosening restrictions on competition between public operators and private companies. In recent years, reductions in the scope of the postal monopoly have been adopted in most industrialized countries and several developing countries. At the same time, public postal operators are being given greater authority to enter new competitive sectors.

8 Given the vast changes that have *already* taken place in the international delivery services in the last decade or two, the IECC submits that, if a magic spell were cast across the postal world and all traces of the present Universal Postal Union were forgotten, it is inconceivable that governments would recreate the Constitution and Convention of the present UPU. Yet, even this discrepancy between old law and new facts fails to reflect the magnitude of the challenge posed by an inquiry into the future of the UPU. Given the rapid pace of market evolution, any discussion of the future of the UPU must necessarily look ahead to the market of the future, not to the market of today.

9 If member governments were faced with a *tabula rasa*, what legal framework would they establish to govern the international exchange of documents and parcels in the future? This is the perspective that, in the opinion of the IECC, should be brought to a discussion of the future of the UPU.

2. PROCESS OF REFORM: NEED FOR A REFORM ADVISORY PANEL

10 The rapid evolution of the international delivery services market and its implications for the future of the UPU have not gone unnoticed by the UPU. For at least ten years, the UPU has undertaken several studies of the fundamental impact of increasing diversification and commercialization in the international mail market.

A. WASHINGTON CONGRESS (1989)

11 In December, 1989, the Washington Congress adopted Resolution C8/1989 based on Proposal 026 by the U.K. This resolution instructed the UPU Executive Council "to have the organization and objectives of the International Bureau, the EC, and the CCPS examined by experts selected from among public postal operators, management consultants or a combination of the two." Proponents explained that the study was necessary because:

> 1. The Post Office is aware of the *growing competition* which is often able to respond better to the ever changing requirements of the clientele. The Post Office must also meet the challenge of the *new technology* in the field of communications.
>
> 2. In the main, the *communications market is growing rapidly*, and the Post Office has the chance to enlarge its share.
>
> 3. The EC [Executive Council] has already carried out a useful study on the improvement of the work of the organs of the Union, but there is no doubt many reforms and improvements to be made.
>
> 4. Several postal administrations have had their organization and practices examined by consultants so that they can react with more flexibility and more dynamism to challenges and opportunities, both on a national and an international scale.
>
> 5. The EC might consider it useful *to examine the existing organization* so that the UPU can adapt its methods and practices to present demands.[1]

12 After the 1989 Congress, the Executive Council assigned the study called for in Resolution C8 to Working Party 3.3. Working Party 3.3 in turn divided this work into two parts: (i) a study on UPU structures and work methods and (ii) a study on long term UPU strategy.

B. STUDY BY THE GROUP OF POSTAL EXPERTS (1992)

13 In July 1991, a Group of Postal Experts was assembled to study the structures and work methods of UPU. The Group consisted of six persons drawn from the postal administrations of the United States, Australia, Finland, France, United Kingdom, and New Zealand. The Group labored during a period of exceptional turmoil in the international postal world caused by

[1][Editor's note: Throughout this chapter, italics within quoted text indicates emphasis added by the IECC unless otherwise indicated.]

formation of a joint venture between a large international express company (TNT) and five major post offices (Canada, France, Germany, Netherlands, Sweden).

14 In January 1992, the Group submitted an 80-page report. CE 1992 C3 Doc 2a. The report makes clear that the Group considered its original brief too limited to address the important issues facing the UPU. The Group therefore pressed Working Party 3.3 to extend its brief to include "recommendations for changes outside the existing scope and objectives of [UPU institutions]" (appendix 5, page 2). The central concern of the Group was the rapid evolution of international express companies such as DHL, Federal Express, TNT, and UPS and the TNT joint venture. The Experts considered the International Bureau too slow to respond to these commercial developments.

15 Noting "a ground swell of recognition of the need for the Union to change and adapt" (page 5), the Experts proposed three scenarios for long term reorganization of the UPU. Each scenario represented a step towards increasing separation of governmental and commercial functions. Scenario 3 posited "a complete separation of operational activities" which would be "'spun off' as a separate enterprise supported by contributions from those administrations (not countries) participating in its activities." The UPU itself would remain as "a purely regulatory body" (page 76). The Experts did not seem to realize, however, that the purely regulatory nature of the UPU under scenario 3 implied that it's membership should be limited to regulators rather than operators. Europeans, however, recognized this implication. In September 1992, a majority of European postal operators indicated their support for "a distinction between regulatory and operational functions within the UPU." CE 1993 C3 Doc 2a Add 1, paragraph 11, and annexes.

C. STUDY BY ERNEST AND YOUNG (1993)

16 The study of long term UPU strategy was assigned to an outside consultant, Ernest and Young. In March 1993, E&Y's report, entitled "Universal Postal Union: Future Organisation and Funding," proposed creation of an Administrative Council and Operations Council within a unified UPU. CE 1993 Doc 7. The E&Y report was developed by consulting with UPU members through questionnaires and workshops. The option implicitly favored by the Group of Postal Experts, separate structures for governmental and operations functions, was rejected in the very first workshop convened by E&Y, held in September 1992. As E&Y took care to point out in presenting its report to the Executive Council in May 1993, "the recommendations contained in the report were not, strictly speaking, those of the external consultant but an amalgam of the views expressed in the course of the various consultations and the three workshops." CE 1993 Doc 7, paragraph 5. Nonetheless, creation of the CA and POC were intended as a move in the direction of further separation of governmental and commercial functions.

D. SEOUL CONGRESS (1994)

17 In August 1994, the Seoul Congress of the UPU reorganized the main bodies of the UPU along the lines proposed in the E&Y report. See Seoul Congress Doc 70. In addition, the Seoul Congress, "recognizing the fundamental changes the international postal sector is currently experiencing, such as the expansion of competition, the liberalization of exchanges of services, and the growing need to take into consideration the interests of all participants in postal activity," instructed the newly formed Council of Administration "to continue seeking as a matter of priority ways of improving all aspects of the Union's structure and of the management of its work." Resolution C 59.

18 In October 1995, the Council of Administration adopted a work program focused on six objectives identified by the Executive Council prior to the Seoul Congress.[2]

19 Pursuant to Resolution C 59 and the October 1995 work program, the Council of Administration initiated several studies to define key aspects of the future of the UPU:

- study on the legal, regulatory, technological and commercial environment in relation with the single postal territory principle (led by Germany);
- study on the status of members of the Universal Postal Union, including the possibility of admitting outside observers (led by the Netherlands); and
- study on the UPU's mission statement (led by France).

The first study, on the single postal territory, was directed by CA Committee 1. The second and third studies were overseen by Committee 1's Working Party 1.1. Reflecting the separation of governmental and commercial functions in Europe, these three studies were, in each case, led by representatives of member governments rather than operators.

E. STUDY BY GERMAN REGULATOR ON THE SINGLE POSTAL TERRITORY (1996-1997)

20 In October 1995, Committee 1 asked Germany, Tanzania, and Argentina to make a study of the legal, regulatory, technological and commercial environment in its relation to the UPU's single postal territory principle. The study was led by the German regulator (i.e, the ministry dealing with postal affairs) and aided by a German market research group, Wissenschaftliches

[2]CA 1995 Doc 17c/Rev 1/Annex 1, "Programme and budget: Five-year cycle 1995-1999, Financial year 1996." As authority for the six objectives, the Programme cites not a resolution of the Seoul Congress but Doc 7 of the 1994 Executive Council. Doc 7 proposed that the Seoul Congress adopt a resolution restating the mission of the UPU "in a more accessible form than the one in the Constitution." Doc 17c, paragraph 36. Apparently, however, this draft resolution was never adopted by the Seoul Congress.

Institute für Kommunikationsdienste (WIK). The study began with a questionnaire on the principles of the UPU sent to regulators and postal administrations in all UPU member countries.

21 In October 1996, the German regulator reported on results from the questionnaire. CA 1996 C1 Doc 2. The report revealed substantial support for procompetitive regulatory reforms and further separation of governmental and commercial functions at the UPU. Based on these replies, the German regulator proposed that "the Universal Postal Convention should commit each member country to offering non-discriminatory transit and delivery services. Non-discriminatory in this context means that *private operators are treated in the same manner as postal administrations in respect of price and conditions of access when volume, structure and regularity of mail is comparable.*" As a consequence, terminal dues and the anti-remail provision of the Convention (Article 25 in the 1994 Convention) would have to be substantially modified. Members of Committee 1 objected to these proposals, however.

22 In October 1997, the German regulator offered a scaled back version of its proposals on the future of the single postal territory, limiting the concept of commercial neutrality to bulk mail. CA C1 1997-Doc 2. The rationale of the German proposal was explained as follows:

> *The changes distinguishing today's market for cross-border letter-post items from that of the past, are fundamental*, developments seem to be irreversible [sic]. In many countries, the postal administrations face competition with private operators whose market share of cross-border letter-post items is constantly increasing. *Many postal administrations no longer confine their activities to the national territory. Some are presently undergoing a process of internationalization, they are becoming global players whose commercial interests reach far beyond the domestic market and the national borders.* In view of all this, *adaption of the regulatory framework for cross-border letter-post items seems to be indispensable*. [Paragraph 6]

23 Committee 1 responded to the pared down German proposal by essentially cancelling the study. Long term policy implications of the German regulator/WIK study were reassigned to the International Bureau. Terminal dues aspects of the German proposal were reassigned to other UPU committees addressing terminal dues revisions. CA 1997 Doc 11a.

F. STUDY BY THE DUTCH REGULATOR ON OBSERVERS IN THE UPU (1996-1999)

24 The possibility of admitting observers to UPU meetings was the subject of a study led by the postal regulator of the Netherlands. In 1996, the Dutch regulator outlined the issues involved. CA GT 1.1 1996.1 Doc 6; CA GT 1.1 1996.2 Doc 4.

25 In April 1997, the Dutch regulator proposed to amend the rules of the UPU to admit observers from interested international organizations. Working

Party 1.1 decided to distribute this proposal to the Council of Administration and Postal Operations Council for comment. CA 1997 C1 Doc 3a, par. 22. This procedure elicited many objections.

26 In April 1998, the Dutch regulator proposed a more limited approach towards observers. CA GT 1.1 1998.1 Doc 5. Members of the Working Party 1.1 continued to raise objections, however, and the matter was referred to the CA meeting in October 1998.

27 In the October 1998 CA meeting, the United States proposed an alternative to the Dutch proposal that would create an Advisory Group instead of granting observer status to outside groups. CA 1999 Doc 11c.bis. The CA decided to send both the Dutch and U.S. proposals to the Beijing Congress for decision. CA C1 1998 Doc 2a. Add 1, par. 22.

28 In September 1999, the Beijing Congress adopted the proposal to create an advisory committee. Resolution C 105/1999. The Dutch proposal to permit non-governmental observers at UPU meetings was rejected.

G. STUDY BY FRENCH REGULATOR ON THE UPU'S MISSION (1996-1999)

29 The long term mission of the UPU was the subject of a study assigned to the French regulator. In April 1996, the French regulator produced a thoughtful paper setting out broad themes which it intended to explore. CA GT 1996.1 Doc 4. Referring to the Ernst and Young study of 1993, the French paper noted the increase in competition in the postal market place and the trend towards liberalization of postal laws. It continues:

> *. . . an increasing number of States have considered they could no longer be "judge and party" and have chosen to separate public authority responsibilities from operational functions both organically and functionally*. Operational functions have mostly been entrusted to autonomous entities. This reorganization movement is on a world wide scale. It must also be stated that this movement is not specific to the postal sector, but concerns the broader problem of conditions of State intervention in competitive economic sectors (telecommunications, energy, transport, etc).
>
> *Just as governments have had to adapt, the UPU, as an intergovernmental body, must also take this new situation on board*.
>
> *The UPU was set up at a time when States were the only actors in the postal sector*. Since then it has acquired a very strong "operational" responsibility through its mission to organize the international postal service. It nonetheless remains an intergovernmental body and is one of the UN's specialized institutions. *As such, it must, just like an increasing number of Member States making it up, take account of the new "ground rules" and ensure that the cooperation methods it recommends to its members, and which to a certain extent are essential for maintaining and improving the postal service world wide, cannot be interpreted as a sort of organized understanding with the aim of combating private competition*. If this were the case, private operators would not hesitate to take legal

> proceedings. If these new aspects were not taken into account in the future workings of the UPU, it is to be feared that an increasing number of Member States will find themselves in contradiction with their international undertakings (European Union Treaty, GATS, etc) and this could lead to a breakup of the Union. The Ernst & Young report stresses the need for the UPU to remain a unified organization where governments and operators may be represented. [pars. 13-15]

30 In early 1997, the French regulator sent a questionnaire on the future mission of the UPU to UPU members, private operators, and users of international mail. The results of this survey were reported in August 1997. CA C1 1997 Doc 3b. The report covers a broad range of issues and notes, inter alia, "*a majority emerges in favour of a certain amount of impartiality by the UPU towards the various players in the sector*." Paragraph 23.

31 In October 1997, Committee 1 decided that the French regulator should develop a proposal focused on a single issue arising from this questionnaire: a proposal adding to the Convention an explicit obligation to provide a universal service. France was also directed to prepare for Congress a draft recommendation listing the components of universal service. CA 1997 Doc 11a.

32 In September 1999, the Beijing Congress adopted a version of the French proposal adding a general universal service obligation to the Universal Postal Convention.

H. HIGH LEVEL UPU STRATEGY CONFERENCE (1997)

33 In October 1997, the UPU organized a major conference on the future direction of the UPU in Geneva. Several speakers spoke in compelling terms of the need for reform of the UPU. For example, Elmar Toime, Chief Executive Officer of New Zealand Post, declared:

> I have a vision for the Post in the year 2005 that I would like to share with you. I see an environment where the reform processes occurring today have been completed. A postal world free from the shackles of Government conservatism and constraint. Where employees concentrate on customer service, on service performance, on efficiency. Where we get the basics right.
>
> *In 2005, I see a postal world where discussions about the need for reform have stopped. Where we have a common, commercial language that talks about competitiveness and wealth creation*. A world of property rewarded, energetic employees, motivated to good service performance.

34 Other speakers at the Strategy Conference noted the importance of globalization and the implications of the WTO telecommunications agreement. Implications of technology, liberalization, regulation, and the rise of private sector competition were also addressed. CA 1997 Doc 8.

I. STUDY BY ARTHUR D. LITTLE ON THE ORGANIZATION OF THE UPU (1998)

35 In October 1997, the French regulator suggested that its study on the mission of the UPU should be supplemented by a study by an outside consultant to "evaluate the present organization of the UPU and, if appropriate, propose a restructuring in the light of the evolving needs of its members, and the rapidly changing international postal environment." The study was also expected to analyze the current and likely future trends in the international postal sector, recognizing the distinctive roles of all major stakeholders.." CA 1997 Doc 2a Add 1 par. 4. The CA approved the proposed study. The International Bureau drafted the terms of reference of the study in consultation with representatives of France, the United States, the United Kingdom, and the Netherlands. In early 1998, Arthur D. Little (ADL) was selected. CA 1998 Doc 2a, par. 23.

36 On 30 July 1998, ADL submitted its 44-page report, *Review of the Organization of the UPU*. CA GT 1.1 1998.2 Doc 3. Like the Ernst and Young report of 1993, the ADL report appears to have been based heavily on workshops and questionnaires in which postal administrations were the major, but not only, contributors. In its report, ADL notes eight trends shaping the environment of the UPU, generally those relating to increased competition and liberalization. Unlike the Postal Experts Group (1992) and Ernest and Young (1993), ADL does not consider whether such environmental changes imply basic changes in the mission or nature of the UPU. Rather ADL recommends a number of organizational reforms to make the UPU more "resilient." In general, ADL recommends decreasing the authority of Congress, increasing the authority of UPU's permanent bodies, elimination of duplication in UPU activities, and increased reliance on task forces rather than permanent committees.

J. U.S. PROPOSAL FOR AN EXTRAORDINARY CONGRESS (1999)

37 In September 1999, at the Beijing Congress, the regulator from the United States suggested that the UPU should convene an Extraordinary Congress in 2001 with authority to adopt changes in the basic acts of the UPU to respond to fundamental changes in the legal and commercial environment. Proposal 033. The U.S. proposals was supported by regulators from countries such as Germany, the Netherlands, Australia, and New Zealand.

38 The Beijing Congress rejected the proposal of the U.S. regulator. Instead, the Beijing Congress opted "to *continue* to review the UPU mission, structure, constituency, financing, decision-making and budgetary processes and to make recommendations for any changes." Resolution C 110/1999. As part of the continuing review, the CA is instructed "to establish a High Level Group (HLG) on the future development of the UPU, within the frame-work of the Council of Administration, and reporting to it." The task of the HLG is generally "to consider the future mission, structure, constituency, financing and

decision-making of the UPU, with particular reference to the development needs of developing countries and the need 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."

K. CONCLUSION: A HIGH-LEVEL REFORM ADVISORY PANEL SHOULD BE FORMED

39 In the last decade, the UPU has clearly shown that it understands the fundamental nature of the commercial and regulatory changes sweeping the international delivery services market. Resolutions of congress, the report of the Group of Postal Experts in 1992, and papers or proposals by regulators of several leading member countries all attest to such appreciation. Likewise, it is clear that UPU members have considered at some length the key elements of reform, including separation of governmental and commercial functions, a commercially neutral definition of the single postal territory, rationalization of terminal dues and elimination of Article 40, admission of observers to governmental meetings.

40 Despite keen awareness of both the need for reform and the path to reform, the UPU has found it difficult to develop a reform plan that truly and objectively reflects the needs of users and the broad economic and legal trends reshaping the sector, trends especially evident in industrialized countries. Reform initiatives, whether by leading postal officials or regulators, have not been translated into fundamental reform. One reason seems to be that the process of deliberation employed by the UPU is inherently ill suited to basic reform. Surveys and workshops dominated by public postal operators have well served the UPU in carrying out its primary mission, coordination of international postal services. However, this process is less adequate to a fundamental rethinking and reformulating of the mission of the UPU itself, especially in light of substantial differences among UPU members in the state of sectoral development.

41 In drawing this conclusion, the IECC emphasizes that it does not in any way consider the UPU's lack of progress towards fundamental reform a "failure" on the part of those who have participated in the UPU's reform efforts to date. External circumstances pressing upon the UPU imply a degree of reform that would present a severe challenge for the internal resources of any organization. The IECC does not pretend that an organization of private operators would have done better than (or as well as) the UPU has done in identifying and grappling with the difficult issues posed.

42 Like the UPU, the International Telecommunication Union has been reconsidering its future for several years. To develop an objective, long term perspective on reform, the Secretary General of the ITU appointed a 27-member Reform Advisory Panel, comprised of ministers and other senior government officials, chief executive officers of industry, and regulators and

operators and chaired by the Secretary General of the International Chamber of Commerce. As the ITU conceded, this approach was "a radical departure from traditional approaches." The ITU RAP met on March 10, 2000. It urged a broad reform agenda including "a truly public/private sector partnership." The RAP suggested the ITU should become "a think-tank for collecting and collating best practice regulatory policies and act as a repository for benchmarking in its area of expertise" and a "global facilitator in regulatory and policy matters." The RAP proposed that a specialized group be appointed to produce concrete recommendations.

43 In light of all of the foregoing considerations, the IECC suggests the High Level Group appoint a truly independent Reform Advisory Panel on reform of the UPU. The RAP should be composed of persons who can and will take a broad view across the entire spectrum of international delivery services for documents and parcels and, indeed, look beyond this to the role that this sector plays in the social and economic life of the globe. This panel should include far sighted representatives of public and private operators and their regulators, of course, but more importantly, the panel should be led by representatives of users and experts in the fields of trade, technology, and law. The mission of the panel should be to exercise its best judgement as to the future structure and role of the UPU. In our view, the tenure of this panel must extend for several months at least, giving members a chance to gather facts and weigh alternatives. A one day meeting is plainly insufficient. This panel should be equipped with a small staff that is completely independent of any group of operators or users, including the UPU itself. An independent consultant might be employed to serve as staff for the RAP. To the extent that governments decide that operators should help defray the costs of a Reform Advisory Panel, private operators will contribute their fair share.

3. PRINCIPLES OF A NEW CONVENTION

44 The International Express Carriers Conference respectfully suggests that the marketplace for the international exchange of documents and parcels has changed so fundamentally from that premised in the present convention of the Universal Postal Union that a wholly new convention must now be developed to govern the international exchange of documents and parcels in the twenty-first century. Preliminarily, the IECC envisions a new convention as a relatively short document, defining principles of international law enforceable by national courts and national regulators.

45 Because of the long history and repository of expertise associated with the UPU, it would be best if this new convention takes the form of a revised and updated Universal Postal Convention. However, a new convention could take other formats. It could, for example, be embodied in commitments within the framework of the General Agreement on Trade in Services (as happened in the international telecommunications sector). Alternatively, a new convention could be implicit in piecemeal reform (or repudiation) of several international

agreements.

46 For the purposes of this statement, we shall assume that a new convention will take the form of a fundamental revision of the Universal Postal Convention. The following paragraphs present a conceptual outline of eight principles that could be included in a new convention. This outline is not intended as a definitive statement but as a starting point for further consideration and discussion.

A. CUSTOMER-DEFINED MARKET

47 In the period from the late nineteenth century to the early twenty-first century, the defining influence in the market for the international exchange of documents and parcels has shifted from public service provider to customer. A new convention must reflect this new reality. The essential object of a new convention should be allow citizens of member countries to exchange documents and parcels as freely, as easily, and efficiently as possible consistent with the requirements of national security and due regard for the prerogatives of national sovereignty.

48 A new convention focused on the customer should apply to the international exchange of documents and parcels generally, not only to the subset of documents and parcels transmitted by public postal operators. This implies a substantially broader ambit than the present convention and a qualitatively different type of agreement. Plainly, it is not in the public interest to straight jacket parts of the market outside the scope of the present convention with new detailed regulations.

49 Focus on the customer's choice further implies that the guiding spirit motivating provisions of the new convention must be the need to develop a "level playing field" for all operators. Market distortions that favor one operator or another impeach the freedom of the customer to make best use of "the single postal territory." While some restrictions may be necessity to protect and advance the general public interest, they should impinge on customer freedom as little as possible and affect all operators equally.

B. RIGHT OF INTERNATIONAL ESTABLISHMENT

50 The cornerstone of the present convention was freedom of transit. In a new convention—in a market of global delivery services—the cornerstone should be a formal right of establishment for *international* delivery services. That is, an international delivery service should have a legal right to open an office in any member country and provide for collection and delivery of international (not domestic) documents and parcels.

51 A right of establishment implies an embrace of *global* delivery services. It does not, of course, imply that international delivery services should be exempt from whatever restrictions and taxes a sovereign nation employs to regulate international trade.

52 Similarly, a right of establishment to provide international delivery

services does not imply an end to reserved services in those countries that choose to retain a postal monopoly. Where a member country maintains a reserved area for domestic postal services, a new convention must permit the member country to protect its public postal operator from the financial effects of reserved domestic traffic migrating into unreserved international markets. For example, a member country could be allowed to tax international delivery services to the extent that such migration occurs and imposes a net cost on the domestic operations of a public postal operator. It is clear, however, that remedial mechanisms must be strictly limited to those demonstrably and objectively necessary to make up for adverse financial effects suffered by the domestic reserved services of the public postal operator.

53 Generally, a right of international establishment must be consistent with the right of member countries to define and assure universal national availability of affordably priced delivery services, especially in developing countries. We would submit, however, that respect for an international right of establishment should imply as a corollary that special or exclusive rights in favor of a domestic public postal operator should be proportional to the requirements of assuring universal domestic postal service.

54 Today, private international delivery services are established in virtually all countries. One way or another, major public postal operators are likewise rapidly opening offices in other countries. A right of establishment is more of a formalization of a new reality more than an introduction of new legal rights. Nonetheless, it would be useful to confirm such rights and to establish clear limits on the authorization procedures that may be used to regulate the right of international establishment.

C. SEPARATION OF GOVERNMENT AND COMMERCE

55 A new convention should reflect a complete separation of governmental and commercial functions at the international level. As noted above, the vast majority of the market is provided by private and public operators acting on a wholly commercial basis. The danger of combining governmental and commercial functions is manifest. Allowing commercial entities to exercise governmental powers may lead to distortion of commercial markets.

56 Intergovernmental authority must be exercised by disinterested governmental officials whose jurisdiction includes the entire breadth of the market, including all operators and consumers. Only governmental authorities should have the power to adopt binding international public law. This principle must apply even where some laws have "operational" implications, such as international customs agreements. Separation of governmental and commercial functions also implies that a secretariat dedicated to implementation of intergovernmental authority should be separate from a secretariat devoted to commercial matters.

57 Collective efforts by public postal operators to improve the quality and commercial success of their national and international delivery services should

not be impeded by a new convention, but these efforts should be carried on outside of a framework of intergovernmental authority. The questionnaire of the High Level Group notes several such collective efforts which under terms of the present convention take place under the auspices of the UPU, but which could equally well be undertaken in a private association of public postal operators similar to PostEurop. These include the following:

- establishment of common procedures and standards for access of national postal services (2.3);
- advocacy of improvements in the application of security and customs laws to public postal operators (2.5);
- development of proposals for compensation schemes between public postal operators and for contractual arrangements between public postal operators collective and air carriers (2.6);
- assisting public postal operators to expand their markets (2.8) and market research for new products and services (2.9);
- advice to member countries in respect to postal reform laws (2.10);
- providing a forum for interaction between public postal operators and their customers and suppliers (2.12);
- promotion of the role of public postal operators, both individually and collectively (2.13).

58 A new convention should also require that, in general, the principle of separation of governmental and commercial functions must be respected at national level. That is, in the regulation of *international* activities covered by a new convention, the new convention should require that member countries establish independent regulators which are separate from, and not accountable to, any supplier of domestic or international delivery services.

D. EQUAL APPLICATION OF LAW

59 A corollary to the principle of separation of governmental and commercial functions is the principle of equal application of the law. Provisions of a new convention should apply equally to all operators and all citizens.

60 In particular, convention provisions relating to customs formalities should apply equally to all operators. This principle does not, however, imply that public postal operators should be faced with the customs complexities now imposed on private operators. There may be good reasons for maintaining two procedures for customs clearance, a fast but complex procedure and a slow but simple procedure. The first procedure might be similar to the one now used for private express shipments; the second might be similar to that used for postal shipments. Equal application of customs law implies only that in future both clearance procedures should be open to all operators.

61 A new convention should also require that, in general, the principle of equal application of law should apply as well to national laws regulating international delivery services. For example, competition laws, customs laws, tax laws, environmental laws, airport access rules, and security laws should,

in principle, be applied equally to all international operators. An exception may be necessary where application of this principle would demonstrably obstruct the ability of a national public postal operators to perform a particular public service task committed to it.

62 Similarly, a revised UPU established under a new convention should be obliged to advance the principle of equal application of law in its coordination efforts with other procompetitive organizations, such as the World Customs Organization, the World Trade Organization, and the International Civil Aviation Organization.

63 Access to *non-competitive* domestic postal services should be a matter of special concern in a new convention. If a public postal operator benefits from a reserved area or other special rights, a new convention should require that the public postal operator give all international operators equal access to the legally protected, non-competitive services. If a member country can, by law, favor one or more international operators with access to non-competitive domestic delivery services, then the member country is effectively applying the law in an unequal manner.

64 At the same time, the IECC recognizes that "equal access" implies only the same charge for the same service at the same quality level and under the same conditions as provided for equivalent domestic mail. Generally, for example, for single piece letters, the concept of equal access implies a terminal dues charge less than the normal stamp price since the domestic stamp price includes, inter alia, a charge for the stamp itself and for collection of letters from post offices and mailboxes (many post offices consider that terminal dues should be 20 to 40 percent less than domestic postage). If a foreign mailer—whether foreign postal administration or private operator—prepares mail by, for example, sorting the mail, the appropriate terminal dues rate might be lower still, just as a domestic postage rate may include discounts for sorted mail. Similarly, if, for some reason, a postal administration provides foreign mail worse, or better, service than provided domestic letters, then the concept of equal access would imply appropriate adjustments in terminal dues rates. Equal access does not preclude surcharging a tender of international mail that differs from a typical tender of domestic mail in a significant, cost-related manner. For example, a postal administration might legitimately apply a cost-related surcharge to a tender of international mail that is all destined for rural areas since the domestic postage rate is based on an average tender of domestic mail that is predominately destined for urban areas where delivery costs are lower than in rural areas.

65 An especially thorny area of unequal application of law is state aid for a selected international operator, usually the national public postal operator. Manifestly, international delivery services among member countries will be distorted if any member country provides state aid to a postal operator, such as access to revenues of a postal monopoly, low-interest loans, or special treatment under tax, customs, or other laws. While state aids are a normal

problem in international trade, the long history of governmental involvement in postal services and the relatively small scale of international operations compared to domestic operations may require special considerations.

E. FREEDOM OF TRANSIT

66 As noted above, freedom of transit was the cornerstone of the present convention. "Freedom of transit" refers to a right of each member country to require a second member country to transport international mail across its national territory to a more distant member country. Article 1 of the UPU Constitution declares unequivocally: "Freedom of transit shall be guaranteed throughout the entire territory of the Union."

67 The significance of the international obligation to provide transit services has declined substantially with development of international transportation services available by the general public. Today, it is relatively easy for any operator to arrange with public transport companies for transportation of documents and parcels across any country in the world. Nonetheless, to assure continuity of international service, a new Convention should retain a residual obligation to provide transit services, at appropriate compensation, where public conveyance is unavailable or impracticable.

68 Article 1 of the present convention restates the principle of freedom of transit as an obligation imposed on postal administrations. In the new convention, however, the principle of separation of governmental and commercial functions implies that an obligation to provide transit services should be considered solely as an obligation imposed on member countries. Each member country should be free to decide which operator or operators will be enlisted to discharge this obligation.

69 A new convention also offers the possibility of extension of the principle of "freedom of transit." "Freedom of transit" could embrace not only an obligation for each member country to provide transit services where necessary but also a pledge to permit any international operator to make its own arrangements for the transit of documents and parcels without undue interference. Under such an extension of this principle, national monopolies (postal or otherwise), restrictions, and taxes applicable to the handling and transportation of domestic documents and parcels would not be allowed to hinder the movement of international documents and parcels in transit to third countries.

F. OPEN DEFINITION OF UNIVERSAL SERVICE

70 "Universal service" is a general concept that is not set out clearly in UPU law. Unlike the obligation to provide transit services, there is no unequivocal obligation to deliver inward international documents and parcels.

71 The historical concept of "universal service" appears to be no more than an understanding that each member country is *implicitly* obliged to ensure that inbound international mail addressed to persons in its territory is delivered in

a manner *substantially* equivalent to that accorded the delivery of domestic mail. Nonetheless, the UPU Convention has *not* been interpreted to require a member country to offer foreign operators—even foreign public postal operators—access to the full range of domestic postal services offered to domestic mailers. For example, it is understood that a member country may offer its citizens a bulk discount postal service but not offer such service to foreign operators on the same terms. Moreover, the concept of "universal service" is further qualified by the fact that not every member country provides postal service to every address in its national territory. Thus, even implicitly, the UPU Convention assures universal international postal service only in a very limited sense.

72 Recent UPU conventions have made a concept of universal service somewhat more explicit. In 1989, Article 36 was added to the Washington Convention to provide that the quality of service provided inbound international mail should be no less favorable than that accorded domestic mail. A legal right to delivery of inbound international mail was assumed. In 1999, Article 0bis was added to the Beijing Convention to require all member countries to "ensure that all users/customers enjoy the right to a universal postal service involving the permanent provision of quality basic postal services at all points in their territory, at affordable prices." Again, there was no explicit obligation for member countries to make this universal service available to citizens in *other* member countries.

73 A new convention should address the concept of universal service more clearly and explicitly and align it more closely with the principle of national treatment found in many international conventions including the General Agreement on Trade in Services. In all cases in which a member country guarantees to its citizens the availability of a "universal postal service," the new convention should oblige the member country to ensure that citizens in other member countries will also have access to such universal postal services on he same terms. In other words, the new convention should embrace the principle that any definition of universal service adopted by any member country must be an *open* definition, available to customers in all member countries.

74 This approach is flexible. It also allows a member country to limit the extent of the universal service obligation imposed by the new convention. If a member country does not assure the provision of a given post service to its citizens, then it would not be obliged to assure its availability to citizens in other member countries. For example, if the government does not guarantee the continued availability of direct mail services throughout the nation, then the country would not be obliged to ensure that such services are available to foreign operators or citizens in other member countries.

75 In principle, the IECC believes that the approach to universal service adopted in a new convention should be consistent with the sovereign right of each member country to define its "universal service obligation" as it deems

appropriate. Nonetheless, the IECC notes that too expansive a definition of "universal service" can lead to unnecessary distortions in both domestic and international markets. Therefore, the IECC submits that a new convention should also enjoin each member country to ensure that its definition of universal postal service is proportional to important public policy goals that cannot be achieved by a competitive market.

G. FACILITATION OF INTERNATIONAL COMMERCE

76 The system of public and private delivery services—not merely delivery services offered by public postal operators—is today vital to the economic welfare of every modern economy and to the growth of the global economy generally. For this reason, it is appropriate for a new convention to facilitate the operation of such services by means of simplification and standardization of regulatory practices which impede their development.

77 The present convention provides facilitation in one vital area of international trade: customs law. Customs laws comprise the single greatest impediment to the growth of modern international delivery services. The present convention provides for simplification of customs formalities for shipments transmitted by public postal operators. Some customs authorities believe that these procedures are out of date. A new convention should refine these customs facilitation measures and extend them to transmission of all documents and parcels by all operators. At the same time, a revised UPU established under a new convention should work to ensure that related provisions in other international agreements, such as the Kyoto Convention, are also rendered consistent with this principle.

78 A new convention might address other areas of facilitation as well, such as aviation security regulations, hazardous material regulation, airport access rules, and so forth. Such possibilities deserve further study.

H. TARGETED ASSISTANCE FOR DEVELOPING COUNTRIES

79 Whether or not a new convention should maintain a special levy on international delivery services to assist domestic post offices in developing countries is a question that requires reconsideration in light of alternative aid programs, such as those administered by the World Bank. The present convention provides aid to developing countries in several ways. The primary mechanism is a terminal dues system that is unrelated to costs. This system directs aid to those countries with the most traffic. It is not targeted to these countries that have the greatest need or who can make the most effective use of such aid. Additional aid is available through specialized programs administered by the UPU.

80 In addition, the questionnaire of the High Level Group lists several activities which appear to be primarily in the nature of assistance to developing countries, including:

- suggesting standards for universal service (2.1);

- technical assistance to member countries in regard to universal service (2.2);
- assistance to public postal operators in monitoring quality of service (2.4);
- assistance to public postal operators in data collection (2.7); and
- technical cooperation programs (2.11).

81 In the future, insofar as member countries decide to include in a new convention a special UPU program of assistance to developing countries, the IECC believes that such assistance should be more carefully targeted. Aid should be independent of traffic flows. The definition of "developing country" should be reviewed to ensure that aid is focused on those countries that are most in need or using such aid most efficiently. Aid in kind for developing country post offices should be preferred over aid in cash that can be diverted to other purposes.

82 Insofar as future aid programs represent an agreement among UPU member countries on the expenditure of *public* funds (including funds derived from reserved services) for public ends, the IECC submits that such funds should come from government coffers, and each member country should decide for itself how to raise such monies. Like other governmental programs, administration of an international aid program should be directed by governments, not operators. Members of the IECC are not opposed to contributing their fair share to a program of aid for developing countries provided such a program is developed and administered within an impartial governmental framework.

83 Insofar as such programs represent a voluntary contribution of *private* funds and expertise by public postal operators derived from competitive activities, IECC members pledge to work with public postal operators informally in an effort to identify opportunities for assistance to developing countries that can be identified outside a framework of legal obligation.

4. CONCLUSION

84 The International Express Carriers Conference respectfully suggests that the marketplace for the international exchange of documents and parcels has changed so fundamentally from that premised in the present convention of the Universal Postal Union that a wholly new convention must now be developed to govern the international exchange of documents and parcels in the twenty-first century. Corresponding revisions should be sought in related procompetitive agreements as well.

85 The Universal Postal Union, as presently organized, has studied the need for future reform for a decade or more. In the course of this study, the UPU has identified major trends impelling reform and outlines of possible reforms. Nonetheless, a review of the history of these efforts indicates that the UPU should now turn to an more external and objective process for carrying forward work towards a new convention.

86 To this end, the IECC proposes appointment of a Reform Advisory Panel similar in composition to that appointed by the International Telecommunication Union but with a longer term and independent staff. The RAP should be requested to undertake a careful review of all relevant issues and legal precedents and to consult with all appropriate parties. In the end, the RAP should offer its best judgement on a legal framework for the international exchange of documents and parcels that will serve the needs of international commerce generally. To the extent that governments decide that operators should help defray the costs of a Reform Advisory Panel, private operators will gladly contribute their fair share.

87 In respect to the content of a new convention, the International Express Carriers Conference has set out eight general principles which, in its view, could appropriately serve as the basis for such a convention. The IECC reiterates that this outline is intended only as an initial contribution for further collaborative discussion.

88 The IECC would like to express its sincere appreciation to the High Level Group for this opportunity to express its views of the activities and future of the Universal Postal Union.

Bibliography

This bibliography lists books cited in the overview chapters as well as other books which provide general background information for topics addressed. A list of informative, important, or accessible reports, documents, pamphlets is also provided, but this list does not include all documents cited. At the end, a note provides an brief guide to documents of the Universal Postal Union.

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NOTE ON DOCUMENTS OF THE UNIVERSAL POSTAL UNION

The *Constitution* of the Universal Postal Union was adopted as a permanent act in the 1964 Vienna Congress; previously organizational provisions were included in the Universal Postal Convention. The Constitution is amended by a new Protocol in each Congress. Hence, the "Constitution § 22 (1994)" refers to the Article 22 of the Constitution of 1964 as amended through the Congress of 1994.

Other acts of the Congress of the Universal Postal Union—including the *General Regulations*, *Universal Postal Convention*, and *Detailed Regulations* of the Convention (until 1994)—are revised and reenacted by each Congress. The General Regulations include organizational provisions implementing the Constitution. The Convention and Detailed Regulations and other Agreements (such as the Postal Parcels Agreement) set out rules governing the exchange of postal items. In this book different versions of these acts are denominated by the year of the Congress in which they are adopted, e.g., "Convention § 25 (1994)." Note that the 1994 Convention did not become effective until January 1,1996, and expired on December 31, 2000.

Each Congress also adopts official *Resolutions*. Resolutions include instructions to the permanent institutions of the Union to conduct studies or take other actions between Congresses.

At the time of signing acts of Congress, a member country may add a *Reservation* or a *Declaration*. Reservations to an act are added as a protocol to that act are binding on those who sign the acts. Declarations are non-binding statements declaring how a member country interprets the act.

All of the foregoing acts and other documents of Congress, together with extensive annotations by the International Bureau, are published every five years in a multi-volume set variously (and unclearly) titled. See Books and Papers, above.

UPU working documents are generally unavailable to the public. They may be obtained only with the assistance of governments or postal administrations. Nonetheless, because of litigation and policy debates, many of these documents are now in the public domain. The following provides a brief explanation of the numbering scheme used by the UPU for working documents.

In Congress, delegates consider primarily two series of official papers: Documents (Doc) and Proposals. Documents are typically prepared in advance of Congress by the permanent bodies of the UPU. A document prepared for consideration of the Congress as a whole is called a "plenary" document and is denominated by number, for example, "Congress Doc 56." The work of Congress is done primarily in committees of the whole, i.e., Committee 1, Committee 2, etc. Documents prepared for consideration in committee are numbered, for example, "C1 Doc 2." Proposals set out resolutions or new provisions in the acts; for example, Proposal 033 or Proposal 20.40.1. Proposals may originate in the permanent bodies of the UPU or individual member countries.

The Congress also prepares minutes for plenary meetings which are numbered by session, e.g., "PV 1." Minutes of meetings of committees of Congress are also numbered by session, e.g., "C 4 Rapp 2" refers the minutes of the second session of Committee 4.

Documents of the UPU's permanent institutions follow a similar scheme. Prior

to 1994, the permanent bodies were the Executive Council (EC) and the Consultative Council for Postal Studies (CCPS). After 1994, the main permanent bodies were the Council of Administration (CA) and the Postal Operations Council (CEP). Each permanent body meets in full session once per year. Documents prepared for use in a plenary session of such bodies are referred to by body and year, e.g., "EC 1993 Doc 1" or "CA 1997 Doc 2" or "CEP 1998 Doc 3." Both the CA and CEP (and previously, the EC and CCPS) make use of numbered committees to study proposals before consideration in plenary session. Documents prepared for committees of the CA and CEP are named, for example, "CA C 4 1998 Doc 2" or "CEP C 4 1998 Doc 2," referring to the documents of 1998 plenary sessions of Committee 4 of the Council of Administration and the Postal Operations Council, respectively. Prior to 1989, the UPU inverted the date and committee number, thus, "CE 1988 C 4 Doc 2." In some cases, committees form working parties to study issues before consideration by the committee. Working parties (GT) are numbered according the number of the parent committee and the number of the working party. Thus, CA GT 4.1 refers to Working Party 1 of Committee 4 of the Council of Administration. If the working party meets more than once in a year, the first meeting is referred to as "1998.1," the second as "1998.2," etc. "CA GT 4.1 1998.2 Doc 6" refers to Document 6 prepared for the second meeting in 1998 of this working party.

Finally, from time to time the Director General of the International Bureau issues sequentially numbered notices, called "circulars," that provide official notice of a wide range of developments relating to the work of the Union.