

European Union  
European Commission  
Case IV/32.791 - Remail  
Statement of Objections  
Press release of 7 April 1997

COMMISSION INITIATES FIRST STAGE OF PROCEEDINGS AGAINST SYSTEM OF  
COMPENSATION BETWEEN POSTAL ADMINISTRATIONS

Date of press release: 1993/04/07

Following a complaint lodged by the International Express Carriers Conference (IECC), the Commission has initiated the first stage of proceedings under Article 85, which concerns restrictive practices, and Article 86, which concerns the abuse of dominant positions, against seven national postal administrations (those of Belgium, France, Germany and the United Kingdom, and Finland, Sweden and Switzerland).

The IECC is a grouping of large companies specializing in the delivery of international express letters and parcels.

The complaint concerned the market in international bulk postage, where IECC members provide a "re-mail" service to meet the needs of large users. The provider of a re-mail service collects bulk mail (periodicals, invoices, advertising material etc.) from a sender in one country, and remails it in a second country for delivery by the ordinary post to addressees in the second or another country.

The IECC's complaint was as follows.

(a) Some postal administrations had infringed the competition rules laid down in the Treaty, in that they had deliberately sought to eliminate competition from remailers by introducing a new basis for the calculation of terminal dues. The terminal dues method is used between national postal administrations for offsetting the costs of delivering foreign mail to their customers.

(b) Some postal administrations had also infringed the competition rules by intercepting, returning or charging extra postage on letters which had been posted in a country other than that of the sender.

The structure of postal administrations' distribution costs, and particularly of terminal dues, was one of the main points discussed in the Commission's Green Paper on the Development of the Single Market for Postal Services (COM(91) 476). The Commission there advocated a more transparent cost structure and prices which reflected real costs.

The Commission hopes to pursue its work here in close collaboration with the national postal administrations, on the basis of the principles set out in the Green Paper. Postal administrations in the Community and the other countries concerned have already made encouraging progress towards alternative systems of compensation which would be compatible with the Treaty. Mr Van Miert is

convinced of the need to help this process of adjustment to go ahead in a broader context.

The statement of objections which the Commission has sent the postal administrations following the IECC's complaint is only one step in the procedure which the complaint set in motion. The Commission will look at progress in the work undertaken in response to the Green Paper and at the attitude adopted by the national postal administrations towards the structure of terminal dues before it arrives at a final decision on the complaint.

European Commission  
Case IV/32.791 - Remail  
Statement of Objections  
5 April 1993

STATEMENT OF THE COMMISSION'S OBJECTIONS

addressed to

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in respect of proceedings under Articles 85 and 86 of the EEC Treaty in the case IV/32791 -  
REMAIL

Contents

I - FACTS

II	-	LEGAL ASSESSMENT
III	-	CONCLUSIONS

## STATEMENT OF OBJECTIONS

### IV/32.791 - REMAIL

#### I. FACTS

##### The complaint

1. On 13 July 1988 a complaint was submitted to the Commission by the International Express Carriers conference (IECC). It alleged that:
  - (i) certain European postal administrations (the UK, Belgian, French, Swedish, Swiss and Finnish) meeting at Berne in Switzerland in October 1987 concluded an agreement concerning terminal dues which had the object and effect of restricting the development of competition from remail companies;
  - (ii) Community postal administrations operated a market allocation agreement using powers under the then Article 23(4) of the Universal Postal Union (UPU) Convention to decline to forward or deliver incoming mail which a mailer in another country had posted with a postal administration other than his own.

##### The parties

2. The IECC is an organisation which represents the interests of the international express mail industry. At the time when its complaint was lodged, its membership included the following companies (with country of incorporation in brackets): DHL (Hong Kong), Federal Express UK Ltd (UK), IML Air Services Group (UK), Independent BV (Netherlands), overseas Courier Service (Japan), Securicor Express International (UK), TNT Skypak Holdings (Netherlands), and United Parcel Service (United States). [2]
3. The respondents to the complaint are two sets of national postal administrations. The part of the complaint dealing with the collective increase of terminal dues is directed against the postal administrations of Belgium, Finland, France, Sweden, Switzerland and the United Kingdom. That part dealing with Article 23 UPU concerns the postal administrations of France, Germany and the UK.

4. These postal administrations are enterprises whose main business is the operation of local mail collection, transport and delivery services in member States. They generally operate certain universally accessible services under a statutory monopoly. They may also provide a range of further services in conditions of free competition with private mail service operators. The postal administrations also generally assure the provision of intracommunity and international exchanges of mail with other postal administrations under bilateral or multilateral arrangements and with private mail service operators under contract.

#### Remail

5. The background to the complaint is the growth of a mail service known as remail. it was developed by private express mail companies and grew considerably during the 1980s, particularly following its liberalisation in the US.<sup>1</sup>
6. Remail is the transmission of bulk international mail using a combination of express and postal services. it is essentially the practice where private mail operators tender bulk mailings to a postal administration other than that of the country in which the mailer resides. [3]
7. Remail is a service used by large mailers such as banks, credit card companies, publishers, the mail order business and others. They produce a distinct type of postal shipment consisting of periodic bulk mailings of large numbers of identical or similar business documents, such as statements of account, solicitations, share prospectuses, newsletters, brochures, catalogues, order forms, operating instructions, company reports etc. The expansion of international commerce has increasingly led these large mailers to seek an international delivery service that can offer them a choice of combinations of cost, speed, service and other factors that is different from traditional surface or air mail services offered by national postal administrations.
8. Two crucial economic factors encouraged the growth of remail. One was that airmail rates for letters were high compared to the cost of handling an international bulk letter mailing. The other was that national postal administrations generally gave a low priority to international mail, both outbound and inbound.

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<sup>1</sup> Suspension of Private Express Statutes: Final Rule, Federal Register Vol 51 No 161, 20 August 1986.

Perspective on international mail and remail

9. International mail is a minor proportion of overall mail traffic. The UPU say that:  
"for most market-economy and planned economy developed countries, international mail normally accounted for only a small proportion of total volume (1-8 per cent); in most cases in those countries, international mail constituted marginal traffic not causing serious economic constraints".<sup>2</sup> [/4]
10. As far as the EC is concerned, on average only about 4 per cent of mail by volume is intra-EC cross-border mail, and about 3 per cent is to or from non-EC countries. This makes a proportion of 7 per cent for all EC cross-border mail. The comparable figures for the postal administrations concerned in this case are: B 14 per cent; UK 8 per cent; F 4.7 per cent; and D 3.8 per cent.<sup>3</sup>
11. In the decade to 1986, international mail volumes were at best stable, while domestic letter mail grew 32% and printed matter by 68%. The growth of remail business may be similar to that of international express mail, which was put at 35% per annum in 1988.
12. Within this overall picture, the proportion of total mail represented by remail is tiny. There are few authoritative estimates. The Bundespost has suggested to the Commission that remail may account for 0.25% of German postal traffic. The Commission's own best estimate is that the proportion of total mail volumes represented by remail may be of the order of 2% to 4% at most in Member States. The IECC puts total EC revenues from remail at 50m ECU in 1988. This represents 0.2% of the total revenues of EC postal administrations in 1988 (estimated at 26,000 m ECU by Sofres for the Green Paper, Chapter 4, Table 8).
13. On the experience of remail liberalisation in the US, the IECC note that postal charges for bulk international airmail declined 58% within a year, representing a saving of \$10 million in terms of normal airmail postage. At the same time there was no significant erosion of the US Postal Service's traditional business, and some evidence that new business had been

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<sup>2</sup> Annotations by UPU International Bureau to Article 64 of 1984 Convention.

<sup>3</sup> Green paper on the development of the single market for postal services (COM(91)476), Annex 2, Table 7.

attracted to the international mail system. [/5]

Conduct of remail business

14. Remail is not an activity undertaken by private mail operators ("remailers") alone: it is a service provided by agreement between an operator (usually an express mail company) and a foreign postal administration. A large mailer may have his bulk mailing picked up by the express company and forwarded by air to a foreign postal administration. This postal administration then handles the bulk shipment as mail and either delivers it within the country or forwards it via the international postal system for delivery in other countries through normal postal services. The express company shops around for the best prices and efficiencies from national postal administrations. its chosen postal administration gains new business, improved economies of scale for its normal business, and a more efficient use of certain fixed costs, such as airline cargo space or warehousing. The labourintensive sorting may be provided by the express company among additional services for the mailer.
15. There are conventionally three main variations in remailing activities:
  - mail originating in country A is picked up by a private operator, brought across the frontier, and put into the postal system of country B, for delivery to addressees in country A (ABA or reimport remail)
  - mail originating in country A is picked up by a private operator and put into the postal system of country B, for delivery to addressees in country B (ABB remail)
  - mail originating in country A is picked up by a private operator and put into the postal system of country B, for onward forwarding and ultimate delivery to addressees in country C (ABC or third country remail). [/6]
16. Remail consists of particular shipments of bulk business mailings rather than individual personal letters, and uses a combination of private and public mail services. Remail is generally organised by private express mail companies which also offer the customer a range of special rates and such services as collection of the mail at the sender's premises; enveloping, addressing and franking; various degrees of priority; tracking and tracing of shipments; periodic invoicing; and other mail services such as list management or business

reply service.

17. Through remail, postal administrations are placed in competition with each other as potential forwarders of bulk international mail. The opportunities for such competition are increased by the ability of remailers to switch routes to take advantage of large differences in postal administrations, respective postage rates; and to negotiate quantity discounts. These differences in rates occur partly because the costs of postal delivery vary considerably (by a factor of about three in the EC according to UPU cost surveys); partly because national postal administrations do not make a detailed analysis of the costs associated with the distribution of international mail; and partly because of the inclusion of political or other factors not reflecting commercial costing. Therefore in general charges are not set according to cost structures.
18. As it has emerged in the market, remail has built on the normally available postal service and offered a range of services with a price and choice of service level hitherto unavailable to the user. A number of postal administrations have recognised and responded to the stimulus of competition in international express mail by further developing their own similar specialised services. In November 1987 the postal administrations of most European countries formed a joint venture based in Brussels, called EMS IPC, to act as [7] a hub for the transport and exchange of international express mail. Such arrangements have enabled the postal administrations acting in association with each other to compete for bulk remail business with express companies acting in association with postal administrations.

#### The Universal Postal Union (UPU)

19. The UPU is a special agency of the United Nations. All Member States are members of the UPU by virtue of being signatories to the United Nations charter. The UPU is based on the 1874 Treaty of Berne. It holds a congress every five years at which it reviews its Convention, the articles of which, if retained, are then reconfirmed. The most recent congress was that held in November/December 1989 in Washington.
20. After each congress, the new Convention is signed by the members of the UPU. Each signatory signs as representing the Government of his country. Previously, postal

administrations signed alone; now, both the national regulator and the postal administration tend to sign together.

21. The Convention provides the framework for the operational relations between the postal administrations of the world in the exchange of mail. The articles of the Convention are divided into rules and recommendations. Because the Convention has the status of a Treaty into which its government has entered, each member of the UPU must treat the rules as having a binding force.
22. Under Article 8 of the UPU Constitution, member countries, or their postal administrations if the legislation of those countries so permits, may establish "restricted unions", usually on a regional basis, which may make special agreements amongst themselves [8] concerning the international postal service, provided that they do not introduce provisions less favourable to the public than those provided for under UPU acts. one of these is the European Conference of Postal and Telecommunications Administrations (CEPT), of which all of the respondent postal administrations are members. The role of these restricted unions in the work of the UPU has increased in importance and influence over recent years.

#### Relevant UPU provisions

##### Terminal dues

23. The basic system by which postal administrations compensate each other for the delivery of international mail on each other's behalf is known as the UPU terminal dues system. At the time the complaint was lodged, the system was laid down in Article 64 of the Universal Postal Union Convention.<sup>4</sup>
24. Prior to 1969, postal administrations did not directly compensate each other for the delivery of international mail by sharing revenue, because of the theory that each mail item generated a reciprocal response, resulting in a broad balance of traffic. This assumption of equilibrium became invalid as imbalances developed, to the point where the UPU has estimated that the costs of delivering inbound mail in countries with high costs may be 34 or more times as

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<sup>4</sup> This article is now Article 73 of the UPU Convention following the 1989 Washington Congress.

much as in the lowest cost countries of the world.<sup>5</sup> Other studies have also shown large variations in domestic letter tariffs.

25. By the time of the 1969 Tokyo Congress of the UPU, the imbalances meant that the variation of economic cost and efficiency in postal [9] services could no longer be ignored. Moreover, some member countries (especially developing countries) suffered increasing financial disadvantage from delivering more mail than they sent. The system of compensatory payments known as "terminal dues" was introduced.
26. Article 64 sets out the basic position that "except where otherwise provided each postal administration shall retain the charges which it has collected". This principle of non-sharing of charges survives in the terminal dues payment system, as no payments are made if there is a broad balance in total amounts of mail sent and received. This is the case even if the handling costs of one postal administration are much greater or smaller than those of the other. Terminal dues are only paid from an origin postal administration to a destination postal administration when it sends a greater tonnage of mail than it receives. The rate of payment for the terminal dues on these imbalances is fixed at the same rate for all postal administrations irrespective of their actual cost structure or their charges to customers. The system further ignores the real cost of delivery by taking only the weight of mail into account and not the number of individual items, since one kg of mail consisting of a single heavy item costs much less to deliver than one kg made up of fifty 20 gr letters.

#### Art. 23 UPU

27. Art. 23 UPU<sup>6</sup> provides administrative powers which postal administrations may use in respect of remail. Art. 23 is in fact two provisions. Paragraphs 1 to 3, originally adopted as one long paragraph in 1924, deal with ABA remail. They provide that no national postal organisation is bound to convey or deliver mail originating within its boundaries but mailed to recipients there [10] from a foreign country; and that any such mail may be returned to

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<sup>5</sup> UPU study on cost aspects of terminal dues ref. CE 1987/C5-Doc 8/Add 2 of 31 March 1987.

<sup>6</sup> Now Art. 25 of the 1989 UPU Convention.

sender or charged domestic tariffs for delivery. Paragraph 4 was adopted amid certain controversy in 1979 to restrain ABC and ABB remail. It provides that no Member state is bound to accept, convey or distribute letters deposited in large quantities in a country which is not that of the sender.

28. Article 23 does not impose mandatory obligations on member countries: it merely allows them to confer discretionary powers on national postal administrations to intervene in respect of mail posted in a country other than that of origin. It is recognised that member countries do not infringe their obligations under the UPU Convention if they do not enact measures giving effect to Article 23(4). The US Administration has instructed the US Post Office not to use Art. 23(4) powers against remailing activities, and to permit and promote competition in the market for international mail.

#### The practices complained of

##### CEPT terminal dues agreement

29. Calls for major revisions in the rate structure, to better reflect real costs of international mail delivery, failed at successive UPU congresses (e.g. at Lausanne 1974, Rio 1979, and Hamburg 1984). Reasons for this include the possible complexity and costs of establishing a new system, and the prospect of loss of revenue by certain postal administrations. However, as remail emerged as a distinctive service, postal administrations were inclined to address more seriously the need for reform. [11]
30. Provisions of the UPU Convention are fixed for a five-year period until superseded by the subsequent Convention. Postal administrations are prevented from agreeing higher postal charges ("No postal charge of any kind may be collected other than those provided in the Convention and Agreements").<sup>7</sup> However, within a restricted union, postal administrations may vary charges from rates provided in the Convention as long as they do not introduce

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<sup>7</sup> Article 7.2, UPU Convention.

provisions less favourable to the public.<sup>8</sup>

31. On 22 April 1987, certain European and North American postal administrations convened an ad hoc meeting on remail in London (termed by them "the Remail Conference"). The purpose of this meeting, as expressed in the invitation letters sent out, was stated to be "to respond to the threat of remail". The letter calling the meeting stated:

"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 [ ... ] it is vital to consider whether there is a common policy we can adopt to counter the activity of these companies."<sup>9</sup>

32. The postal administrations' objective was concerted action which would protect their commercial position, limit competition between them, and put remailers at a disadvantage. This was evident in the preparatory papers, e.g.:

"The one problem that can be addressed immediately is the lack of an agreed response by administrations. [ ... ] A failure to agree a [12] response will not only help the couriers, it will also lead to a war amongst postal administrations as they fight to maintain their commercial position."<sup>10</sup>

33. A report by a working party of the Remail conference recorded that:

"Realising the seriousness of the threat from the remailing companies both to international mail and - in the long run - also to domestic mail, representatives of 14 European Postal Administrations met in London on 22 April 1987 at the invitation of the British Post Office."<sup>11</sup>

34. The discussions took place on these matters in spite of informal letters of enquiry sent from the Commission to the British Post office on 15 and 22 April 1987, raising its concern that

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<sup>8</sup> Article 8, UPU Constitution.

<sup>9</sup> Letter "Remailing" from the UK Post office, 12 March 1987.

<sup>10</sup> "Remail - the threat to postal services: an overview".

<sup>11</sup> Paper by Sweden: "Remail: Postal Administrations, Competitive Strategy", 22 May 1987.

the object or effect of the meeting could be in conflict with the competition rules of the Treaty.

35. Working outside normal CEPT channels, the Remail Conference appointed an ad hoc working party consisting of the postal administrations of Sweden, the UK, France, and the Netherlands. Later, the postal administrations of Belgium, Finland and Switzerland were added to the Working Party. It met again in London on 22 May 1987 and in Copenhagen on 4 September 1987.
36. This Working Party concluded that it was "convinced that remail constitutes a serious threat to postal business and that a vigorous response is urgently needed. It has for that purpose worked out a three-part strategy: a new system of terminal dues, a set of aligned practices and a new business letter service".<sup>12</sup> [/13]
37. The proposals on "aligned practices" amounted to a code of conduct under which postal administrations would not market services to customers of other administrations; not contract with third parties wishing to exploit differences in postal charges between administrations; not set international rates below the level of national rates; "refrain from all speculations on compensatory rates where this is to the detriment of another administration"; and collaborate on achieving the highest possible quality of service. This proposed code of conduct was not formally pursued by the Remail Conference. It concluded instead that the most feasible defence strategy against remail was a revision of terminal dues.
38. On the occasion of a UPU meeting in Berne, on 27 October 1987, the Working Party finalized an agreement for a new terminal dues schedule (hereafter the "CEPT agreement"). Observers from the postal administrations of certain other UPU member countries (US, Australia, Canada and Japan) were in attendance. Under the proposed new system, the terminal dues charge for a quantity of mail would be changed from a fixed charge per kilo to a two-fold charge based upon both the number of items and the total weight of the shipment. The new charges agreed upon were 3.75 gold francs per kilo plus 0.37 gold francs

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<sup>12</sup> Report by Sweden for meeting of Directors General, 10 September 1987.

per item. The same charge was to apply to LC as well as A0 items.<sup>13</sup>

39. The economic basis upon which the new charges were arrived at has not been demonstrated. According to the British Post office, the CEPT rates were an "amalgam of the various rates proposed by the participants in the working party" and the individual rates proposed "related to costs that they each incurred in handling inward mail". The result would not be "a perfect system in economic terms,, but would "be reasonably close to the cost profile of all the countries concerned". [14]
40. The effect of the new terminal dues formula is shown in the following table. As this table makes clear, the new terminal dues system would substantially raise the terminal dues for lighter items of mail of the type most suitable for remail operations. The rise would be of 179% for letters of 20 grams. There would be some decreases in the case of heavier items: for example dues on printed matter such as magazines averaging about 200 grams would decline by 30%.

	1984 UPU Rates		New CEPT Rates		Change
	<u>SDR</u> <sup>14</sup>	<u>ECU</u>	<u>SDR</u>	<u>ECU</u>	
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%

41. The following example illustrates the economic effect of the new rates. A and B represent

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<sup>13</sup> LC is the postal designation for letters and cards, and AO is "autres objets", referring generally to printed papers.

<sup>14</sup> Special Drawing Rights: SDR is the accounting unit of the International Monetary Fund and is also the currency unit used by the UPU, together with gold francs. 1 SDR = 1.365 ECU (at the date the complaint was lodged).

two countries with postal administrations participating in the CEPT agreement. A mailer in A sends statements of account to 1000 customers in B. Each of the statements weighs 50 grams. Assume that the traffic between A and B is roughly in balance, and the cost of delivering equivalent quantities of letters in each country is similar. If the cost of delivering a letter is half the cost of domestic postage, and domestic postage in A is 0.27 ECU, then the cost of delivering these statements in B [15] via the postal administration of A is about 135 ECU. If the mailer in A uses a remailer who routes the mail via a postal administration that is operating the 1984 UPU terminal dues rates, the cost of delivery by the postal administration in B would be 149 ECU. If the mailer in A uses a remailer who routes the letters via a postal administration which is also participating in the CEPT agreement, the cost of delivery would be determined by the new terminal dues rate in the table above - 207 ECU.

42. In such a case of identical shipments between countries with similar internal costs, the differences between these three possible charges derive from the way the respective terminal dues systems work, and not on any objective economic factor. The differences depend on which postal administration forwarded the mail to the postal administration in B. The main effect is that bulk business mail handled by a remailer becomes significantly more expensive under the new CEPT arrangements than under the existing UPU regime.
43. The Berne meeting of 27 October 1987 on a revised terminal dues rate was to be followed by bilateral agreements effective from 1 January 1988, amongst the participants in the working party, and between them and other interested postal administrations. The Netherlands decided not to conclude any such agreements.

#### 1989 UPU Washington Congress

44. The postal administrations of member states have agreed to a further arrangement for the compensation of international mail traffic, in the context of the negotiation of the 1989 universal Postal Convention. As in the case of the Remail conference, the 1989 UPU Congress also aimed to reach an agreement specifically designed to suppress remail competition. A working document<sup>15</sup> recognised that remail firms offered "better quality of

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<sup>15</sup> UPU Executive Council Report of 23 June 1989 (Document 56).

service[/16] (speed and reliability) than that offered by the Post; and added-value services which are not offered by the Post". It also recognised that remail firms took advantage of weaknesses of the "simplistic terminal dues system", which "takes no account of the structural differences between the various traffic flows". It called for "close collaboration among all [postal] administrations ... to face up to the competition", and recommended specific measures including lowering postage rates to big customers; raising terminal dues; improving postal quality; adding new services; sharing information about remail activities; and encouraging further discussion on the scope for using Article 23 UPU.

45. The proposals submitted to the UPU Congress by the postal administrations represented on the UPU's Executive Council included a high average terminal dues rate for items of less than 20 gr (i.e. items most suitable for remail); permitted postal administrations to negotiate alternative (including higher) terminal dues rates on a bilateral basis; and permitted low-traffic postal administrations to retain the old system with a combined rate for LC and AO mail. This three tier system was adopted by the UPU Congress as proposed, except that the terminal dues rate for major postal administrations was raised still further (resulting in rates of 8.115 SDR/kg for LC and 2.058 SDR/kg for AO). Most postal administrations which are the respondents to the present complaint opted for bilateral agreements using these new UPU rates, effective 1 January 1991.
46. The UPU has continued to demonstrate its intention to restrict remail competition. In June 1990, the UPU Director-General wrote<sup>16</sup> to the postal ministers and administrations of all member countries, "to issue a further warning" on remail; noting that "from 1 January 1991, many administrations of destination [/17] will doubtless apply the correction mechanism to increase the rates of terminal dues in their relations with administrations that practise remailing"; and requesting that they "take the necessary steps to terminate any relations which your administration may have with remail companies".

#### Terminal dues and user prices

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<sup>16</sup> UPU International Bureau circular, reference 3390(B)1550, Berne, 28 June 1990.

47. A UPU report<sup>17</sup> based on a questionnaire answered by 62 postal administrations including the respondents to the complaint shows the effect of terminal dues on remail prices:

“The international rates available to the remail firms are often based on the terminal dues assessment and transportation costs plus a modest profit margin to the accepting (postal) administration [ ... ] The rates made available by remail firms are closely linked to the present terminal dues structure and the willingness of many postal administrations to offer discounted rates to the remail firms.”

48. Terminal dues are compensatory arrangements between participating postal administrations. The resulting payments of compensation to each other represent charges for services rendered. Terminal dues can directly affect prices of international postal services. Increases in terminal dues can be expected to lead to related increases in bulk mailing rates charged to remail companies and ultimately to mail users. In December 1990 a major international letter remail company told the Commission that increases quoted to his company ranged from 35% to 60%. The price differential between remail and ordinary outbound international mail had decreased because terminal dues rates did not vary in proper relation to piece and weight factors, nor geographic destination. Public postal [18] tariffs for international mail had not increased correspondingly, and nor had bulk discount rates to remailers. Although some new terminal dues rates were lower, the opportunity to take advantage of them was limited by the relevant traffic volumes and alternative methods of delivery.

Article 23(4) UPU

UK Post Office

49. On 12 February 1987, the UK Post office wrote to a number of other postal administrations in the following terms:

“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

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<sup>17</sup> Report prepared for UPU Executive Council, ref. CE 1988/C4-Doc 9.

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 ( ... ). we 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”.

50. This letter was sent to the postal administrations of Belgium, Singapore, Panama, South Africa, Bahrain, Hong Kong, Japan and New Zealand. in response to such requests, 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 UK Post office. In January 1988, the Japanese Post Office notified the Hong Kong Post office that it would not accept international mail remailed through Hong Kong.
51. In June 1987 the UK Post office wrote to all of the eight postal administrations previously contacted, except Belgium. It expressly stated that the question of remail would now be dealt with by negotiations to develop a more cost-related terminal dues system and that 11 ... this commercial approach (would) ... overtake "the primarily legal approach adopted in the earlier letter".
52. On 21 April 1989 the UK Post Office gave assurances to the Commission that notwithstanding representations made by letter to third-country postal administrations, it had not itself used powers under Art. 23(4) UPU, nor did it intend in future to do so.

#### German Bundespost

53. The postal administration of the Federal Republic of Germany, the Bundespost, has invoked Article 23 of the UPU Convention in two different ways.
54. Firstly, the Bundespost has cited Article 23 to mailers in Germany to discourage them from using remail for outbound intra-Community and 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. The Bundespost wrote:

"The transportation of first-class mail abroad with a view to mailing it there infringes not only the postal administration's monopoly of transportation but also the provisions of the UPU Convention. This protective provision (i.e. Art. 23 UPU] becomes effective, inter alia, if the mail does not remain in the country of mailing but is addressed to receivers in other countries." [/**20**]

55. Secondly, the Bundespost has also adopted the practice of intercepting and returning inbound international mail posted by EEC mailers and destined for German addressees. For example, 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 postal administration. The transmittal forms completed by the Bundespost explicitly cited Article 23 as its grounds for refusing to deliver this mail.
56. The Bundespost told the Commission on 30 June 1989 that the Bundespost would be prepared to forego the use of Art. 23(4), for intra-Community remail, but only on condition that its right to invoke powers under Art. 23(1-3) was accepted. on 10 October 1989, it indicated that it no longer applied Art. 23(4) to ABC remail between Member States.

Art. 23 (1)-(3) UPU

57. Article 23(1) UPU gives UPU member countries the discretion to refuse to forward or deliver mail which senders resident in its territory cause to be posted abroad. Although Art. 23(1) UPU primarily lends itself to protection of the postal administrations, exclusive rights as reserved service providers, the terms of the article may also cover all other letter-post items posted or caused to be posted in a foreign country for remailing back to the country of residence of the sender. Exceptions are now generally recognized in developed countries, e.g. for time-sensitive mail. However, because of the potentially broad scope of the article, there can be a wide divergence in the ways in which it is invoked.
58. The French postal administration has intercepted mail originating from senders in France

which was mailed in the UK, intended for addressees in Africa, but which transitted through Paris. The French Post office cited Art. 23(1), even though erroneously, given [21] that the mail was in fact destined ultimately for addressees in a country other than France (and so covered rather by Art. 23(4) UPU). By contrast, the UK Post Office has assured the Commission that it considers that to invoke Art. 23 UPU against mail transitting the UK would be to breach other provisions of the UPU laying down obligations for member countries to ensure freedom of transit.

59. Nevertheless, the UK Post Office reserves the right to invoke Art. 23(1) UPU where there is “no genuinely international situation”. According to this criterion where a company in the UK has for instance a properly incorporated subsidiary in the Netherlands, and delegates the printing of brochures to that subsidiary, the UK Post Office would accept that such brochures could be mailed from the Netherlands back to addressees in the UK, on the grounds that this constitutes a "genuinely international situation" not covered by Art. 23(1). However, "if it were doubted that there was a bona fide Dutch subsidiary producing brochures on a European-wide basis", Art. 23(1) might be applied to refuse to deliver the mail.
60. The Bundespost, on the other hand, takes a different view. The Commission has taken up with the Bundespost cases where it had intercepted mail that could be called "genuinely international". For example, a German resident company had arranged for the mailing from England to Germany of a catalogue printed in England together with a letter printed in Germany. The Bundespost, seeing a German return address on the incoming items, had resorted to Article 23(1) UPU to send the mail back to England on the grounds that it infringed German postal monopoly law. in spite of repeated requests by the Commission to ensure that such cases do not occur, it appears that bulk mail users have continued to receive standard [22] letters from regional offices of the Bundespost, in which Article 23(1) to (3) (now Article 25(1)-(3)) UPU is cited, and which request a payment corresponding to the inland tariff for each letter concerned. As mentioned in para 56 above, the German authorities have insisted on the Bundespost's right to invoke powers under Art 23(1-3) UPU to intervene against such mail even though it is not physically prepared in Germany.
61. This practice has an adverse effect on competition not only in the market for postal services,

but also in other activities. As EC mail users - banks, printers, advertisers - modify their location and buying strategies as a result of the development of a single market, the effect of centralised production of their mailable output - statements, publications, direct mail - effectively transforms domestic mail into cross-border mail., Clearly, the interpretation of postal laws to protect domestic monopolies should take full account of the development of a single market in electronic data, banking, printing, advertising, etc, and not vice versa. otherwise, distortions of competition in the relevant community markets could clearly ensue.  
[23]

## II. LEGAL ASSESSMENT

### Applicability of Articles 85 and 86 of the Treaty

62. The postal administrations are subject to the provisions of Articles 85 and 86 of the Treaty because they are undertakings carrying out an economic activity, namely the provision of postal services. The 1987 CEPT terminal dues agreement was concluded between postal administrations acting on an ad hoc basis and so falls to be considered under Article 85. Art. 23 UPU is a provision of a treaty negotiated between governments, and where implemented into national law may also be subject to scrutiny under Art. 90(1) of the Treaty (see para 78 below). Article 86 however applies in parallel to the postal administrations as such when they invoke administrative powers pursuant to Art. 23 UPU.
63. Trade between member states is likely to be affected due to the cross-border nature of remail. Mail services including remail are traded between member states individually and between them and non-Community countries. The same goes for trade in goods and services which depend on information distributed by international mail. Restrictions on remail may thus affect the conduct and location of such businesses as printing, financial services, mail preparation, mail order and direct mail may be affected, as well as the provision of mail transportation facilities.

### Terminal dues agreement

Article 85(1)

64. 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. [/24]
65. 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". The action which was finally undertaken during 1987 within the restricted union of the CEPT could have been begun at any stage within the intervening period of almost twenty years, but was not.
66. This "threat" of remail competition to the ability of postal administrations to assure basic postal services remains unproven. Remail is such a small proportion of overall mail activity that it is unlikely to have had a significant effect to date in terms of reduced revenues or volumes. Although the importance of remail is growing, it is unlikely to be growing so fast as to alter this perspective. 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.
67. 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. This is not just potentially but actually a competitive market, as can be seen from the creation by the postal administrations of new businesses designed to penetrate and compete in the market for express and remail services (EMS-IPC, GD Express worldwide, Chronopost, Datapost etc.). [/25]
68. The terminal dues agreement has the effect of appreciably restricting the freedom of action 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 of about three within the EC. However, the agreement obstructs the development of such patterns and thus distorts trade in postal services. Moreover, the pattern of the various trades engaged in by mail users may also be distorted (see para 63 above).

69. The CEPT agreement distorts competition in this market because it fixes a uniform rate for the inward delivery of international mail. The agreement thus prevents price competition from operating fully in delivery to final destination, which is a major part of the economic service provided by remail.
70. This document deals primarily with the CEPT agreement which is the subject of the complaint. It does not examine the compatibility of the terminal dues arrangements of the 1984 or 1989 UPU Conventions with the EC Treaty. It is sufficient to say here that the effects of these arrangements would be very likely to raise similar competition issues.

Article 85(3)

71. The terminal dues agreement on the above considerations thus falls within the terms of Art. 85(1). Furthermore it does not appear to be capable of exemption under Art. 85(3), both on the merits, for [26] reasons which follow, and because it has not been notified under Article 4.1 of Council Regulation 17/62, and is not covered by the exceptions in Article 4.2 of that Regulation. Moreover, agreements of the nature of a price cartel are not normally capable of attracting exemption.
72. The new terminal dues system instituted by the agreement cannot be said to promote technical or economic progress to the benefit of consumers. On the contrary, its principal effect in raising terminal dues charges in the most competitive weight steps is to hamper remailers if not eliminate them from the market for international mail distribution, and thus remove the competitive stimulus which was responsible for the development of remail as a postal service which responds to the user's needs. Arguments to the effect that the setting of terminal dues needs to take account of the need for universal service provision, "péréquation tarifaire" or other socio-political objectives are inapplicable as these are matters for which

governments rather than postal administrations are ultimately responsible.

73. Nor does the CEPT terminal dues agreement fulfil the criterion of indispensability. International parcel post operations function satisfactorily without any terminal dues arrangements. since the inbound postal administration determines the charges for international parcels, these charges may generally be expected to reflect the cost of delivery. methods of compensating destination postal administrations for delivering international mail could be either fully cost-based or at least much more cost-related than the method chosen. A fully cost-based method would require the calculation of fully allocated costs and regular updating of the formula. Another alternative method, which if not based upon actual costs would at least involve a more accurate approximation of [27] these, would be one whereby the relation between terminal dues and costs is established by calculating the terminal dues as a percentage of inland tariffs in the country of destination.
74. There seems no reason why domestic postal rates may not be set reasonably close to fully allocated costs in most Member states. The Commission has been informed that the CEPT intends to move towards a compensation system based on domestic delivery charges as a next step. (The CEPT countries have created a group consisting of their postal regulatory authorities (CERP), with the duty of studying the terminal dues question as a priority.) Such systems are understood to be already in operation among the Nordic countries, and under further study by certain postal administrations, led by those of NL, DK and D.
75. To the extent that the terminal dues agreement may foreclose remail competition, it may include the "possibility of eliminating competition in respect of a substantial part of the products in question".

Article 90(2)

76. As far as postal administrations are under a statutory or other public duty to provide certain services, they may be considered to be undertakings entrusted with the operation of a service of general economic interest within the meaning of Art. 90(2) of the Treaty. If this is so, the competition rules apply only in so far as this does not obstruct their performance of the particular tasks assigned to them. some postal administrations argue on this basis that being

forced to charge for international mail strictly on the basis of costs could cause deterioration in the domestic postal service through loss of the ability to cross-subsidize. The onus of [28] proving such a contention lies on the postal administrations and has not been discharged. As pointed out by the Court of Justice, the exception laid down in Art. 90(2) is allowed only in cases where

- the undertaking has no other technically feasible and economically attainable means of performing its tasks,<sup>18</sup> and
- the nature of that task and its effects on the tariff structure are clearly defined.<sup>19</sup>

77. It has not been demonstrated that the discouragement of remail is indispensable for the maintenance of the universal service. It appears unlikely that the economic survival of postal administrations in the EC depends on limiting the amount of traffic accounted for by remail. There is no evidence that remail has significantly reduced the volume of domestic or international mail available to postal administrations.

#### Use of Art. 23(4) UPU

#### Article 86

78. 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. [29]
79. The use of powers under Art. 23 (4) UPU by the Bundespost was contrary to Art. 86 of the Treaty. This and other postal administrations are dominant in the relevant service market, which is the forwarding and delivery of inbound, outbound and transiting international mail. In addition to their legal monopoly in all member states on collection and delivery which

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<sup>18</sup> Pommes Fun6bres, Case 30/87, 4 May 1988.

<sup>19</sup> Ahmed Saeed, case 66/86, 11 April 1989.

- gives them de jure dominance in most postal activities, national postal administrations also have a de facto dominance in the transportation and distribution of international mail by virtue of their structure and network deriving from postal legislation and postal traditions.
80. 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. Partition of the international mail market is encouraged because each UPU member has the potential discretion to refuse to forward or deliver mail that was mailed in a country other than the country of residence of the mailer. The purpose and effect of the scheme is to protect each postal administration's position in the outbound international mail market.
  81. 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.
  82. 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 [30] Germany (see paras 54 and 55 above) . 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 Art. 86(b), and, additionally, applies dissimilar conditions to equivalent transactions contrary to Art. 86(c).
  83. Under Art. 23(4) UPU, member countries are not obliged to handle remail; but they are similarly not obliged to make legal provisions whereby their postal administrations are empowered to intercept remail. in these circumstances, a member country cannot cite provisions of the UPU Convention as a defence against infringement of community competition law. Even if it could so argue, community law takes precedence over arrangements they may have entered into under the UPU Convention (see paras 87-89 below).
  84. Since Art. 23(4) UPU is a provision agreed between governments-of member countries of the UPU, Art. 90 may apply to any State measure whereby its terms are enacted into law. To

the extent that application of Article 23(4) is not made compulsory but only discretionary, Art. 90 would continue to apply to the State measure, and Art. 86 would continue to apply to the postal administrations where they act autonomously.

#### Use of Art. 23(1) UPU

##### Article 86

85. The objective of Article 23(1) is to prevent ABA remail where items that should fall within the postal administration's exclusive rights have been physically transported out of a country for mailing back into it. However, the scope and interpretation of this article mean that the following problems occur in applying it. It appears to permit the postal administration of country A to turn [31] back mail items even if these do not fall within the definition or weight limits of its exclusive rights. Also, the concept of "senders resident in its territory" is far from clear in the context of a diversified European company with activities in different Member states, and might discourage it from organising the transport of its own mail between its locations. Finally, the provision is directed at "member countries" of the UPU, which implies that each decision to apply it should be taken by the national regulatory authority; however, Art. 23 has often been applied by postal administrations without reference to such a body.
86. These factors seem to diverge from the aims of Article 23(1) as stated above, and lead to vagueness, legal uncertainty, and subjectivity as to the scope of its application, which could vary widely from one postal administration to another. This kind of interpretation has led a postal administration, the Bundespost, to turn back items which were not ABA remail, but ordinary cross-border mail, thereby exceeding what can be considered as the activity reserved to the Bundespost under its exclusive rights.<sup>20</sup> This behaviour constitutes an abuse of a dominant position in so far as it prevents the development of cross-border mail without any objective justification.

#### Other legal aspects

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<sup>20</sup> See paras 60-61 above.

Art. 234 of the Treaty

87. Some postal administrations have argued that the provisions of Art. 234 apply to the matters covered by this complaint. In other words, since the matters covered by the complaint arise within the context of an international convention (UPU) , they constitute rights and obligations which by virtue of Art. 234 are unaffected by the provisions of the Treaty.
88. However, this is no defence for postal administrations because only Member States themselves may invoke Article 234, and it is they who are the signatories of the UPU Convention. in any case, the UPU Convention confers no rights and obligations on member states to deal with remail in a way that would be inconsistent with community law. Even if it did, Article 234 provides that Member States should take all appropriate steps to eliminate the incompatibilities, which clearly they have not done.
89. Although the UPU Convention itself long pre-dates the Treaty of Rome, its regulations are renewed or renegotiated at plenary sessions of the Congress held every five years, most recently in Washington in 1989. Article 92 UPU provides that the Convention remains in operation until the entry into force of the Acts of the next Congress. The competition rules are fully applicable to such international obligations which are novated by member states subsequently to their adhesion to the European communities.

Third-country postal administrations

90. Several of the respondents in this complaint are postal administrations of countries which are not members of the EC (Sweden, Finland, Switzerland). it is unnecessary here to go into more detail than to recall that the Commission has always held and the Court has confirmed that Articles 85 and 86 apply also to undertakings located outside the EC when restrictive agreements are implemented or intended to be implemented or abuses are committed and implemented within the common market to the extent that trade between Member states is affected.<sup>21</sup> [33]

III. CONCLUSIONS

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<sup>21</sup> Woodpulp", (1988) ECR 5193.

Termination of the infringements

91. In order to remedy the above incompatibilities with EC competition law, the Commission intends to adopt a decision under Article 3(1) of Regulation 17/62 finding that there are infringements of Articles 85(1) and 86 of the Treaty; and requiring the parties to bring the infringements to an end by rescinding the bilateral agreements made pursuant to the CEPT agreement and ceasing the use of Article 23(4) UPU to refuse to forward or deliver mail posted in a country other than the country of residence of the mailer. The other parties to these agreements may be required to join in any rescission of the agreements which is necessary to bring them to an end.
92. While certain of the infringements complained of may be considered to have ended, they may recur, and in any case related behaviour may persist. It has been the Commission's standing administrative practice to take decisions which simply declare that an infringement which has already been terminated was in breach of the rules of competition law. The Commission may adopt decisions establishing the existence of an infringement which the undertaking in question has already terminated provided that it has a legitimate interest in taking such a decision. Such an interest exists if the Commission considers that there is a real danger of a resumption of the practice which the undertaking has terminated and that consequently it is necessary to clarify the legal position.<sup>22</sup> [34]

Fines

93. In the light of the considerations set out above, the Commission considers that there are grounds for finding that the parties have infringed Article 85(1) and Article 86 of the Treaty of Rome.
94. Under Article 15(2) of Regulation No 17/62, the Commission may impose fines of from 1,000 to 1 million ECU or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85(1) or Article 86. In fixing the amount of the fine, regard must be had both to the gravity and to the duration of the

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<sup>22</sup> See the Court's judgment on Commission Decision 7/82 of 02.03.83 (GVL/Commission).

infringement.

95. The following factors are relevant to an assessment of the gravity and duration of the infringement:
- (i) By consciously entering into the above mentioned actions, the parties have deliberately obstructed the achievement of the integration of the common market, which is a fundamental objective of the Treaty.
  - (ii) The infringements are of long duration. Their essence has existed for as long as terminal dues have been the subject of agreement between Member States' postal administrations in the context of the UPU. They have existed in the substantive form since the conclusion of the CEPT agreement in September 1987.
  - (iii) The parties have not notified the arrangements to the Commission. They did not notify them after the completion of [35] the agreements, nor after the Commission had made enquiries both before and following receipt of a complaint.
  - (iv) The parties are very important enterprises with a large turnover and are very significant in the market for the forwarding and delivery of inbound, outbound and transitting cross-border mail.
96. The Commission considers that the finding of these infringements justifies the imposition of a fine on the postal administrations participating in the CEPT agreement. However, except in the case of the infringements committed by the German Bundespost in relation to Article 23 UPU (i.e. the use of Article 23(1) to turn back mail items not physically originating in Germany, and its refusal to renounce unequivocally the use of Article 23(4)), the Commission is inclined to set the fine to be imposed on them at only a nominal amount on this occasion, bearing in mind the following mitigating circumstances:
- (i) Community law is not well developed in this area.
  - (ii) The issues are complex and the delay in their resolution should be taken into account.
  - (iii) The parties may already have initiated plans for remedies which demonstrate their willingness to comply with Community law.
  - (iv) The Commission's policy proposals for postal services are currently being developed,

notably with the issue of a Green Paper, and relevant legal measures may be implemented in due course. **[/36]**

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Sommaire

I	-	FAITS
II	-	APPRECIATION JURIDIQUE
III	-	CONCLUSIONS