

European Commission
Case IV/32.791 - Remail
Decision SG(95) D/4438
6 April 1995

COMMISSION OF THE EUROPEAN COMMUNITIES
KAREL VAN MIERT
Member of the Commission

Brussels, 06.IV.1995

SG (95) D/ 4438

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for the attention of Mr. J.I. Campbell Jr.

Dear Madam / Sir,

Subject: Case No. IV/32.791 - Remail

1. The Commission refers to your complaint submitted to my services on 13 July 1988. That original complaint contained two separate allegations, namely that (i) the system of terminal dues referred to as CEPT 1987 constituted a collusion between European postal administrations to prevent competition from remail companies and (ii) some postal administrations were invoking Article 23 of the UPU Convention to stifle competition by intercepting inbound or outbound cross-border mail.
2. With respect to the alleged collusion between postal operators by means of the CEPT 1987 agreement, you have received a letter dated 17 February 1995 signed by myself on behalf of the Commission of the European Communities as the Member in charge of competition matters, indicating that this part of your complaint has been rejected.
4. With respect to the part of your complaint regarding the interception of mail by certain postal operators on the basis of what is now Article 25 of the UPU Convention, the Director-General of the Directorate-General for Competition wrote to you on 17 February 1995 pursuant to Article 6 of Commission Regulation No. 99/63, informing you of the

reasons why the Commission considered that there were no grounds for granting your application with respect to the interception activities of Deutsche Post AG or similar activities by other postal operators. You were, however, given a period of two months in which to present further arguments to the Commission before it would take a definite position on this issue. [/2]

4. The comments subsequently submitted on your behalf by your legal representative, Mr. Morgan de Rivery, on 22 February 1995 do not, for the reasons set forth below, contain any arguments which would justify a change in the Commission's position. The purpose of the present letter is to inform you about the final decision which the Commission has reached with regard to the allegations in your complaint relating to the interception of mail on the basis of Article 25 of the UPU Convention.
5. Summarized briefly, the Commission's letter sent to you on 17 February 1995 pursuant to Article 6 of Regulation 99/63 identified four types of mail items which have been subject to interception on the basis of the UPU Convention, namely commercial physical ABA remail, non-commercial or private physical ABA remail, so-called "non-physical ABA remail (which as I will explain below we do not consider to constitute "mail"), and normal cross-border mail from country A into country B which has been erroneously suspected of actually having originated in country B.

Re commercial physical ABA remail

6. With respect to commercial physical ABA remail, the Commission's position is that to the extent the commercial collection of mail from residents in country B for subsequent remailing in country A to final destinations in country B constitutes a circumvention of the national monopoly for domestic letter delivery laid down by the law of country B, the interception of such mail when it is re-entering country B may be considered to be legitimate action under the current circumstances and therefore does not constitute an abuse of a dominant position in the sense of Article 86 of the EC Treaty.

In your letter of 22 February 1995, you argue that the Commission's position overlooks the fact that the root of this circumvention is the terminal dues system between postal operators which has resulted in an imbalance between the level of terminal dues as compared to the real costs incurred by the distributing postal operator in the country of final destination of the mail in question. My response to this argument is that the Commission has not in any way overlooked this factor, but has on the contrary specifically noted that 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, if not prevented from doing so under national law, legitimately intercept such mail in order to recover the actual costs of delivery.

With respect to your further argument that such interceptions are not among the means authorized by the German legislator to enforce the postal monopoly, the Commission's position is that it is the interception as such of commercial physical ABA remail which is considered not to constitute an abuse under Article 86 of the EC Treaty, whether a given postal operator such as Deutsche Post AG has gone beyond what it is authorized [3] to do under national law is not an issue which can be decided upon by the Commission in the context of a procedure under Article 86 of the EC Treaty, but must be submitted to the appropriate national authorities.

Re interception of non-commercial physical ABA remail, "non-physical" remail and normal cross-border mail

7. With respect to the interception of non-commercial physical ABA remail, "non-physical" remail and normal cross-border mail, the Commission's position is that to the extent the IECC's members do not engage in activities involving this type of mail, they are not harmed in their business activities by the interception of such mail and thus have no legitimate interest as required pursuant to Article 3(2)b of Regulations No. 17 for applications to the Commission with respect to infringements of the competition rules.

With respect to non-commercial physical ABA remail, referred to as "self-delivered" mail, and normal cross-border mail, you have neither during the course of the procedure nor in your letter of 22 February 1995 submitted any arguments indicating the legitimate interest required by Article 3(2)b.

With respect to so-called "non-physical" remail, you state in your letter of 22 February 1995 that "the IECC's members are involved in activities which postal administrations have described as 'non-physical remail'". On this issue, a further clarification appears to be called for as to what the Commission considers to constitute "nonphysical" remail, which as explained in the previous letter of 17 February 1995, does not, with respect to part of the route, take the form of "mail" at all but consists of electronic data transmission not involving a postal but rather a telecommunications activity.

In the Commission's view, which is based on experience gained in cases other than the IECC's complaint, 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.

In view of the fact that one of the distinguishing features of the scenario described above relates to the "non-physical" flow of information directly from the bank's subsidiaries and branches in various countries to its central service centre, there are in our view no indications as to how the IECC's members could be involved in this type of arrangement. Therefore, action by the postal operator in country B to directly or indirectly stop the flow of information from the subsidiaries and branches in that country, aimed at obliging those subsidiaries and branches to produce and mail their bank-statements themselves in country B, without the benefit of the central printing and mailing facility in country A [4] cannot in the Commission's view be of relevance for the business activities of the IECC's members, which therefore lack the legitimate interest required by Article 3(2) of Regulation No. 17 for Commission action regarding obstacles to the setting up of this type of central service arrangement.

8. For the above considerations I inform you that your application of 13 July 1988 pursuant to Article 3(2) Regulation No 17162, as far as the interception of commercial physical ABA remail, non-commercial physical ABA remail, "nonphysical" remail and normal cross-border mail is concerned, is hereby rejected.

Done in Brussels, 06. IV.1995

For the Commission

Karel VAN MIERT
Member of the Commission