

European Commission
Case IV/32.791 - Remail
Decision SG (95) D/10794
14 August 1995

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

Brussels, 14/08/1995

SG (95) D/10794
Sent by Fax and Registered Post with Acknowledgement of Receipt
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Fax No: 00 1 202 457 9121
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 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) certain postal administrations were invoking what is now Article 25 of the UPU Convention to stifle competition by intercepting inbound or outbound cross-border mail.

The 1987 CEPT agreement on terminal dues

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.

Interception of mail on the basis of Article 25 of the UPU Convention

(A) Interception of ABA remail

3. 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, you have received a letter dated 6 April 1995 signed by myself on [2] behalf of the Commission of the European Communities as the Member in charge of competition matters, indicating that the part of your complaint relating to the interception of commercial physical ABA remail, non-commercial physical ABA remail, "nonphysical" remail and normal cross-border mail, has been rejected.

(B) Interception of ABC remail

4. With respect to the part of your complaint regarding the interception of ABC remail by the German, UK and French postal administrations, the then Director-General of the Directorate-General for Competition, Mr. Ehlermann, wrote to you on 12 April 1995 pursuant to Article 6 of Council 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 behaviour of the postal administrations of the United Kingdom, Germany and France. 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 the issue.
5. The comments subsequently submitted jointly by Mr James Campbell and your legal representative, Mr Morgan de Rivery, on 9 June 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 ABC remail on the basis of Article 25 of the UPU Convention.

6. The letter from Mr Campbell and Mr Morgan de Rivery of 9 June 1995 states that (i) the Commission no longer has jurisdiction to take a further decision matter, and (ii) even if the Commission had such jurisdiction, the rejection of this aspect of the complaint proposed in that letter was inappropriate for a number of reasons. These issues will be addressed in turn.

(i) The Commission's jurisdiction to take a further Decision

7. In the letter from Mr Campbell and Mr Morgan de Rivery of 22 February 1995, which was a reaction to the Commission's letter of 13 February 1995 pursuant to Article 6 of Regulation No 99/63 on the question of certain types of interception of remail, the IECC noted that the examples contained in the complaint of July 1988 regarding the restriction on remail interposed by the postal administrations of Germany and the United Kingdom all represented implementations of Article 23(4) (now Article 25(4)) of the UPU convention against "ABC" remail. The letter further stated that, as the letter of 17 February 1995 from the then Director-General of the Directorate-General for Competition did not refer to restrictions on ABC remail, it could not be regarded as an adequate justification for rejecting the second aspect

of the IECC's complaint.

8. The letter from Mr Campbell and Mr Morgan de Rivery of 9 June 1995, however, now claims that the Commission Decision SG(95)D/4438 purported to deal with the totality of the second aspect of the complaint. In the view of the Commission, the ambit of the above Decision is clearly stated at paragraph 5: [3]

"... the Commission's letter sent to you on 17 February 1995 pursuant to Article 6 of Regulation No 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" 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."

Further, the operative part of the Decision reads as follows:

"For the above considerations I inform you that your application of 13 July 1988 pursuant to Article 3(2) Regulation No 17/62, 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."

9. On the basis of the above wording, it is clear that the Decision related to a rejection of the specified aspects of the complaint only, and was not a rejection of the complaint as a whole. This is confirmed by your own letter of 22 February 1995, where you specifically stated that the issue of "ABC" remail had not been covered in the letter sent pursuant to Article 6 of Regulation No 99/63, which from the procedural point of view necessarily preceded the final rejection decision of 6 April 1995. To the extent that the complaint covers ABC remail, it is not rejected by that Decision.
10. In your letter of 9 June 1995, however, you contend that the Decision should be construed as rejecting the whole of the second part of the complaint. Given the extracts quoted above and in particular the wording of the operative part of the Decision, the Commission does not see the basis for such an assertion.

(ii) The substantive issues raised by the complaint

(1) Interception of ABC remail by the German and UK postal administrations

11. 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 Statement of Objections sent by the Commission to seven postal administrations on 5 April 1993, a copy of which was sent to your legal representative on 23 April 1993.

12. In its submissions of 29 March 1994 regarding the Statement of Objections and the replies given by the postal administrations, the IECC stated that "a promise of good future conduct is no reason not to condemn past infractions of the Treaty [4] of Rome, thereby clarifying the law for the future and for other postal administrations".
13. Although it is true that the Commission may adopt a formal prohibition decision regarding anti-competitive behaviour which has in the meantime been terminated, it is not under an obligation to do so and will decide whether such a step is appropriate in the specific circumstances of an individual case. In the case at hand 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. Under those circumstances, you were informed in the letter pursuant to Article 6 of 12 April 1995 that there do not appear to be any grounds for taking a decision on this part of the complaint.
14. In your letter of 9 June 1995 you disagree with the above position, citing five points in support:
 - 14.1. *The IECC believes that there is a real danger of resumption competitive behaviour on the part of the Post Offices*
The Commission points out that this is an uncorroborated statement of opinion, and no evidence has been provided by the IECC to demonstrate the existence of any such danger.
 - 14.2. *The DBP (sic) has instituted court proceedings in the German courts "against those very entities upon whose rights it so boldly encroaches"*
The institution of court proceedings is not by itself an activity which can be prohibited under either Article 85 or 86 of the EC Treaty. Should the defendants in these cases believe that the DBP is acting in a manner contrary to the competition rules of the Community, this could be brought to the attention of the Commission by way of a separate complaint. However, as the court proceedings relate to the interception of ABA remail, there is no evidence to suggest that the DBP is asserting that it has a right to block ABC remail on the basis of Article 23(4) of the UPU, let alone that it has actually blocked such mail. The Commission does not see that the institution of proceedings by the German Post Office regarding ABA remail calls into question the reasoning employed in the present decision, which deals solely with ABC remail.

14.3. *The German post office's interpretation of Article 25 UPU*

The issue referred to in the footnote to this statement related to a single non-recurring incident in 1991, which has since been raised before a national court. This incident was not referred to the Commission by the IECC, but by a separate letter (in 1995, four years after the incident in question) from the legal representative of the company concerned. As there is no evidence that this related to ABC remail and not to other types of mail, the Commission does not believe that this incident demonstrates, as the IECC alleges, the German Post Office's determination to block ABC remail. [5]

14.4. *The IECC has no means to ascertain whether the German and UK postal administrations have ceased to contact other postal administrations*

The Commission notes that the IECC is here repeating the allegations contained in its original complaint. 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.

14.5. *The support of the postal administrations for the maintenance of Article 23/25 of the UPU*

The Commission would point out that the mere existence of Article 23/25 of the UPU is not necessarily contrary to the Community competition rules: it is only the exercise of the possibilities of action granted by Article 23/25 in certain circumstances - ie between Member States - which may constitute a breach of those rules. As such, the fact that certain postal administrations are in favour of maintaining Article 23/25 is not evidence that those administrations are now, or intend in the future, to breach the Community competition rules.

15. The IECC's request that strict penalties be imposed on the postal administrations in order to bring an end to the violations of EC competition law is inconsistent with the IECC's inability to produce any evidence that the infringements are continuing or that there is a real danger of their resumption.
16. In the light of the above, the conclusion expressed in the letter pursuant to Article 6 of Regulation No 99/63 of 12 April 1995, that there do not appear to be any grounds for taking a decision on this part of the complaint, remains valid.

(2) Interception of mail by the French postal administration

17. The July 1988 complaint refers to the anti-competitive use of Article 23 UPU only by the United Kingdom and German Post Offices. The Commission did, however, on 10 October

1989 receive information from TNT Skypac relating to an incident where the French Post Office had intercepted mail destined for Africa. The mail had originated in France, but was remained in the United Kingdom and was then intercepted while in transit through France. The French Post Office cited Article 23(1) UPU as the legal basis for the seizure, although the incident would appear to have been more appropriately based on Article 23(4). The Commission's services wrote to the French Post Office on 18 October 1989 to express concern about the incident and indicated first, that the interception was an extreme example of the authorization contained in Article 23 UPU, and secondly, that such practices were under investigation by the Commission and could constitute an abuse of a dominant position.

18. On 13 July 1990, the Commission's services wrote to the Post Offices of the United Kingdom, Germany and France in relation to the use of Article 23 UPU. [6] The French Post Office replied on 24 October 1990 maintaining that it believed such use of Article 23 UPU to be legitimate under Community law. The incident was subsequently referred to in the Statement of Objections of 5 April 1993, in order to allow the Commission to record its disapproval of such practices: in its response to the Statement of Objections, the French Post Office reiterated its earlier position that the incident was not incompatible with Community law.
19. In the circumstances of the case, taking into account the isolated nature of the incident and that there is no evidence of recurrence of the behaviour. The Commission does not believe that it is necessary to take a prohibition decision against the French Post Office.
20. It should be stressed that the Commission is not aware of other instances of the French Post Office invoking Article 23 UPU to intercept mail, neither after the incident referred to by TNT in the letter of 10 October 1989, nor following the issuing of the Statement of Objections in 1993. As noted above, the Commission is not under any obligation to adopt a formal prohibition decision regarding an incident of anti-competitive behaviour in the past, but it may decide whether it would be appropriate to do so in the specific circumstances of an individual case. Given that the interception of mail by the French Post Office referred to above appears to have been an isolated incident, the Commission does not believe that there are grounds for taking any further action.

21. For the above considerations I inform you that your application of 13 July 1988 pursuant to Article 3(2) of Regulation No 17/62 is hereby rejected, in so far as it relates to interception activities by the postal administrations of the United Kingdom, Germany and France implementing the then Article 23(4) of the UPU Convention against ABC remail, as described in your complaint of 13 July 1998 with respect to the UK and German postal administrations and in a letter to the Commission from TNT Skypac of 15 October 1989 with respect to the French postal administration.

Yours faithfully,

For the Commission

Erkki Liikanen