Collected Papers on Shaping Public Policy

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Couriers and the European Postal Monopolies (1994)*

Since 1983, private courier companies have been working together to reform postal policy in the European Community. Their goal is a legal regime that allows free, undistorted competition among delivery services operating between Member States and between the Community and the rest of the world. Effecting change in basic Community policy has proved a large and complicated task; ten years later, it remains unfinished. This chapter summarizes the efforts of the couriers to put their case for reform of the postal laws to the European Community and key Member States up to the publication of the *Postal Green Paper* in June 1992.

My purpose in this overview is to convey a sense of the major themes and factors which have shaped our ten-year campaign rather than to recount particular tales and tactics. Such a summary approach relegates public affairs programs that consumed more than a year to a sentence or two, but the long perspective gives a better understanding of the lasting nature of the policy barriers the couriers have tried to surmount. The couriers' experience in seeking fundamental, Community-level policy reforms may offer insights for other emerging entrepreneurial industries that must tread a similar path.

1. THE COURIERS

The first top level meeting of courier executives convened in a hotel in Geneva in August 1983. They met to discuss a letter which each company had received two months earlier from the Competition Directorate (DG IV) of the European Commission. The Commission's letters inquired into the relationship between the courier business and the postal monopoly laws in the European Community. As everyone realized, a European policy decision on postal monopoly issues would have a profound effect on the future of the international

*Published as R.H. Pedlar and M.P.C.M. Van Schendelen, eds., *Lobbying the in the European Union* (Aldershot, U.K.: Dartmouth, 1994).

courier industry throughout the world.

At the time the couriers were immature companies by current standards. Most were still personally managed by their highly individualistic founders. The "couriers"[1] originated in the late 1960's in North America and Western Europe as extra fast and reliable delivery services for urgent documents, such as financial, shipping, and engineering papers. They usually carried items from city to city as airline passenger baggage. Courier traffic rose with the increase in international commerce in the 1970's. Delivering documents and samples worldwide, they invented two descriptive terms which are now commonplace in the language of international commerce: "time-sensitive" and "door-to-door".

The Geneva meeting was called by DHL, by then the largest international courier. DHL was started in 1969 by Larry Hillblom, a young American law student, to provide rapid delivery of shipping and banking documents between the West Coast of the United States and Hawaii. In Geneva, DHL was represented by its CEO, Bill Walden, and myself, head of legal and regulatory affairs. Prior to the arrival of DHL, World Courier's expensive, specialist service had been the paradigm for an international courier. The delegation from World Courier was led by its founder, New Yorker Jim Berger. TNT Skypak, second in size to DHL, was represented by its founder and chairman, Gordon Barton. Before starting Skypak, Barton, an Australian, had pioneered express trucking and airfreight operations in Australia and Europe (IPEC) and led a successful fight to deregulate the Australian trucking industry. TNT, another Australian company, acquired a controlling interest in Skypak in 1983 and in 1991 sold a half interest to a consortium of postal administrations.

Also in attendance in Geneva were the founders of a number of smaller companies that were destined to serve as the courier skeletons for today's integrated carriers. Andrew Walters, an Englishman, was the founder of IML, a courier begun in the early 1970's and originally specialising in service between London and West Africa. IML was later purchased by United Parcel Service. Another English pioneer of industry was Bertie Coxall, an ex-Pan American employee, who had organized Airport Couriers in 1966 to transport urgent documents around Heathrow Airport. Airport Couriers soon grew into the one of the first international couriers. The year before, it had been purchased by a large English armoured car company, Securicor, retaining Coxall as CEO. Purolator, an American armoured car company which had expanded into courier operations, was represented by John Callan. Callan was the founder of one of the early couriers, Callan Air Courier (Calico), which ran into financial difficulties before being sold to DHL. Purolator itself was eventually bought by an American freight forwarder, Emery. Another courier veteran present in Geneva was John Dauernheim, representing Gelco. Dauernheim was a holdover from the days before Gelco had bought Loomis, an early courier based in Seattle. Gelco would

[1] *Courier* is an old English word meaning a "running messenger, one sent in haste".

itself soon be acquired by Federal Express.

None of these participants knew what to expect from the Geneva meeting. In the fiercely competitive courier industry, the principals rarely spoke and hardly knew each other. Previous industry cooperation had been limited to short, single-issue, national-level policy campaigns. The most important had been in the United States (1976-79) and the United Kingdom (1980-81). Both had been successful, leading to laws excepting courier services from the postal monopoly. A European level public policy effort, however, implied a much higher degree of cooperation over a longer period of time. Indeed, it was tantamount to establishing a mechanism for coordinating key public policies on a more or less worldwide basis. This, in fact, was the proposal of DHL.

After two days, the couriers reluctantly agreed to form a trade group, which they called a "conference" to avoid a sense of permanent association. Temporary articles were approved in a second meeting in New York in November 1983, and Gordon Barton of TNT Skypak was elected chairman. This was the beginning of the International Express Carriers Conference, which became the primary client for the long effort to untangle the restraints of the European postal monopolies.

The courier industry evolved rapidly, forcing corresponding changes in IECC. Although the IECC had achieved a certain permanence as an industry institution by 1987, it was still heavily dependent upon the finances and guidance of its largest member, DHL. In April 1987, TNT and Federal Express agreed to match DHL's contribution, and the enlarged IECC decided to expand its postal policy goals to include the defence of "remail" and general deregulation of international postal laws. In 1988, UPS was added as a fourth major member.[2]

Changing from a one-horse buggy to a four-horse carriage proved difficult. A committee of equals with different corporate priorities and different levels of international experience replaced a committee led by a single dominant member. As the size of couriers grew beyond the capability of personal management, the IECC had to accommodate the shift from entrepreneurs who were personally familiar with all aspects of the business to corporate officers who had sophisticated but specialized skills. For a time, it became impossible to agree on long-term public affairs goals or budgets.

In late 1988, the IECC recognized that the rising prominence of the European Community demanded the establishment of a European-level courier association that would include regional couriers as well as IECC members. IECC members, however, disagreed on how to form a European level association. Further dispute arose over the goals of postal policy. DHL urged the IECC to limit its goals to protecting "traditional" express services while the majority wanted to continue to seek reforms across a broader range of postal policy issues,

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[2]In addition to the "majors", a number of smaller companies participated in the IECC at various times, including IML Air Services, International Bonded Courier, Overseas Courier Service, Purolator Courier, Securicor Express, Sky International, and XP International Express. Most of these were eventually purchased by the one of the four majors.

including remail, terminal dues reform, access to postal service, and cross subsidization.

In mid-1989, DHL and Securicor withdrew from the IECC and established a rival European-level courier association, the Association of European Express Carriers (AEEC). Meanwhile, the remaining IECC couriers continued with their plan to form a European level association, calling it the European Express Organisation (EEO). The resulting division in the industry's façade in Europe considerably complicated the task of presenting the case for reform of European postal laws.

In Europe, the "public affairs department" of the IECC and EEO consisted of a team of talented and energetic European legal and public affairs advisers. The key legal members of this team were French lawyers Dominique Borde, Jean-Marie Duchemin, and Eric Morgan de Rivery; German lawyer Ralf Wojtek; and Italian lawyer, Livia Magrone. The major public affairs consultants were Gerta Tschaschel in Germany, Bernard Le Grelle in France, Michael D'Arcy in Ireland and Ian Greer and John Roberts in the U.K.[3] From time to time, other lawyers, consultants, and research firms have assisted this core group. In total, however, the basic set of advisers has never exceeded the equivalent of two full-time persons. Throughout the decade, this team was managed by me, working first for DHL and then for the IECC directly.

As the industry has become populated with larger, more sophisticated firms, the public affairs departments of the individual couriers have also become increasingly active in the postal policy reform efforts of the IECC/EEO group. The IECC has turned over management of Community postal policies to the European Express Organisation, led by its chairman, Jaap Mulders of City Courier; secretary general, Anton van der Lande of United Parcel Service; postal committee chairman, Tim Bye of TNT; and lawyer Rick Gerber of Federal Express. Thus, the public affairs work of the industry has grown into a collaborative effort between the original industry advisers and the public affairs and legal experts in the major courier companies, coordinated through the EEO.

2. ISSUES

Throughout the decade, the fundamental policy issue has been whether couriers should offer unrestricted cross border delivery services or be limited in some manner by the legal privileges of the postal administrations.

From a legal standpoint, the crux of the issue was the tension between the Treaty of Rome and national postal monopoly laws. The Treaty of Rome establishes the constitutional framework for the European Community and generally guarantees the "free movement of goods, persons, services and capital" among the twelve Member States of the European Community. On other hand,

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[3]When AEEC was founded in 1989, Ian Greer and John Roberts shifted to AEEC, and the IECC retained Kevin Bell and Julie Harris of Westminster Strategy.

centuries-old postal monopoly laws in the individual Member States typically reserved to the postal administration a monopoly over the transport of certain items within the Member State and between the Member State and points outside the Member State.

This basic policy issue has been manifested in several permutations of increasing legal and economic sophistication. As the couriers win, or begin to win, one version of the policy issue, a new variant is pressed by postal administrations. Thus, the fundamental issue of whether or not there should be free competition in cross border postal markets may be viewed in terms of four sub-issues.

a) *Express service: should couriers be permitted to provide express delivery services?* The first issue was one of market entry: whether the couriers should be allowed to operate at all or whether, alternatively, rapid delivery services should be deemed within the exclusive privilege of postal administrations.

b) *Remail: should couriers be permitted to deliver bulk mail to postal administrations in other countries?* By 1987, the policy issue came to be viewed as whether a large mailer could use a courier to tender cross border mail to whichever postal administration would provide the best international distribution at the best price. An American bank in New York, for example, might send statements of account by courier to the Dutch Post Office for postal distribution to customers throughout Europe. This use of courier service offered several advantages over posting with the U.S. Postal Service. The courier would typically offer pick up, sorting, monthly billing, and tracing services not provided by USPS. Compared to USPS, the Dutch Post Office would add less markup to the inter-administration rate for delivery of cross border mail. Both the courier and Dutch Post Office were spurred by competition to provide a faster, cheaper service than provided by USPS; if they did not do so, the courier would find another partner postal administration or the customer would find another courier. Using a courier to forward mail to a foreign postal administration came to be known as "remail".

c) *Cross border liberalisation: should couriers be permitted to deliver bulk cross border mail?* With remail, a large mailer could post his mail "downstream" with a postal administration closer to final destination, but final delivery still depended upon the postal administration in the destination country. In some cases, however, public postal delivery might not meet the needs of the mailer. Postal sorting and delivery operations are necessarily attuned to the needs of the local, not the cross border mail. If an international flight arrives at 8 a.m., the cross border mail cannot be delivered by the postal administration until the next day; a specialized delivery service might provide delivery by noon on the same day. Moreover, it is no secret that some postal administrations do not provide a very good service. As traffic has grown, some couriers have found it better or cheaper to deliver cross border mail themselves in central cities.

In short, the issue has become whether to allow development of

international postal systems that can provide integrated collection and delivery of mail across national boundaries. While this possibility has been generated by courier competition, it is not limited to private companies. Large postal administrations, as well, are considering the possibility of arranging for pickup and delivery in foreign cities where they have a large number of customers. This is less remarkable than it may seem at first blush. National airlines have always marketed their services in each others' home territories. More recently, telecommunications administrations are doing the same.

d) *Cross subsidy: should postal administrations be prohibited from using monopoly profits to subsidise competitive services?* Where postal administrations have been unable to prevent competition, they can still use the postal monopoly to restrict the growth of couriers by using the economic benefits of the postal monopoly to subsidise the prices of competitive products. Although postal administrations usually disavow cross subsidisation in principle, definition and enforcement are all important. The couriers believe that regulation of cross subsidy requires a truly independent regulator applying objective economic criteria to detailed, transparent cost accounts. Postal administrations generally prefer non-public scrutiny by a Ministry of Communications that remains politically responsible for the financial well-being of the postal administration.

3. PARTICIPANTS

While the postal administrations and private couriers have been the major antagonists in the long running postal policy drama, the dramatis personae would also include business users, consumers, postal unions, and (particularly in the U.K.) policy "think tanks".

The postal administrations, of course, are in the first rank of the economically and politically important public services in Europe. Virtually all have been active in postal policy issues, supported by their unions. In general, postal administrations have opposed the pro-competitive solution to each policy sub-issue as it has arisen. Different administrations have participated in different degrees. The French administration, La Poste, has been the political and intellectual leader of the conservative majority of Community postal administrations, supported by an especially active Irish postal administration, An Post. The British Post Office has led in the development of quantitative and economic analysis, an approach which has sometimes led it to advocate a more liberal position than La Poste. In the last few years, a minority position has developed among administrations, led by the Dutch Post Office, sometimes joined by the Danes, the British, and the Germans. The minority position has been to support alignment of postal prices and charges with costs and liberalisation of cross border and other postal services.

In 1983, the courier industry was composed of small companies without access to the governmental or commercial circles of Europe. Outside of the U.K., the largest courier, DHL, had only thirty or forty staff in any European city, almost all drivers. Most industry executives were former operations supervisors,

who were too busy inventing and building a new industry to waste time on subtle policy questions. Few even spoke the language of the countries they were trying to serve. The total traffic in the courier industry in 1983 was about 4 million shipments, compared to 2,200 million *cross border* postal shipments (cross border mail is only about four percent of all mail).

The activity of the user groups tended to reflect the resistance to competition by the local postal administration. The most active, pro-reform, user groups have been the French chapter of the International Chamber of Commerce and the French employers' association, Conseil National du Patronat Français. Similarly, the German chapter of the ICC and the German chamber of commerce, Deutcher Industrie und Handelstag, have been involved in postal reform policy for many years. In Italy, the employers' association, Confindustria, became involved in 1989 when the European Commission confronted the Italian postal administration over its practice of taxing cross border courier shipments. Since about 1989, consumers' needs have been actively championed by the Bureau Européen des Unions de Consommateurs as well as national level associations. In the last two years, the Fédération Européene du Direct Marketing has also become a major user participant in the policy debate.

These participants have urged their positions to a loose panel of judges consisting of the European Commission's Competition and Telecommunications Directorates (DG IV and DG XIII, respectively) and the postal and economic ministries of key Member States. In the Member States, the British Department of Trade and Industry, the German Ministry of Economics, and the French Ministry of Posts and Telecommunications have been especially involved in the postal policy debate.

4. CHANGING NATIONAL POLICIES IN A COMMUNITY CONTEXT

The question of whether or not private couriers should be allowed to operate was first fought at the Member State level, although within the framework of Community law. In the early 1980's, the United Kingdom was the only Member State that accepted private couriers on any terms. By virtue of a 1981 law, couriers in the U.K. were permitted to operate if they charged more than UK£ 1.00 per shipment. In the rest of the Community, the position of the postal administrations was that couriers should be prohibited entirely. Outside the U.K., postal administrations acted individually to suppress the couriers within their respective Member States.

4.1 POSTAL STRATEGY

The basic strategy of postal administrations was to intimidate and handicap the couriers by administrative means rather than to seek judicial enforcement of the monopoly. The most aggressive tactics were adopted by La Poste in France. Couriers were variously warned, on pain of prosecution, to cease operations or to stop advertising or to notify customers of the need to comply with vaguely worded postal monopoly laws that were, in turn, interpreted by postal lawyers.

News articles were placed in newspapers questioning the legitimacy of couriers. Speeches by ministers condemned the couriers. Couriers' offices were subject to dramatic raids by postal inspectors, upsetting local employees. Customs officials conducted lengthy searches of courier bags entering the country. Necessary permits and licenses - for example, relating to the right to occupy buildings on airport grounds - were delayed or denied. Major customers were warned off the couriers. Many, but not all, of these tactics were employed in most other Member States as well.

Uniquely in France, beginning in 1980, La Poste also demanded that couriers sign an agreement under which a certain amount of money was to be paid La Poste for each shipment carried by courier. This informal tax did not explicitly exempt couriers from the postal monopoly, nor was it authorized by French legislation. Nonetheless, the couriers felt that they had no choice but to pay it, believing that it gave them at least a moral right to operate. In 1982, La Poste notified the couriers that the agreements would be limited to the Paris area. The rationale of La Poste was apparently that its own express mail service was ready to take over from the couriers in the provinces and would soon be available in Paris.

4.2 COURIER STRATEGY

Since the couriers were small, unknown, and largely foreign, we, couriers and advisers, had none of the political tools of an established national industry. We had no ability to approach the minister, speak out at the chamber of commerce, or generate press stories. From experiences in the U.S. and U.K., however, we knew how to analyze the weaknesses of the legal and economic premises upon which the postal administrations' positions rested. Our strategy was based on this expertise.

Our first concern was to limit the possibility of a prosecution under the postal monopoly law. In the major Member States, we retained lawyers and researched hundreds of years of statutes and judicial decisions, until the evolution of the postal monopoly law and all its concepts were understood thoroughly. Related laws were also examined in depth: competition law, administrative procedure, and the Treaty of Rome. Formerly, administration lawyers claimed an exclusive expertise in this arcane corner of the law, allowing them to pronounce the scope of the monopoly without challenge. In fact, however, as our research demonstrated, the postal monopoly law was often a jumble of contradictory precedents whose application to modern commerce was extremely unclear.

This legal research allowed us to forestall outright prosecution. We knew enough about the deficiencies of the officially proclaimed postal monopoly that administration lawyers were reluctant to put at risk the entire monopoly edifice. While our customers could still be intimidated - they rarely believed us over the postal administration on the finer points of postal law - our most fundamental fear was alleviated.

While legal research was useful as a shield, it would not serve as a sword.

The uncertain scope of the postal monopoly, per se, would not convince the legislature to clarify the law over the objections of the postal administration. To make the case for an affirmative exception to the postal monopoly, we retained credible, independent economic consultants to identify the role the couriers fulfilled in the national economy. Placing our case in the hands of truly independent consultants meant the loss of some control over final reports, but we believed that only independent analysis would have currency in a policy debate.

Like the legal research, the economic research proved to be extraordinary; the consultants were asked to analyze an industry that did not exist yet. Businessmen did not then think of the flow of urgent documents and small parcels in distinct, analytical terms. Neither customers nor economists had any accepted way to measure the quality or importance of an express delivery service. What appeared obvious to the couriers was, in fact, not nearly so obvious or easy to explain to an outsider. In the end, these economic reports represented an arduous joint intellectual effort by consultants and couriers. They did finally provide, however, a useful description of the economic role of couriers in terms understandable and credible to established commercial and governmental institutions.[4]

Armed with economic studies, we undertook to explain the idea of courier service to the commercial establishment in key Member States. Our approach was to avoid presenting the "courier issue" as a new policy problem. Rather, we related our problem to policy issues that were already being publicly debated. In Germany, for instance, the courier issue could be best understood as an example of the potential of deregulation. In France, because La Poste had decided in 1982 to ban couriers in the provinces before Paris, the courier issue was more understandable as an element in the national debate over decentralization of power to the provinces. In both countries, we noted the importance of the international couriers to support exports.

In all countries, the educational task was approached broadly to escape being confined to the terms of "postal policy." We tried to avoid a public confrontation with the postal administration for two reasons. First, we believed that, as relatively unknown outsiders, we could not win a public debate over legal or economic technicalities. Second, we believed that postal officials would be more likely to compromise in the end if they were not forced into assuming inflexible public positions.

In addition to the legal shield and the economically honed sword, a third element in the couriers' strategy was introduced by the Commission's June 1983 inquiry. In its first collective action, the IECC responded to the Commission with a candid, detailed report with voluminous appendices. This presentation represented our first involvement with the European Commission, and it set the

[4]Examples include studies by Professor E. Kaufer in Germany, the Bureau d'Informations et de Prévisions Economiques in France, and Coopers & Lybrand in Ireland.

tone for a cooperative and professional relationship between the Competition Directorate and the couriers.

In our strategic thinking, we envisioned the role of the Competition Directorate as one of a casting vote at the national level. We felt that, if we could demonstrate in a given Member State substantial political support for couriers to offset opposition from the postal administration, the Commission could, if it agreed with our position, tilt the balance in favour of liberalisation. To protect our credibility with the Commission, we were most reluctant to ask the Commission to do the politically impossible. In particular, although we were early aware of the legal feasibility of a formal complaint against the postal administrations under Community law, we did not file such a complaint. We concluded that a formal complaint at that time would unite all the postal administrations against the courier industry before we had a recognized commercial role in the Community economy.[5]

A final aspect of courier strategy in those days related to the timing of political decisions among the Member States. The couriers realized that they enjoyed a fundamental advantage over the postal administrations because they could better coordinate political and legal activities in different national fora. The couriers could, to some degree, delay a decision in an unfavourable forum and advance the date in a relatively more favourable forum. In September 1984, the IECC decided to concentrate on the German government as the major Member State most likely to be responsive to the policy factors favouring the courier industry. Thus, we resisted proffered negotiations in France while pressing ahead in Germany.

4.3 COURSE OF EVENTS

The years 1983 and 1984 passed with postal administrations and couriers pursuing their separate strategies. Postal administrations sought to limit the couriers' growth with administrative threats and harassment. The couriers developed their business and the economic case for being allowed to continue. Neither side sought a definitive legal confrontation in court.

The dénouement to these competing manoeuvres came in Germany at the end of 1984. The opportunity for resolution appeared almost by chance, although it was recognized only because of long preparatory work. It turned out that the Bundespost was offering "on demand" express mail service without proper legal authority. This omission was only a technicality since the Bundespost had obtained proper authority to provide "contract" express mail service. Nonetheless,

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[5]During this period, our legal strategy was affected as well by the appeal of the *British Telecommunications* case pending before the European Court of Justice. In December 1982, the Commission had applied the competition rules of the Treaty of Rome to certain telex activities of the British Post Office. The Commission's decision had been appealed to the European Court of Justice by several conservative PTT ministries, led by Italy. We did not want to launch a massive legal case until the law was clear.

to extend its contract express service to non-contract customers, the Bundespost was legally required to obtain authority from the Postal Council, a quasi-legislative body comprised of members of several ministries, the parliament, and representatives from business and labour.

The true legal significance of this missing authorization derived from the Bundespost's position on the postal monopoly. The Bundespost insisted that its monopoly precluded courier service on routes where the Bundespost's express mail service was adequate. Hence, before the Postal Council approved new operating authority, it should logically consider the implied extension in the Bundespost's de facto monopoly. This point had never occurred to anyone. By bringing it to the attention of members of the Postal Council who supported courier services, we were able, in effect, to place the Postal Council in a position to review the applicability of the postal monopoly to courier services.

There were two possible outcomes. The Postal Council might decline to review the monopoly implications and simply authorize the extension of express mail service, in which case the couriers would be no worse off than they were already. Alternatively, the Postal Council consider the postal monopoly issues and require the Bundespost to accept courier competition before granting the ordinance. It was unlikely that the Postal Council could or would use a decision authorizing a new postal service to hinder the couriers. In short, the couriers could force the issue in circumstances in which they could win but could not lose, an ideal place to make a stand.

After much debate, the Postal Council decided to suspend approval of the ordinance until a mutually satisfactory solution to the 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.

When Germany accepted the right of couriers to provide cross border express services, it was clear that the next step would be negotiations between the French government and the Competition Directorate.[6] To solidify its economic arguments, the IECC commissioned Sofres, a leading polling firm, to conduct a survey of French international businessmen on their need for courier services. The IECC also commissioned the Bureau d'Informations et de Prévisions Economiques (BIPE), a research institute jointly funded by industry and government, to prepare a comparison of courier and postal express services. The couriers also presented their ideas for reform at various meetings of users organised by the French Association of Users of International Couriers (AFCUI),

[6]The Commission's position was further strengthened in March 1985 when the European Court of Justice finally decided the *British Telecommunications* case. The ECJ upheld the position of the Commission and for the first time applied the competition rules of the Treaty of Rome to postal administrations in the same way as to other undertakings.

led by M. André Sacy, president of the French Exporters' Association.

In May 1985, the Competition Directorate and representatives of La Poste and the French government began a series of meetings to review the French postal monopoly policy. Negotiations dragged on through the summer, rapidly shifting, as nearly as we could tell, from optimism to pessimism and back again. On 2 June 1985, La Poste seized courier shipments at Roissy airport, a bad sign from the couriers' view. In September, La Poste struck a still more defiant note by demanding an increase in the level of payments provided in the highly questionable "agreements" that La Poste had coerced the couriers to sign under threat of the postal monopoly.

In response, the couriers precipitated a public confrontation. Armed with highly favourable results from the Sofres and BIPE studies commissioned earlier in the year, on 22 October the couriers and AFUCI held a large rally over lunch at a Parisian hotel. Representatives of over 400 users attended. At this meeting, the couriers dramatically announced that they would refuse the revised postal agreements and place further payments under the existing agreements into escrow. On 14 November, apparently fighting intense pressure from his unions, 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.

Despite this private concession to the Commission, the courier issue was of such political sensitivity in France that the French government was reluctant to provide public acknowledgment of its position. Negotiations between the couriers, the EEC, and La Poste continued until a formal announcement was provided in November 1986 in an official letter from the Competition Directorate of the European Commission to the French courier association.

Similar, closely related public policy battles were also fought in other Member States over the right to provide cross border services without prosecution, taxation, or other harassment under the postal monopoly, notably in Ireland, Belgium, Italy, Denmark, and the Netherlands. With the agreement of France, however, the main line of defense for the postal administrations moved from prohibiting "pure" express service to blocking "remail" and the *modus operandi* shifted from national administrative action to collective postal action.

5. CHANGING POLICY AT COMMUNITY LEVEL

In October 1986, the Reagan Administration required the U.S. Postal Service to accept the right of couriers to provide international remail service. As a result, European postal administrations were placed in competition with each other for the right to distribute large amounts of American mail transmitted from the U.S. via courier. Some Community postal administrations sought to become central distributors for large European as well as American mailers. The Community postal administrations were determined to stop this growing inter-administration competition induced by courier services.

5.1 POSTAL STRATEGY

Recognizing the advantages that the couriers had enjoyed by coordinating public affairs efforts in different Member States, the postal administrations immediately fixed upon a cooperative approach towards stopping remail. On 22 April 1987, the British Post Office called an emergency meeting of major Community postal administrations. The U.K. Post's letter of invitation noted:

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

This ad hoc "Remail Conference" met several times over the next six months, fortified by the active participation of the U.S. Postal Service - notwithstanding the United States' official support of competitive remail. The Remail Conference developed a four-part strategy for preventing the extension of courier service into remail.

a) *Increase terminal dues*. Postal administrations agreed to raise substantially the charge which they levied against each other for the delivery of cross border mail. This "terminal dues" charge was applied at the same rate to postal administrations regardless of the actual costs of postal delivery. A large increase in terminal dues would disproportionately affect the couriers since terminal dues between postal administrations exchanging similar quantities of mail largely cancelled each other out, whereas couriers had to pay the full cost of any increase.

b) *Enforce Article 25*. Postal administrations urged each another to refuse to forward or deliver remail. The legal pretext for this was Article 25 of the Universal Postal Convention, the multilateral treaty between governments that, since 1874, had established the basic rules for international postal services.

c) *Boycott couriers*. Since remail depended upon the fact that some postal administrations were willing to accept bulk mail carried from abroad by couriers, postal administrations urged each other to refuse to do business with couriers in the name of postal solidarity.

d) *Lower the price and improve the quality of international postal services*. Recognizing that remail was a response, in some cases, to international postal service that was overpriced and poor in quality, postal administrations resolved to do better.

After months of fruitless discussion, the IECC, in July 1988, filed its first formal complaint with the European Commission against the postal administrations. The complaint suggested that activities of eight European postal administrations were inconsistent with the Treaty of Rome insofar as they purported to fix terminal dues rates for the purposes of limiting competition and encouraging enforcement of Article 25.

Faced with this renewed appeal to the Treaty of Rome in fall 1988, the postal administrations decided to broaden the postal policy debate in the Community by encouraging the Commission to prepare a fundamental analysis of Community postal policy, a *Postal Green Paper*, as had done in the field of telecommunications. Postal administrations apparently believed that a policy review was likely to be more sympathetic to their views than a legal review conducted in the context of competition law. A policy review would be led by the Telecommunications Directorate (DG XIII) rather than the Competition Directorate (DG IV).

The basic idea of the postal administrations was to seek an agreement on a high level of socially necessary, universal postal service *before* a detailed consideration of Community law. After all, who could disagree with good quality postal service for all citizens? Once a high level of universal service was agreed, the postal administrations could then use this social goal to justify limitations on the application of the competitive provisions of the Treaty of Rome. Moreover, the postal administrations could argue that the pendency of a major policy review justified a delay in addressing the IECC's complaint.

A final element of postal strategy was to circumscribe the European Community by seeking agreement at the 1989 UPU Congress. The Universal Postal Union meets once every five years and is controlled by postal administrations even though its product is an international treaty among governments. By obtaining UPU ratification of the Remail Conference's anti-remail strategy, the Community postal administrations could lend additional weight to arguments that the Community should attempt to disturb a consensus of the world community.

Thus, in the light of couriers' initial public affairs successes, leading postal administrations concluded that the linchpin of future postal strategy should be a common front among administrations. At international gatherings, postal officials began to speak of the community of postal administrations as if it were a single corporation composed of national divisions.

5.2 COURIER STRATEGY

The couriers were surprised by the formation of the Remail Conference in April 1987. Faced with a suddenly united phalanx of postal administrations, the IECC felt that it had no alternative but to prepare a formal complaint against the most clearly anti-competitive aspects of the postal administrations' anti-remail strategy. As noted, this complaint was lodged in July 1988.

Because of the complications arising from restructuring the IECC described above, courier strategy was essentially limited to support of this complaint until mid-June 1989. By this time, the public affairs situation had changed considerably. Community postal administrations were well organised. In the Community, postal officials were working closely with DG XIII on the *Postal Green Paper*. At the world level, the 1989 UPU congress was imminent. And at the national level, both the Bundespost and the Danish Post Office had filed legal

cases against couriers claiming that outbound remail operations violated national postal monopoly laws. Meanwhile, the increasingly competitive nature of the courier business translated into sharp reductions in the IECC's legal and public affairs budgets.

Under these conditions, the strategy of IECC and EEO was largely shaped by the need to respond to external events. Legal cases had to be defended, essentially by relying upon the Treaty of Rome, and an industry position on the *Postal Green Paper* had to be prepared. The crucial area for discretion arose in the development and content of a *Postal Green Paper* position.

The basic strategy of the IECC/EEO group was simple enough. The couriers could not hope to compete with the postal administrations in the number of man-hours devoted to working with or influencing the Commission in the preparation of the *Postal Green Paper*. The only road open to us was to make an extraordinarily persuasive case. But first we had to try to dissuade the Commission from adopting a hastily conceived postal policy that reflected only input from postal administrations. For both reasons, we decided to encourage and participate in a series of public and academic discussions of the fundamental public policy issues presented by a *Postal Green Paper*. In trying to educate the Commission, Member State officials, and customers, we also educated ourselves.

From this process, we tried to divine a policy approach that would satisfy a number of criteria:

- meet the present and future commercial needs of the courier industry;
- respect both the Treaty of Rome and substantially different levels of public postal development in different Member States;
- avoid serious financial threat to the majority of postal administrations; and
- further the aims of the European Commission's program to achieve economic integration of the Community by the end of 1992.

Our hope was to produce a well-conceived and well-presented industry position that would be found persuasive to the Commission and consistent with the long-term interests of the more progressive-minded postal administrations. In so doing, we also hoped to minimize the influence of the AEEC which, we felt, would be unable to prepare a comparable position paper.

5.3 COURSE OF EVENTS

The couriers' successful use of careful legal analysis seemed to inspire the postal administrations. They responded to the IECC's complaint against the terminal dues agreement and resort to Article 25 by retaining some of the leading law firms in Europe. After several months of trading legal briefs, however, it became apparent the postal administrations' legal defense was unconvincing. The postal administrations, therefore focused their energies more on organizational and political activities.

By the fall of 1987, the major Community and non-EC postal administrations had reached agreement not only on an increase in terminal dues

charges but also on the establishment of a postal airline system called EMS International Postal Corporation. EMS provided air transport of express postal traffic, and like several couriers, used the Zaventem airport in Brussels as its hub. In 1988, the postal administrations, led by U.K. Post, expanded EMS to form a new company, Unipost. In addition to operating the EMS system, Unipost was to provide marketing, research, and consulting services for international mail.[7] Unipost opened provisional offices in Brussels in late 1988 with an official of La Poste, Guy Meynié, as its chief executive. With the simultaneous initiation of the *Postal Green Paper*, IPC quickly came to act as a common front for public affairs issues as well.

Meanwhile, the Executive Council of the Universal Postal Union, chaired by the Bundespost, pressed for the UPU as a whole to adopt the anti-remail strategy of the Remail Conference. A major conference on terminal dues was convened in April 1989 to lay the groundwork for UPU ratification of some version of the CEPT terminal dues agreement at the UPU congress in fall of the same year.

There was no public announcement to signal the commencement of the *Postal Green Paper*. DG XIII staff apparently began their research with a tour of Community postal administrations in late 1988 and early 1989. Several postal administrations, including La Poste and the British Post Office, seconded a substantial number of staff to DG XIII to assist in preparation of the Green Paper. In September 1989, the telecommunications ministers of the European Council met in Antibes under the chairmanship of France and endorsed a six page outline for the *Postal Green Paper* that emphasized governmental support for postal administrations and largely ignored the benefits of competition and the needs of users.

It was at this point that the couriers actively reentered the game, now under the banner of the European Express Organisation, whom IECC had agreed should manage the public affairs effort. In October 1989, we responded to the Antibes declaration with two short papers, a critique of the Antibes paper and an outline of a pro-competitive Postal Green Paper policy. These papers served as the basis for background briefings of key officials in the Commission and various national governments.

We also filed a second complaint with the European Commission, this time against efforts by the Danish post office to use the postal monopoly to stop outbound courier services. We did not want to make this complaint, but efforts at compromise in Denmark had failed, and we were pessimistic about litigating under the unusually anti-competitive postal law of Denmark. Despite our reluctance to file a complaint, we concluded that a Danish case would serve as a good test case for the legal question of whether the national postal monopoly

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[7]Unipost was organised by 20 postal administrations, including eleven Community postal administrations and the postal administrations of the United States, Canada, Australia, and Japan.

could be applied against outward cross border courier service. The Danish post office was a shareholder in Unipost and a major participant in remail as well; it was therefore in a weak moral position to claim the protection of the postal monopoly.[8]

After the UPU congress ended in December 1989, we initiated a series of public seminars in Europe, including conferences in Dusseldorf (February 1990), London (April 1990), Rugby, U.K. (July 1990), Brussels (September 1990), Bonn (October 1990), Amsterdam (November 1990), Brussels (November 1990), and London (April 1991). While time-consuming, we believed that this was the best way to present our view to national governmental officials, postal users, and the "establishment" of the Community. We also briefed a few governmental officials at the national and Community level. Our impression is that this public discussion of the Postal Green Paper was at least useful in persuading the Commission and the Member States of the complexities of the issues involved and the inappropriateness of the simplistic approach taken in the Antibes declaration.

The seminar in July 1990 in Rugby was especially noteworthy. It was organized by two American professors and was the first seminar jointly sponsored by both postal administrations and couriers. Despite considerable apprehension on both sides, the participants discovered a high level of agreement on many technical issues. The Rugby seminar laid the basis for a collegial dialogue between policy experts from the couriers and postal administrations which has continued through many seminars and informal meetings to the present day. There is no doubt that this dialog has been mutually informative and stimulating, and has encouraged the couriers towards positions which, while protecting their own interests, would not be unduly threatening to the interests of postal administrations.[9]

The culmination of this consultation process came in November 1990 when EEO completed a comprehensive (185-page) discussion of Postal Green Paper issues entitled *Community Delivery Services: A Discussion Paper on the Proposed Green Paper on Postal and Private Delivery Services*. As hoped, *Community Delivery Services* was well received. The paper was mentioned positively in the *Financial Times* and London *Times* and a top official in EC President Delors' office wrote that our paper was "the most interesting document on the industry, both in structure and content". Perhaps the best compliment was paid by the European postal union, CEPT, by establishing a special committee to review and rebut the EEO position. Commission staff referred to it wryly as the

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[8]The legal cases filed against remail in Germany were successfully defended in German courts under German and Community law.

[9]The proceedings of this seminar are published in Michael A. Crew & Paul R. Kleindorfer, eds. *Competition and Innovation in Postal Services* (Norwell, Mass.: Kluwer, 1991). Proceedings of a second seminar held in the south of France in March 1992 may be found in M.A. Crew & Paul R. Kleindorfer, *Regulation and the Nature of Postal and Delivery Services* (Norwell, Mass.: Kluwer, 1993).

"shadow Green Paper".

Community Delivery Services suggested that there are sound legal and economic reasons why cross border delivery services should be completely liberalised. Cross border competition will not materially affect the ability of each national post office to provide universal service to the citizens of its Member State but will, on the other hand, promote better communications among citizens of different Member States. At the national level, however, it was accepted that Member States should be able to adjust local monopolies over local services to suit their needs. Monopolies, however, implied the need for transparent regulation by truly independent regulators.

In December 1990, DG XIII completed a first working draft of a Postal Green Paper called "Document 35". In our view, Document 35 was rather convoluted in its reasoning and timid in its proposals. Document 35 did, however, accept the correctness of the points that we had raised in our 1988 complaint against terminal dues and Article 25 of the Universal Postal Convention. We responded with a detailed critique of Document 35 which we submitted privately to Commission staff and a few governmental officials active at Member State level. Despite our disappointment in Document 35, we felt that the Commission was indeed trying to grapple with the issues involved and that a public row over a draft document would be counterproductive.[10]

In the summer of 1991, the well-laid plans of both couriers and postal administrations were upset by an announcement that five Unipost postal administrations - those of Germany, France, Sweden, Netherlands, and Canada - would purchase one-half of the courier business of TNT, an IECC member. This announcement threatened the viability of a common public affairs front for both the postal administrations and the couriers. The five post offices in the joint venture constituted half of the EMS traffic and more than half of the European political clout of Unipost. Without them, EMS would have to stop and Unipost would have little political credibility. The UPU called an extraordinary Executive Council meeting in October 1991 to consider how to oppose the joint venture. Meanwhile, if the IECC were unable to accept the TNT joint venture as a member, it would probably have been forced to dissolve. Even the Commission was given pause; the Green Paper analysis would have to be adjusted to fit a world in which postal administrations owned half of a major private courier.

By the end of 1991, the dust began to settle. Under Community competition rules, the joint venture was required to obtain clearance from the Commission. The Commission approved the merger but imposed certain procompetitive conditions, including extracting a promise that the postal administration would

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[10]In December 1990, the couriers also filed their third major competition law complaint, this time against La Poste for effectively subsidising its subsidiary, Chronopost, in its competition against couriers in the domestic and international express markets. Chronopost is a private law joint venture between La Poste and a private transport company. This case was filed with both the European Commission and French competition authorities.

not interfere in the joint venture's public affairs work and an admission that the joint venture would have none of the legal privileges of the postal administrations. After several further months of consideration, the couriers gradually accepted these assurances. The postal administrations, however, seemed to pull back from Unipost, placing more reliance on their own individual public affairs efforts.

In September 1991, the postal administrations demonstrated that they were ready to copy yet another lesson from the couriers' play book. The postal administrations of Germany, Netherlands, and Denmark retained a well respected outside consultant to prepare an economic study for public consumption, that supported certain policy points supported by the three administrations. The basic point of the study was that shifting from the CEPT terminal dues agreement to cost-based terminal dues (as demanded by the couriers), while desirable, should also be accompanied by the freedom for postal administrations to adjust intra-Community postage to reflect higher or lower delivery costs depending upon the destination Member State. No one could disagree with the soundness of this economic argument. This study effectively ended further opposition from the more conservative postal administrations that opposed moves towards cost-based terminal dues.

By January 1992, "final" drafts of the policy chapters of the Postal Green Paper began circulating. These drafts indicated a substantially more progressive policy than foreshadowed in Document 35, one that was much more clearly reasoned and carefully documented. Most of the basic points urged by the EEO in *Community Delivery Services* were incorporated in proposals or at least recognised in principle. The Commission's final approval of the Green Paper was then repeatedly delayed, apparently by last-minute efforts by postal administrations to weaken its liberal proposals. In April 1992, the Commission accepted some revisions in the original final drafts, although the basic thrust of the Green Paper remained. The *Postal Green Paper* was finally approved by the May meeting of the European Council and published in June 1992.

Despite some shortcomings, the Green Paper represented the most thorough official analysis of large-scale postal policy since the British Parliament accepted Rowland Hill's reform ideas and revolutionized postal operations in 1840. The major proposals of the Green Paper included the following:

- a Community guarantee of "affordable" universal service throughout the Community;
- liberalisation of cross border and direct advertising delivery services and Community-wide restraints on the remaining postal monopolies;
- establishment of independent regulators to oversee prices and services of postal administrations and prevent cross subsidy of competitive services by monopoly services;
- alignment of charges for delivery of intra-Community mail with domestic postage rates and prohibition against postal use of Article 25 of the Universal Postal Convention.

In so recommending, the *Postal Green Paper* moved the goal posts in the postal policy discussion in a number of respects. First, the argument over whether couriers should be permitted to compete with postal administrations in the collection and forwarding of cross border mail sent to other postal administrations suddenly became yesterday's issue. Likewise, it was no longer possible to argue whether or not postal administrations should be regulated and whether they should be required to keep proper accounts. The major policy goals of the Community postal administrations shifted from stopping outbound "remail" competition to preserving an absolute monopoly on delivery of all regular mail, cross border or otherwise, and retaining discretion to subsidise their competitive services from the monopoly rents earned from this monopoly.

Since publication of the *Postal Green Paper*, most of the Community postal administrations devoted themselves to blocking or delaying implementation of its recommendations. Publicly, this opposition is usually expressed as enthusiastic support for the Green Paper except for those few provisions that call for substantial liberalisation. The postal administrations and postal unions successfully urged the European Parliament to condemn the Green Paper in January 1993. The couriers, of course, have tried to support the *Postal Green Paper* and to encourage users to lend their support. This process is continuing. So far, the Commission has spoken only guardedly about future legislature.

6. CONCLUSIONS

In this manner, over the course of a decade, the fundamental postal policy of the European Community has slowly become more receptive to competition in the provision of mail services at the cross border level. The couriers have won the right to provide cross border express services in Europe. They have, apparently, also won the right to extend this express capability to bulk remail. More generally, the European Commission has accepted, on a draft policy level, that couriers should, sooner or later, be allowed to compete freely in the cross border market without restraints grounded in traditional legal privileges accorded the postal administrations.

Despite this progress, the majority of postal administrations are vigorously opposing the policy recommendations of the *Postal Green Paper* and have successfully delayed a Commission decision in three major competition law complaints lodged with the Commission over the last five and a half years. As of November 1993, despite great progress in gaining acceptance for courier operations at cross border level, it remains questionable whether the liberal proposals of the Green Paper will ever be enacted into Community law.

In late 1990, Gerald Harvey, head of Unipost, was kind enough to suggest that these positive policy developments were due, in part at least, to skillful legal and public affairs efforts by the couriers:

> the postal industry should understand what it is up against; perhaps the

> most effective form of competition that exists, and which acts with a dedication and a passion to ensure that the way back for the post office will be severely restricted by the legislative and regulatory process, which the courier industry is busily and continuously trying to influence to its own advantage. To a large extent they are succeeding in creating the perception amongst legislators in Europe, at any rate, that the wings of the post offices should be clipped. . . .

Regardless of where the credit for policy change may lay, the couriers' case may be of interest to others as an example of the difficulties faced by a entrepreneurial industry in trying to manage basic policy changes at Community level. In retrospect, some observations:

1. Changing public policy in the Community is too difficult. Putting forth a case for changing policy in the European Community is extremely difficult, costly, and frustrating for an entrepreneurial group. Much of the cost arises from the fact that a case for change must be presented at both Community and Member State levels. This means that a small, struggling industry must fund the costs of presenting its case not only to the Community itself but also in, at a minimum, France, Germany, the U.K. and other Member States in which a major legal challenge is posed. The cost of inducing change is increased further by the difficulty of obtaining compliance with the Treaty of Rome when the application of the law can be delayed for years by political intervention.

It does not seem to me in the interests of the Community that the regulatory system as a whole should be so resistant to the introduction of new commercial ideas. It is easy to imagine that, if the couriers were only slightly less quick afoot, the Community would have little or no courier service. It is also easy to imagine that, if the couriers had been allowed to provide unhindered cross border service after, say, a two- or three-year policy review at Community level, then the Community would today be enjoying a more integrated Single Market with a substantially higher quality cross border delivery services, public and private.

2. Commerce changes faster than policy. The couriers' case also illustrates the fact, likely true for any entrepreneurial activity, that there is a fundamental mismatch between the rapid pace of commercial development and the slow pace of Community-wide political decisions. It is very difficult for a businessman, and still more difficult for a coalition of competing businessmen, to plan or commit themselves to a program of action that extends for several years, yet no Community-wide policy change is possible without a sustained effort of such duration.

Incompatibility between commercial and policy processes leads inevitably to the sorts of organisational difficulties experienced by the IECC. In couriers' case, the couriers ameliorated these problems by retaining a core of outside advisers who maintained a continuity of presentation throughout the entire decade. While other solutions may be imagined, it would be helpful for other new industries to recognize in advance (as the couriers did not) the implications of this mismatch of pace.

3. For a new industry the first problem in managing Community-wide policy change is scarce resources. This observation is related to the first two. Resources available to an entrepreneurial industry are so minuscule compared to those available to vested institutions like the postal administrations that the main problem is always how to get the most impact for a given expenditure. This is not primarily a matter of finding cheap consultants or working them harder. It is a matter of selecting only those projects, entering only those legal cases, writing only those papers, attending only those seminars, pressing for only those new stories, and seeing only those officials that are most likely to affect the long-term resolution of the issue at hand. Although industry officials and outside consultants will be able to identify many useful legal, lobbying, and public relations activities that would advance the cause, the reality is that, for a small entrepreneurial industry, it is impossible to pay for almost all of them.

4. There is no substitute for a good plan. Gordon Barton, chairman of the IECC for most of the postal policy effort, used to conclude long planning sessions of courier officers and advisers by observing humorously, "It's a good plan, and it *should* work". Good plans do not always work, but the experience of the couriers suggests that there is no substitute for a good plan. A strategy plan and position should be well conceived; that is, it should derive from a clear understanding of the fundamental economic and other benefits that a change in policy will bring to the Community. It should also incorporate a comprehensive awareness of Community law and how it relates to the proposed activities. A wisely chosen position is essential to an entrepreneurial industry, if for no other reason than economy. The advocates for the courier industry, for example, have been able to learn thoroughly and make use of one fundamental view of law and economics. Our opponents have been required to master several different positions as the postal administrations have been gradually forced to abandon one ultimately indefensible position after another.

A good position must be not only well conceived but also articulate. It must be readable and literate, not merely short and simplistic, so that it bears up under study by those very few, but critically important, staff people who will do so. As important, the basic position must be expressed in a manner that is sensitive to the economic and political needs of the audience.

While these points may seem obvious, both businessmen and consultants resist the level of preparation that this approach implies. During preparation, there are no tangible products to view, and the field is left unchallenged to the other side. The basic postal position of the couriers, *Community Delivery Services*, took months to produce. Half a dozen full drafts were circulated and marked up by industry members and the core of advisers. Nonetheless, it was worth it. In the end, we had a well-honed position that everyone understood and supported. For a small entrepreneurial industry which, by definition, does not have ready access to many of the other tools of public affairs, the best use of limited resources is, I believe, the development of a solid case and sound strategy.

5. Nor is there any substitute for demonstrably true truth. In the

beginning, almost the only political asset that a new entrepreneurial industry can claim is credibility. It is critically important, therefore, that the industry strive to build its advocacy from the sober, objective, demonstrable truth. When addressing outsiders, the industry must, as far as possible, transcend the peculiar prejudices and assumptions that facilitate any enterprise. The normal tendency to exaggerate must be suppressed, and the truth exposed whole. In the first meeting with DG IV in September 1983, the couriers were unsure of their legal position, yet they resisted the temptation to omit details of legal challenges posed by postal administrations. At many points, the couriers cooperated with independent outside economic and legal studies whose outcome they could not control in hope of gaining a credible public demonstration of the correctness of a given proposition. This tactic would have been impossible without a careful attention to both the correctness and the scope of public positions. Thus, candour has served the couriers well. In contrast, the postal administrations' repeated tendency to exaggerate the difficulties of competition and hide inconvenient facts has considerably complicated their public affairs efforts.

6. *Specialisation is more of an enemy than a friend.* Changing policy requires a synthesis of law, economics, politics, and commercial detail. In Europe especially, there is a tradition of respecting traditional boundaries for professional work. Lawyers research law, economists describe markets, public relations consultants organise the press, public affairs consultants chat up parliamentarians and departmental staff, and professors merely profess. Each views the challenge of changing policy primarily as a matter of resorting to his expertise. To change policy economically, tradition should be resisted. In general, lawyers under appreciate the importance of politics and, conversely, public affairs consultants under appreciate the role of law; both underestimate the importance of economics and technology. In seeking to change Community policy in the most economical manner possible, an entrepreneurial industry must view these disciplines as different tools for a single task. Sometimes one works best, sometimes another; usually, they should be employed in concert.[11]

7. *People in Europe come from different countries.* To change Community policy, it is highly desirable to develop a team of different nationalities. The Commission and other Community institutions are staffed by individual men and women who all come from one Member State or another. Most people, naturally, find it easier to exchange thoughts on complicated new ideas with persons from similar backgrounds. Thus, it is highly desirable to be able to put forth a policy position in Europe in multiple languages, rather than in merely English or French or German.

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[11] A new industry should also be aware that the blinders of specialisation affect the relationship between client and consultant as well. There is a tendency for professional consultants to under-appreciate the importance of commercial facts, the business detail underlying any policy argument. There is, as well, a tendency for entrepreneurs to underestimate the importance of professional expertise, particularly in the public affairs area.

The multinational nature of Europe also affects the internal organisation of public affairs effort. A Community-wide campaign requires the contributions of industry representatives and professional consultants from quite different cultures. Superficial politeness notwithstanding, it is a non-trivial task to develop a sufficient sense of mutual respect and trust among persons of different nationalities so that ideas and genuine assistance can flow across cultural divides.

An example of the subtle role of cultural diversity in Community public affairs arose in the context of a critically important meeting between the Competition Directorate and a postal administration. At this time, we had good contacts with both German and French staff in the Commission and, via German and French members of our core of advisers, called to get a candid assessment of the meeting. Our German adviser reported that his contact felt the meeting was a disaster because the postal administration in question refused to admit the supremacy of the competition rules of the Treaty of Rome. Our French adviser reported that his contact viewed the meeting as a great success because the administration in question had finally indicated a willingness to reconsider certain philosophical points. With the assistance of our German and French advisers, we were able to understand more or less what happened and plan accordingly.

8. You can do more than almost anyone thinks. At the beginning of virtually every particular public affairs battle that the couriers undertook in Europe, we were told by legal and public affairs experts and local industry officials that the policy change we sought was impossible to achieve. While changing policy is more difficult than it should be, it is also less impossible than generally thought. In the quotation above, Mr. Harvey accused couriers of acting with "a dedication and a passion" to effect policy reform in the Community. He has put his finger on a telling point. For all its political weaknesses, the primary strength of an entrepreneurial industry is dedication and passion. If a new industry attacks the problem of changing policy in the Community with dedication and passion, as well as with intelligence, candour, and a minimum stockpile of resources, it can, I believe, reasonably hope to accomplish much more at the policy level than almost anyone thinks possible

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Why Aviation and Telecommunications But Not the Post? (1996)*

In 1970, the airline, telecommunications, and postal systems in the United States were all large, nationally organized monopolies or shared monopolies. See table 1. All three industries claimed economies of scale implying "natural monopolies." All provided a "public service" integral to the national infrastructure. All claimed that "universal service" depended upon protection from "destructive competition." In all three industries, federal laws and regulations blocked new entry and restrained price competition. In each case, the regulatory status quo was strongly supported by well-organized, politically powerful groups, while public sentiment for reform was nil.

A quarter of a century later, the airline and telecommunications systems are substantially deregulated, while the regulatory framework of the U.S. Postal Service has remained unchanged. Why? While aviation and telecommunications deregulation was proceeding, many observers argued that the intellectual case for deregulating the postal system was essentially the same. [1] Yet Congress, which enacted legislation to deregulate the national airline system in 1978 and the national telecommunications system in 1996, has yet to address seriously reform of the national postal system.

This chapter considers why deregulation proceeded in the airline and telecommunications industries but has never been seriously addressed in the postal sector. It suggests that airline and telecommunications deregulation were rooted in economic analyses and judicial cases prepared well before congressional action. These necessary roots of deregulation have, so far, been missing from the postal

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*Published as "The Roots of Deregulation: Why Aviation and Telecommunications But Not the Post Office?" in *Managing Change in the Postal and Delivery Industries*, eds. Michael Crew and Paul Kleindorfer (Boston: Kluwer, 1997).

[1] *See, e.g.*, John Haldi , *Postal Monopoly* (1974); U.S. Department of Justice, *Changing the Private Express Laws* (1977) (principal author, Ken Robinson); Joel Fleishman, *The Future of the Postal Service* (1983); Douglas Adie, *Monopoly Mail* (1989).

policy debate. Nonetheless, the history of aviation and telecommunications deregulation suggests steps which might engender conditions under which Congress could consider postal deregulation in the foreseeable future.

Table 1. Relative size of certain regulated sectors in 1970

	Revenues ($ bil)	Employees (000)
Aviation	9.0	297
Telephone	19.0	839
Post Office	7.7	741

Source: Dept. of Commerce, *Statistical Abstract of the United States 1985*, tables 919, 925, 1070, 1071. Aviation includes CAB certificated carriers only. Telephone includes telegraph.

1. AVIATION: DEREGULATION BY ECONOMIC CONSENSUS

Airline deregulation was the result of an extensive Congressional review of the Civil Aeronautics Board that started with oversight hearings in 1974 and 1975 by the Senate Subcommittee on Administrative Practice and Procedure, chaired by Ted Kennedy of Massachusetts.[2] This congressional review culminated in the Airline Deregulation Act of 1978. The Kennedy committee investigation, in turn, was built upon economic and legal analyses undertaken during the previous decade.

The Civil Aeronautics Board was established by the Civil Aeronautics Act of 1938. The act prohibited commercial airlines from offering interstate air transportation to the public without a certificate from the CAB. By granting or denying certificates, the CAB regulated entry into the interstate airline industry route by route. It could also reject rates proposed by the airlines and exempt intercarrier agreements from the antitrust laws. The act directed the CAB to use its powers towards several public interest ends, including "encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States" and "competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States."[3]

In 1970, the airline industry consisted of ten carriers with operating authority between the major cities ("trunk routes") and several groups of smaller carriers

[2]Senate Administrative Practice Subcommittee, *Civil Aeronautics Board: Hearings* and *Civil Aeronautics Board: Report*. *See generally* Derthick and Quirk, *The Politics of Deregulation*, which offers an excellent description of the legislative process involved in deregulation of the aviation, trucking, and telecommunications industries. The focus of this 1985 study is Congress: why, in these cases but not others, did Congress embrace an unrepresented general public interest instead of strongly supported narrow economic interests? Viewed from the more general standpoint of how deregulation is precipitated, this study is less complete (although still enlightening) in its appreciation of the implications of work done by the Executive Branch (especially the Department of Transportation of the Ford Administration in aviation deregulation), the role of law and judicial review (especially the *Execunet* and *AT&T* cases), and changing cost structures implied by improving technology.

[3]Civil Aeronautics Act of 1938, sec. 102.

operating on the fringe of the trunk system. All of the ten trunk carriers predated establishment of the CAB. In 1974, they collectively accounted for 92 percent of domestic revenue passenger miles; the "big four" (American, Eastern, TWA, and United) accounted for about 60 percent. Thus, despite a 269-fold increase in revenue passenger miles between 1938 and 1974, federal regulation had preserved the airline business as a shared monopoly for ten airlines in business in 1938. In addition to the trunk carriers, four groups of carriers operated in markets that had developed around the 1938 scheme. "Local service" carriers (e.g., Allegheny, North Central) provided regional service, essentially as feeders for the trunk airlines. "Supplemental" carriers provided charter service but not regularly scheduled service. "Air taxis"—companies operating very small aircraft (gross takeoff weight less than 12,500 pounds)—were exempt from CAB regulation by virtue of the act. Similarly, carriers operating wholly within California and Texas—"intrastate carriers"—were exempt from federal regulation.[4]

The market structure of the airline industry was the subject of a seminal 1962 "industry study" by Richard Caves, a professor of economics at Harvard. Caves' study was prompted by the relatively easy availability of data in the airline industry and, probably, by detailed criticism of the CAB flowing from a 1950s Congressional investigation into the CAB's failure to allow new entry or articulate objective principles for approving air fares. In the end, Caves concluded "*the air-transport industry has characteristics of market structure that would bring market performance of reasonable quality without any economic regulation*."[5]

In 1969, Congressman John Moss of California and 31 of his colleagues sued the CAB for developing price policies by means of non-public discussions with airline officials. In *Moss v. CAB*, decided in 1970, the D.C. Circuit Court of Appeals invalidated the resulting airline tariffs, declaring: "We hold that the procedure used by the Board is contrary to the statutory rate-making plan in that it fences the public out of the rate-making process and tends to frustrate judicial review."[6]

Prompted by the *Moss* case, the CAB launched a public investigation into airline costs and reasonable fares. The four-year *Domestic Passenger Fare Investigation* (*DPFI*) forced administration officials to consider and declare their positions on CAB pricing policies and gave economists the data with which they could assess in detail the effects of CAB regulation of prices. In the end, the single most politically attractive argument for reform arising from the Kennedy hearings was the prospect of lower airfares that could be achieved by wringing out the excessive costs laid bare by the *DPFI*.

In the early 1970s, Caves' analysis was extended by several economists. In a

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[4]For a brief history of the development of the Civil Aeronautics Act and its regulation of the airline industry from 1938 to 1974, see Senate Administrative Practice Subcommittee, *Civil Aeronautics Board: Report*, appendix B (principal author, J. Campbell).

[5] Caves, *Air Transport* at 447 (emphasis added).

[6]*Moss v. Civil Aeronautics Board*, 430 F. 2d 891, 893 (D.C. Cir. 1970).

1970 book, William Jordan, an ex-airline employee turned economist, examined intrastate service in California as a "control" against which the effect of the CAB's policies could be assessed. In 1972, George Eads demonstrated that federal regulatory policies produced an exorbitant price tag for the amount of extra local service generated by federal subsidies. Like Jordan, Eads relied in part on comparison between the CAB regulated carriers and another class of unregulated carriers, in Eads' case, the air taxis. In 1974, the data and emerging rationale of the *DPFI* led to a careful analysis of airline fares and CAB fare policy by George Douglas and James C. Miller III. These studies, and others, produced a general consensus among economists that federal regulation of the aviation industry was misguided and even counter-productive.

Economic literature setting out the case for reform for aviation reform was instrumental in the Kennedy committee hearings that began in fall 1974. Although it is often cynically suggested that major congressional action depends upon the bidding of large economically interested constituencies, oversight of airline regulation was in fact opposed by all the major players in the airline business. The impetus for the hearings was primarily Kennedy's desire to improve his legislative reputation by undertaking the difficult and unpopular job of seriously and systematically reviewing the work of a major federal agency. The fact that aviation regulation had been the object of well-developed economic analyses made the CAB a more feasible subject for serious review than regulatory agencies whose merits and demerits had not been so thoroughly studied. In the beginning, Kennedy himself had no idea of deregulating the airline industry and no notion of the degree to which his hearings would attract the attention of the popular and academic press. In reality, Kennedy's general philosophical stance was not so much militantly pro-deregulation as vaguely pro-consumer.[7]

The Kennedy committee hearings focused on four fundamental defects in CAB regulation. First, the CAB had blocked entry into the trunk routes by refusing to act on applications for new entry into trunk routes, holding such applications for years, and then dismissing them as "stale". In so doing, the CAB avoided judicial review of an implicit policy excluding newcomers from the major airline markets, a procedure of highly questionable propriety. Second, the CAB's domestic fare policy was criticized as leading to unnecessarily high prices. Third, the CAB's exemption of certain airline market allocation agreements from the antitrust laws was heavily criticized. Fourth, the CAB was found to have misused its enforcement powers.[8]

As the Kennedy committee hearings demonstrated, inadequacies in CAB

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[7]Derthick and Quirk, *The Politics of Deregulation*, 105-06. Despite his diffidence in the beginning, aviation deregulation will likely be viewed one of the most significant legislative accomplishments in Kennedy's long Senate career.

[8]The Kennedy committee hearings laid the intellectual basis for more summary reports by the committees with substantive jurisdiction. *See* House Committee on Public Works and Transportation, *Legislative History of the Airline Deregulation Act of 1978*.

regulation were exacerbated by changes in the cost structure of the industry brought about by new technology. In the early 1960s, the introduction of turbojet aircraft reduced airline costs substantially, especially in long distance markets, yet prices did not fall with falling costs.[9] Instead, airlines competed by means of greater flight frequency and service enhancements. The introduction of all-jet aircraft in the late 1960s and jumbo jets in the early 1970s increased this tendency towards "service competition." On the long distance routes, service became extravagant, featuring free drinks, fashion shows, and many empty seats per passenger. The high level of long distance fares prompted a charter airline, World Airways, to propose new service that would cut the coast to coast airfare in half. The CAB's failure to even consider World's application nicely illustrated the connection between fare policy and entry restrictions.

The Kennedy committee hearings prompted the CAB itself to reconsider its mission. In 1975, under the chairmanship of newly appointed John Robson, a special CAB study committee courageously confirmed the gist of the outside economic analysis and generally supported deregulation. [10] In 1977, with pro-competitive legislation looming on the congressional horizon, President Carter appointed renowned economist Alfred Kahn as chairman of the CAB. Kahn started deregulating without awaiting legislation, making legislation both more necessary and inevitable.

Despite the momentum created by the Kennedy committee hearings and the initiatives of the CAB, deregulatory legislation proved politically impossible without specifically addressing the issue of governmental assurances of service to small towns. It proved necessary to extend Eads' analysis of local air service with detailed state-by-state and carrier-by-carrier analysis carried out by the Department of Transportation and an outside consultant.[11] In the final legislation, CAB regulation over small town air service was substantially enlarged by adding a new section to the law. The CAB was made directly responsible for contracting for service to small towns and determining reasonable fares and schedules.

The Airline Deregulation Act was enacted in October 1978. It phased out federal regulation over several years. Entry regulation was continued for three years. Price regulation was continued for five years. "Essential service" to all towns served by the national airline system was guaranteed for ten years.[12] A ten-year program to assist employees dislocated by deregulation was also enacted.

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[9]George W. Douglas and James C. Miller III, *Economic Regulation of Domestic Air Transport*, 7-9, 52.

[10]CAB, *Regulatory Reform: Report of the CAB Special Staff*. A courageous long time CAB staffer, Roy Pulsifer, was the chairman of the group and principal author of the report.

[11]*See* Paul McAvoy and John Snow, *Regulation of Passenger Fares*, chapters 3-6, which reprints some of the key analyses of the Department of Transportation. At the Department of Transportation, the principal author of small community studies (and hence of the resulting essential air service program) was Peyton Wynns.

[12] *Airline Deregulation Act of 1978*, secs. 33, 40, 43.

While prior economic and legal analyses made airline deregulation possible, they did not necessarily make it inevitable. Airline deregulation was presented to Congress and eventually enacted because of a high level of leadership from key individuals. The vital first step was contributed by Senator Ted Kennedy. In addition, the critical mass for reform depended upon the efforts of the Senate Commerce Committee, led by Howard Cannon; the Ford Administration, led by Deputy Under Secretary of Transportation John Snow; and the Civil Aeronautics Board, led by John Robson and Alfred Kahn.[13]

2. TELECOMMUNICATIONS: DEREGULATION BY THE COURTS

Whereas airline deregulation was prompted by Congressional oversight, deregulation of the telecommunications industry was precipitated primarily through judicial review of the decisions of the Federal Communications Commission.[14]

The Federal Communications Commission (FCC) was established by the Communications Act of 1934. The FCC regulated entry and rates in the interstate telecommunications industry. The act required the FCC to ensure that telephone service was available "upon reasonable request." The general public purpose of telecommunications regulation was expressed in the following terms: "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ."[15]

Like the aviation industry, the telecommunications industry was wholly owned by private companies. One company, American Telephone and Telegraph (AT&T), dominated the market to such an extent as to be a virtual monopolist. AT&T's position derived from skillful use of patents and mergers, a process which raised its market share from 50 percent in 1907 to 80 percent in 1934. In 1970, AT&T still controlled 80 percent of the greatly enlarged market telephone service and virtually all of the long distance telecommunications.[16]

As in the aviation industry, improving technology lowered the cost of long distance service while prices remained high. Unlike in the aviation industry, high prices in long distance markets did not result in service competition since AT&T was the sole carrier. Instead, high prices generated high profits which were used to underwrite some of the costs incurred in serving local telephone markets. Although the amounts of cross-subsidy could not be determined with accuracy, AT&T suggested that they were substantial.

In the 1960s, microwave technology both reduced the cost of bulk long

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[13]*See* Derthick and Quirk, *The Politics of Deregulation*, 239-42.

[14]In this paper, only the "common carrier" aspects of telecommunications regulation are considered.

[15]47 USC 151.

[16]The regulatory history of the telecommunications industry until 1980 may be found in the excellent study by Gerald Brock, *The Telecommunications Industry.*

distance telecommunications services and created opportunities for new entry. In 1963, Microwave Communications, Inc. (MCI) applied to the FCC for authority to offer long distance telecommunications for large business customers by means of a microwave system between St. Louis and Chicago. After reviewing extensive objections from AT&T, the FCC ultimately approved the MCI application in 1971. MCI opened for business in 1972. In the same year, the FCC announced a general policy in favor of new entry in the "specialized communications" field. The *Specialized Common Carrier Decision* , however, did not deregulate the long distance telecommunications market. It allowed competition only for bulk business users, in a manner roughly equivalent to charter aviation service provided by "supplemental" air carriers.

The main event was deregulation of retail or "switched," long distance telecommunications markets. This was effected in 1978 over the objections of the FCC and AT&T. In September 1974, MCI filed a tariff for a long distance telecommunications service called "Execunet." Execunet allowed retail customers to share a bulk business line. In 1976, the FCC ordered MCI to stop Execunet service because it crossed the boundary from bulk business service to retail service. MCI appealed to the courts, arguing that the FCC had failed to exercise its discretion according to the public interest standards set out in the statute. In 1977, in the *Execunet I* case,[17] the D.C. Circuit Court of Appeals agreed with MCI and reversed the FCC decision. The court ruled that the FCC could not stop MCI's retail service unless it made an "affirmative determination of public interest need for restrictions," which it had not done.[18] More generally, the court warned:

> the Commission must be ever mindful that, just as it is not free to create competition for competition's sake, it is not free to propagate monopoly for monopoly's sake. *The ultimate test of industry structure in the communications common carrier field must be the public interest, not the private financial interests of those who have until now enjoyed the fruits of de facto monopoly.* [561 F.2d at 380 (footnotes omitted, emphasis added)]

AT&T then refused to allow MCI to connect its long distance lines with AT&T's local lines, creating up an insurmountable practical barrier to new entry. The FCC quickly acquiesced, and MCI returned to the courts. In *Execunet II*, an exasperated D.C. Court of Appeals again reversed the FCC, holding that a right of interconnection was implied by its earlier judgment.[19] Although practical difficulties remained, the legal walls protecting AT&T's monopoly in the long distance telephone market had crumbled.

In 1976, while the MCI cases were under study at the FCC, Congress began

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[17]*MCI Telecommunications Corporation v. Federal Communications Commission*, 561 F. 2d 365 (D.C. Cir. 1977), *cert. denied* 434 U.S. 1040 (1977).

[18]561 F. 2d at 379.

[19]*MCI Telecommunications Corporation v. Federal Communications Commission*, 580 F. 2d 590 (D.C. Cir. 1977), *cert. denied* 439 U.S. 980 (1978).

to consider legislative reform of telecommunications regulation. Its starting point was a bill proposed by AT&T that would have created a legal monopoly in favor of AT&T. The basic argument in support of this bill was that a monopoly over long distance telecommunications was necessary to allow cross-subsidization of local, especially residential, telephone service. Competition in the long distance market, argued AT&T, threatened to raise everyone's local telephone rates, a political nightmare. Almost two hundred congressmen and senators cosponsored the "Bell bill." In congressional hearings, however, economists uniformly deplored the prospect of a legal monopoly for AT&T even though they could not, in the absence of detailed data about the costs of telephone service, quantitatively refute AT&T's cross-subsidy arguments. Their criticism was enough to doom the Bell bill; it was abandoned after a year of hearings.[20]

With the demise of the Bell bill, pro-competitive forces tried to make the case for reform legislation based upon deregulation. Congressmen Lionel van Deerlin and, later, Tim Wirth, successive chairmen of the House Subcommittee on Communications, held extensive pro-reform hearings in the late 1970s and early 1980s. The hearings included many of the same witnesses who had made the case for aviation deregulation. Nonetheless, the pro-competitive forces were unable to gain Congressional support in the face of AT&T's opposition. Van Deerlin and Wirth failed where Kennedy had succeeded.

AT&T's assorted tactics to hinder its competitors—including predatory pricing of competitive services, withholding cost information from the FCC, contesting FCC jurisdiction over interconnection issues, and technical excuses to deny interconnection with AT&T facilities—raised legal questions under the antitrust laws. In 1974, the Department of Justice filed suit against AT&T. In 1982, facing almost certain defeat, AT&T agreed to settle the case by breaking up its operations into a long distance company and a series of local operating companies as of January 1, 1984.[21]

After the *Execunet* cases, the FCC was required to reconcile competitive entry in the long distance markets with its statutory obligation to maintain universal service. In response, the FCC innovated. [22] It required AT&T to keep separate

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[20]The story of the rise and fall of the AT&T bill is retold in Derthick and Quirk, *The Politics of Deregulation*, 136-40, 174-88. Writing in 1981, the staff of the House telecommunications subcommittee noted that the levels of cross-subsidy between long distance and local telephone services remained a mystery: "It is unclear to what extent local exchange has benefitted from past shifts in revenue requirements . . . . It has not been shown which offerings benefitted from the balance of total separations charges. This residual could have been used to lower local residential services revenue requirements and provide rate relief. But it could also have been used for reducing businesses' local rates, or other intrastate expenditures, such as local private lines or terminal equipment." *Telecommunications in Transition*, 78.

[21]*United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[22]For an account of the evolution of FCC regulation in the 1980s, see Howard Griboff, "New Freedom for AT&T."

accounts for local exchange services and long distance services. Access to local services were charged to all long distance service providers, whether AT&T or its competitors. The "access charge" sufficiently above cost to underwrite losses incurred in maintaining universal telephone service at the local level. In short, all long distance services were "taxed" to pay for universal local service. The breakup of AT&T facilitated this taxing mechanism by providing structural separation between the long distance and local operations previously provided by AT&T.

Deregulation of federal entry controls did not immediately result in effective competition in the long distance telephone market. In this respect, as well, the long distance telephone market differed fundamentally from the aviation sector. Starting from a monopoly position, AT&T had the resources to strangle small new entrants unless restrained. Therefore, after the *Execunet* cases, the FCC adopted a strategy of phased transition towards a competitive market. A study of policy options, the *Competitive Carrier* investigation, proceeded through numerous reports and appeals between 1979 and 1985. In the end, the FCC divided the long distance telephone market into two types of carriers: dominant and non-dominant. A dominant carrier was one "able to engage in conduct that may be anti-competitive or otherwise inconsistent with the public interest."[23] Dominant carriers were subject to the traditional rate of return regulation; non-dominant to a more streamlined regulation. The only carrier found to be "dominant" was AT&T.

After breakup of AT&T in 1984, the FCC looked for ways to loosen the strict rate-of-regulation to which AT&T was subject as the "dominant" carrier. In 1989, the FCC replaced rate-of-return regulation with price cap regulation. Price caps allowed AT&T to adjust rates within limits intended to prevent gouging or predatory tactics. Furthermore, to prevent AT&T from cutting business rates by raising the rates of the general public, price caps applied separately to three "baskets" of services: individual customers, 800 number service (WATS), and large businesses. In 1991, the FCC concluded that "basket 3" services (large business customers) had become effectively competitive and reduced regulatory requirements accordingly. This decision allowed AT&T to negotiate individual contract rates. In 1993, the FCC came to a similar conclusion with respect to "basket 2" services (800 number services). In 1995, the FCC granted AT&T's petition to effectively deregulate "basket 1" services (individuals) and reclassified AT&T as "non-dominant".[24]

Thus, there was an 18-year period from the *Execunet I* decision opening the long distance telephone market to new entry in 1978 to the elimination of "dominant" classification of AT&T in 1995. During this transition, the FCC managed the transition from a monopoly to an effectively competitive and

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[23]The FCC continued, "This may entail setting prices above competitive costs in order to earn supra normal profits, or setting prices below competitive costs to forestall entry by new competitors or to eliminate existing competitors." FCC, Competitive Common Carrier Services and Facilities Therefor, First Report and Order, 85 FCC 2d 1, 21 (1980).

[24]FCC, Motion of AT&T Corp to be Reclassified as a Non-dominant Carrier, Order 95-427 (Oct. 23, 1995).

deregulated long distance telephone market.

With AT&T broken up and entry into long distance telephone service permitted by court decree, Congress slowly returned to consideration of a telecommunications deregulation bill. As in the aviation deregulation, legislative assurance of universal service become a primary goal. Indeed, universal service assumed even greater importance in the telecommunications debate because of a general feeling that, after aviation deregulation, the Civil Aeronautics Board (later, the Department of Transportation) had not used its new regulatory powers over small town air service to assure the level of service expected by Congress. As Ernest Hollings, chairman of the Senate Commerce Committee put it, "we still have got to do better with universal service . . . . . I admire all of these [telephone companies] but somebody has to look after the public. [W]e saw what happened with deregulation of the airlines, and we do not want that to happen with this one."[25]

The Telecommunications Act of 1996 largely confirmed the phased deregulation of long distance telephone service overseen by the FCC since 1978 and authorized the FCC to continue to manage the process, particularly in respect to the expansion of the local telephone companies into the long distance market (forbidden by the 1982 AT&T case) and development of an evolving program to define and guarantee universal service. The law confirmed the FCC's policy of "forbearance," that is, exempting carriers from regulatory controls where there is effective competition.[26] As intimated by Senator Hollings, the universal service provisions in the telecommunications act are more detailed than the corresponding provisions in the aviation deregulation act. The FCC was authorized to develop, in conjunction with state authorities, a definition of universal service that reflects "an evolving level of telecommunications." Geographic rate averaging was endorsed. Special protection was afforded particular groups of users such as rural health care providers, schools, libraries, and the poor. The FCC was also authorized to require carriers to provide necessary service and to pay subsidies for the services so required.[27]

In retrospect, it seems likely that telecommunications deregulation, like aviation deregulation, might not have occurred but for the extraordinary work of certain individuals. In telecommunications, however, the exceptional contributions were legal rather than legislative: the work of MCI lawyers in planning and executing the legal strategy that led to the *Execunet* decisions and the work of the Department of Justice and Judge Harold Greene that culminated in the breakup of AT&T by application of the antitrust laws.

3. POSTAL SERVICES

The regulatory framework for the delivery services industry differs markedly

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[25]Senate Commerce Committee, *S. 1822: Hearings*, 84.

[26]*Telecommunications Act of 1996*, sec. 401 adding new secs. 10 and 11 to the 1934 act.

[27]*Telecommunications Act of 1996*, secs. 101, 102 adding new secs. 254 and 214(e) to the 1934 act, respectively.

from that in the aviation and telecommunications industries. In the postal sector, unlike in aviation and telecommunications, there is no unified regulatory framework which embraces all market participants and regulates activities according to neutral public interest criteria. The regulatory framework for the postal sector, such as it is, was established by the monopoly provisions of the Postal Code of 1872 [28] and the Postal Reorganization Act of 1970. Regulatory authority is divided and asymmetric. An independent agency, the Postal Rate Commission, regulates the *structure* of USPS's rates according to public interest criteria regarding unjust or unreasonable discrimination among mailers.[29] The Postal Service itself determines the overall *level* of postage rates and, since 1974, purports to set criteria and conditions for entry into the most important segments of the industry.[30]

Factors which led to deregulation of the aviation and telecommunications industries in the last 25 years have been conspicuously absent from the postal sector. The key to aviation deregulation was the availability of careful economic studies showing that the CAB had failed to achieve the public policy goals set by Congress in 1938. These studies, in turn, derived in part from the courts' insistence that the CAB give reasons for decisions with reference to evidence gathered in public hearings and in part from facts available from certain unregulated sectors which provided benchmarks for the effectiveness of federal regulation. In the telecommunications industry, deregulation was unlocked by court cases that required the FCC to base entry decisions on demonstrated public interest considerations, not on the commercial interests of AT&T, and by application of the antitrust laws to AT&T. In both industries, deregulation was furthered by actions of federal agencies after they were externally forced to exercise their powers according to objective public interest criteria.

In the postal sector, economic analyses to date have not been sufficiently detailed and consistent to offer a reasonably clear picture of how competition would affect the Nation's universal postal service. There is no postal equivalent of Caves' industry study.[31] Although, as in the airline industry, there are fringe markets—parcel, express, and local messenger—there are no detailed studies of these markets and the lessons they may hold for the central, regulated market, due in part to an absence of uniform data from the private sector. In particular, there are no studies of markets which might be considered as reasonably equivalent to USPS's markets in the same way that the intrastate markets were taken by Jordan to be sufficiently equivalent to regulated aviation markets to allow comparisons and

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[28]Act of June 8, 1872, ch 335, secs. 222-239, 299, 17 Stat 283, 310-12, 322, *codified* 18 USC 1693-99; 39 USC 601-06.

[29]39 USC 3601-3662.

[30]39 CFR parts 310, 320 (1995).

[31]Books which provide extended descriptions of the Postal Service but fall short of the standard set by Caves include: Alan L. Sorkin, *The Economics of the Postal System* (1980) and John T. Tierney, *Postal Reorganization* (1981).

conclusions. Finally, a central feature of the current regulatory scheme is the uniform national postage rate for letters, yet there is no generally accepted analysis of the means or cost of maintaining a uniform tariff (at least for personal letters) in a deregulated environment. In short, unlike in the aviation industry in the mid-1970s, there has not developed a well-documented consensus among economists as to what deregulation would bring.[32]

On the other hand, economic analysis of the postal sector is perhaps not so barren as in the telecommunications sector in the mid-1970s. In important areas, economic analysis has achieved a considerable degree of consensus. Most importantly, there seems to be general agreement over estimates of excess wages induced by the postal monopoly.[33] The resulting estimates of possible savings from deregulation are very high: on the order of $8 billion annually. Such analysis roughly parallels the work of Douglas and Miller in the aviation field. Similarly, since the pioneering work of Robert Cohen and others, there seems considerable acceptance of the view that the cost of universal service is relatively small compared to total postal revenues..[34] Such studies could play a role in postal policy discussions similar to that of Eads in aviation policy discussions.

The relative poverty of postal economic studies is due in some measure to the Postal Service's ability to suppress much of the data that could be useful in assessing reform proposals. Like AT&T in the 1970s, the Postal Service has chilled the possibility of legislative deregulation by arguing that deregulation would result in disruption of massive cross-subsidies which sustain postal service to substantial portions of the citizenry. Despite the central importance of this claim, the Postal Service has never provided quantitative support. The Postal Service has also strongly criticized the nature of regulatory oversight by the Postal Rate Commission while, at the same time, refusing requests by the Senate and the Postal Rate Commission to provide information on international mail services, an unregulated postal service which could serve as a benchmark for gauging the failings or successes of current regulation.[35]

The other path to deregulation emerging from experience in other industries is judicial review. However, in postal cases, unlike in cases involving aviation and telecommunications regulation, the courts have not held key regulatory decisions to

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[32]In Appendix D of *The Postal Crisis* issued in 1977, the Department of Commerce considered deregulation "the single most important postal issue" and listed a number of economic studies which it judged "must be conducted in the search for a solution to current postal and communications industry problems" including studies related to low density service, labor costs, new technology, and a more quantitative approach to the value of the Postal Service contribution to the national life.

[33]*See* Michael. L. Wachter and Jeffrey M. Perloff. "A Comparative Analysis of Wage Premiums"; Douglas Adie, "How Have Postal Workers Fared Since the 1970 Act?"

[34]Robert Cohen et al, "Rural Delivery and the Universal Service Obligation."

[35]Letter from Marvin Runyon, Postmaster General, to David Pryor, Chairman, Subcommittee on Federal Services, Post Office, and Civil Service of the Senate Committee on Governmental Affairs, dated April 22, 1993.

a standard of demonstrable consistency with the public interest.

In 1974, the Postal Service adopted regulations which defined the postal monopoly in such a way that they asserted broad new USPS authority to regulate entry into the delivery services industry. These regulations expanded USPS's claim of monopoly to include carriage of all types of commercial papers and printed matter in addition to first class correspondence. According to the 1974 regulations, entry into this market depended upon issuance of a general administrative license by the Postal Service "suspending" the postal monopoly as to particular types of service or classes of mailers. The Postal Service also claimed the right to attach conditions to such licenses, applicable to both private carriers and their customers. [36] The most important effect of these regulations was to block entry into the burgeoning market for delivery of "direct mail" (printed advertisements). Just as MCI's entrance into the bulk long distance telecommunications market cast doubt on the efficiency of AT&T's monopoly over long distance telecommunications, so new delivery services for direct mail might have challenged assumptions about the postal monopoly.

The only important challenge to the 1974 regulations to date has been a 1979 case, *ACTMU v. Postal Service*.[37] In this case, the direct mail industry questioned the Postal Service's administrative extension of the monopoly to direct mail. The D.C. Circuit Court of Appeals, by a divided vote, upheld the regulations without, as in *Execunet I*, requiring that regulations blocking new entry be consistent with the public interest, as distinct from the interest of the incumbent carrier. Instead, the court required only that the new regulations "further the objectives of Title 39 [i.e., the Postal Service]." Rather than requiring the factual premises of the regulations be supported by evidence gathered in public hearings, the court was satisfied that, in defining the scope of its "letter" monopoly, "the Postal Service has settled upon a reasonable criterion— the presence or absence of an address— and that its definition suffers from no more than the level of arbitrariness which is inevitable."[38] In effect, the legal test in *ACTMU* is the mirror image of the test employed in *Execunet I*. The standard for legal validity was held to be consistency with the good of the Postal Service, not the good of the general public, and the standard of proof was held to be not objective evidence but absence of arbitrariness.

In telecommunications deregulation, the other legal coup was application of the antitrust laws. This approach has never been tried in the postal sector since the Postal Service is apparently immune from U.S. antitrust law. By way of contrast, it may be noted that European post offices are subject to European competition laws,

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[36]38 FR 17512 (1973) (first notice); 39 FR 3968 (1974) (second notice); 39 FR 33209 (1974) (final rule). In these regulations, the Postal Service also asserted previously unheard-of powers to investigate and fine persons who violated the Postal Service's postal monopoly regulations.

[37]*Associated Third Class Mail Users v. U.S. Postal Service*, 600 F.2d 824 , *cert. den.* 444 U.S. 837 (1979).

[38]600 F. 2d at 825 n. 5, 830. Remarkably, the opinions in the *Execunet*, *Moss*, and *ACTMU* cases were written by the same judge, J. Skelly Wright; Judge Malcolm Wilkey, who joined Judge Wright in both *Execunet* cases, dissented in the *ACTMU* case.

and cases brought under these laws have been a major factor in bringing about a wide-ranging reconsideration of postal policy by the European Commission.[39]

Similarly, a notable stop on the road to aviation deregulation was the court's demand, in *Moss v. CAB*, that the level of airline rates be publicly justified. In a 1981 rate case, the Postal Rate Commission modified the overall level of new rates proposed by the Postal Service by disallowing about 4 percent of costs which the Postal Service claimed to justify its proposed rates. Later in that year, in *Newsweek v. CAB*, the Second Circuit Court of Appeals reversed the Postal Rate Commission's action and held that the Commission decision "had t[40] The effect of this decision was to give the Postal Service unfettered discretion regarding the overall level of rates to be charged for monopoly services.

More generally, a consideration of these cases suggests that differences between the aviation and telecommunications industries, on the one hand, and the postal sector, on the other, are intimately related to differences in their organic statutes. The organic statute of the Postal Service, the Postal Reorganization Act of 1970—unlike the Communications Act of 1934 and the Civil Aeronautics Act of 1938—does not separate commercial and regulatory functions. The Postal Service itself decides when its commercial interest requires it to withhold disclosure of information which may be useful to regulatory reform. And the Postal Service itself decides, within broad bounds, the details of its legal monopoly and the level of monopoly rents which should be extracted from mailers in order to further the public interest.

Differences in the organic statutes of the sectors reflect differences in the manner in which they were drafted. The Civil Aeronautics Act was prepared under the direction of a subcommittee of the Senate Commerce Committee chaired by Senator Harry Truman. The temper of the committee was revealed when officials of the Post Office (of all people) complained that the proposed regulatory scheme would throttle competition. Truman retorted, "*Show me that provision. If that is true, it ought to be changed*."[41] If the Civil Aeronautics Act proved anti-competitive in practice, its authors nonetheless established a public interest standard against which administrative deficiencies could finally be measured. Once the public interest in competition became evident, the Civil Aeronautics Board was independent enough to promote competition. In contrast, the Postal Reorganization Act of 1970 resulted from recommendations of a ten-member committee chaired by Frederick Kappel,

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[39]European Commission, Case IV/32.791 - Remail. In 1988, the International Express Carriers Conference complained that agreements among post offices relating to terminal dues and market allocation were inconsistent with the competition rules of the EC Treaty (USPS was a party to the agreements in question). The European Commission agreed but, in 1995, dismissed the IECC's complaints based on the conclusion that the post offices promised to mend their ways. An appeal of this dismissal is now pending before the European Court of First Instance; a decision is expected in early 1997.

[40]*Newsweek v. United States Postal Service*, 663 F. 2d 1186, 1204 (2d Cir. 1981).

[41]Senate Committee on Interstate and Foreign Commerce, *Hearings on S. 2 and S. 1760* at 75.

former chairman of AT&T. The driving force behind enactment of the act was the desire of postal management to gain greater control over the Postal Service so that it could operate in a "business-like" manner.[42] However unlikely deregulation by administrative reform was at the CAB, it appears still less likely at the Postal Service because of the influence of the Postal Service's short-term commercial interests.

Finally, as noted above, deregulation of the aviation and telecommunications industries proceeded in part because of extraordinary leadership exerted by certain individuals, such as Senator Ted Kennedy in the aviation field and MCI's lawyers in the telecommunications field. In contrast, postal policy has generally not benefitted from such leadership. No congressional committee has so far (early 1996) stepped forward to conduct an analysis of the postal sector similar to that undertaken by the Kennedy committee in the airline industry or by the House Communications Subcommittee in the telecommunications industry. Nor has anyone mounted a skilled and innovative legal challenge to the fundamental regulatory structure comparable to that mounted by MCI.[43] The Executive Branch (outside the Postal Rate Commission) has put little effort into postal policy.

There is, it should be noted, one significant exception to absence of deregulatory movement in the postal sector: the exemption from the postal monopoly for urgent letters, adopted in 1979.[44] The urgent letter exception to the postal monopoly permitted development of the most important new fringe market in the postal sector, the express market. This exception serves to highlight the importance, and possibilities, of leadership in postal deregulation.

The urgent letter exception was primarily the result of political leadership by Senator Tom Eagleton, a member of the subcommittee on postal affairs but not its chairman. In the mid 1970s, the Postal Service was determined to suppress the rise of fledgling private express companies such as DHL, Federal Express, and Purolator. Although political novices, the private express companies responded to USPS's threats with a grass roots campaign designed to demonstrate, through customer statements, the economic value of their services. The Postal Service and postal unions fiercely opposed an exemption from the postal monopoly that would permit private express companies to carry high priority mail. The Postmaster General estimated that an exemption for urgent letters could cost the Postal Service up to $2

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[42]*See* J. Tierney, *Postal Reorganization* (1981) at 1-27.

[43]In the critical *ACTMU* case, ACTMU's lawyer was a former Postmaster General, J. Edward Day, who was ill prepared to conduct a proper exposition of the case. The completeness of ACTMU's presentation may be surmised from the fact that the circuit court's opinion is directed more towards the arguments of an *amicus curiae* than to those of the plaintiff.

[44]In addition to the exemption for urgent letters, a second, but less significant, deregulatory development was exemption of international remail in 1986. 51 FR 29636-38 (Aug. 20, 1986). Postal unions fought this exemption in the courts until finally losing in the Supreme Court on procedural grounds. *Air Courier Conference of America v. American Postal Workers Union* , 498 U.S. 517 (1991). This exemption was essentially the result of leadership from a group of small private remail companies and the Antitrust Division of the Department of Justice.

billion, 13 percent of USPS's revenues. [45] Despite unfamiliarity with the express industry, Eagleton became convinced of the merits of its case. He succeeded in amending the Senate postal bill to provide an exemption for urgent letters. [46] The Senate postal bill died with expiration of the 95th Congress in 1978, but the Eagleton amendment led to House hearings the next year[47] which prompted the Postal Service to issue regulations "suspending" the postal monopoly for urgent letters in September 1979 in order to forestall legislative reform.[48] Thus, in at least one significant area of postal policy, sound economic arguments and political leadership carried the day against the opposition of incumbents with far greater political clout, as had occurred on a grander scale in the aviation and telecommunications sectors.

In summary, aside from the limited debate over permitting express services, the question of postal deregulation has never been seriously considered by Congress because the postal sector has not been subject to either the careful economic analysis that underlay aviation deregulation nor a sustained and innovative legal challenge to entry restrictions such as pressed by MCI in the telecommunications industry. In both cases, the absence of deregulatory stimuli can be traced, in part, to differences in the organic statutes which establish the regulatory framework for the Postal Service. Further, the high quality legal and political leadership evident in the deregulation of the aviation and telecommunications debates has so far been largely missing from the postal policy debates. Nonetheless, the last quarter century of postal policy is not wholly barren of the sorts of influences which could ultimately lead to postal deregulation.

4. PRESENTING POSTAL DEREGULATION FOR DECISION

Experience in the aviation and telecommunications industries suggests that deregulation has increased use of these industries and thus served the general public interest. At least, it is clear that Americans have substantially increased their use of the airlines and telephones relative to their use of the post office (table 2). If, in fact, deregulation of the postal sector would similarly serve the public interest, then it seems plausible that a way can be found to bring about such reforms, however politically daunting the prospect may now appear. Possible steps to this end are illuminated by an appreciation of the roots of deregulation in other industries.

One step, plainly suggested by the history of aviation deregulation, would be to encourage more and better economic analysis of the postal industry, especially in

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[45]Letter from William F. Bolger, Postmaster General, to Edmund S. Muskie, chairman, Senate Committee on Governmental Affairs, dated September 26, 1978.

[46]The Senate committee firmly endorsed the Eagleton amendment. Senate Committee on Governmental Affairs, *Postal Service Amendments Act of 1978*, 17-21.

[47]House Subcommittee on Postal Operations and Services, *Private Express Statutes*.

[48]44 FR 61178-82 (Oct. 24, 1979), *codified* 39 CFR 320.6. Although these regulations purport to suspend the postal monopoly for urgent letters, the Postal Service has no statutory authority to suspend any portion of the postal monopoly. See footnote 51, below.

Table 2. Relative growth in certain sectors, 1970-1993

	1970	1993	Growth
Aviation, revenue passengers (mil)	153	487	318%
Telephone, average daily calls (mil)	484	2370	490%
Post, items (trillion)	85	171	202%

Sources: U.S. Dept. of Commerce, *Statistical Abstract 1995* and *Historical Statistics of the United States: Colonial Times to 1970* (1975). Telephone calls in 1993 assumes average time per is 4.5 minutes (estimate by P. Wynns, FCC).

several areas. For example, an economic profile of the delivery services sector obviously needs to be drawn. It would also be helpful to have an economic analysis of the implications of deregulated delivery services—U.S. messenger services, delivery services in Sweden, Finland, New Zealand—and their implications for the U.S. delivery services market. Still another useful study would be a comparison of the costs and revenues of international postal services with the costs and revenues of domestic postal service to shed light on the costs and benefits of current regulation by the Postal Rate Commission.[49] More generally, in both the aviation and telecommunications deregulation debates, pro-competition forces underestimated Congressional concern for assurances of universal service. It seems clear that economic studies of the postal industry should, in particular, focus on the costs and mechanisms of assuring universal service at a uniform rate for individual letters. Finally, the history of deregulation in other industries suggests the importance of changing technology in undermining the rationale for regulation. In the postal sector, it would seem useful to examine carefully the implications of telecommunications and personal computers for the future of regulation.

Both aviation and telecommunications deregulation also show that great policy changes can flow from judicial review which requires reasoned justification for policies critical to the regulatory scheme. While such postal litigation has been fruitless so far, a close examination of cases suggests that future prospects are not necessarily hopeless. In particular, the *ACTMU* case was poorly argued and the decision weakly reasoned; it may be subject to challenge in subsequent litigation. Indeed, the 1974 postal monopoly regulations as a whole appear vulnerable to judicial review. The rationale underlying these regulations—the proposition that the Postal Service is authorized to "suspend" the postal monopoly[50]—is a legal myth which has so far escaped serious legal challenge.

A third possible approach may be indicated by the failure of the organic regulatory acts in the postal sector to provide a clear separation between commercial

[49]Such a study, however, will apparently require Congressional assistance in obtaining the necessary historical data from the Postal Service.

[50]As several observers have noted, the statute cited by the Postal Service as authority to *suspend* the postal monopoly, 39 USC 601(b), in fact only authorizes the Postal Service to *extend* the scope of the postal monopoly in certain limited circumstances. *See, e.g.,* George L. Priest, "The History of the Postal Monopoly," 60.

and regulatory authority. As a matter of administrative law, the Postal Reorganization Act of 1970 represents a far less effective means of controlling abuse of public authority than either the Communications Act of 1934 or the Civil Aeronautics Act of 1938. The latter two employed public authority to create pockets of economic privilege and oversight mechanisms that, eventually, became captured by the economic forces they were called upon to regulate. Nonetheless, these acts also incorporated objective standards of the public interest and the means of judicial review. The Postal Reorganization Act of 1970, on the other, established a large area of economic privilege with no means to measure the level of monopoly rents or administration of the monopoly law against objective standards of the public interest. The scope of independent regulation is essentially confined to the single issue (albeit an important issue) of preventing unjust and unreasonable discrimination among mailers.

As a preliminary step, it may be possible to encourage Congress to address the definition of the public interest in postal affairs in a manner that is independent of the commercial interests of the Postal Service. For example, the Postal Rate Commission could be given greater independence from the Postal Service and more objective public interest standards on which to base its decisions. Similarly, administration of the postal monopoly law could (as in the European Union) be legally linked to evidence relating the scope of monopoly to support for universal service, rather than support for the commercial well-being of the Postal Service. Such fundamental changes in the organic law of Postal Service could allow the courts and Congress more objective bases against which to judge the appropriateness of substantive deregulation.

Deregulation of the aviation and telecommunications industries also highlights the need to consider carefully the transition from a regulated to a deregulated industry. In the telecommunications industry, regulation of long distance telephone service was phased out over an 18-year period as effective competition gradually replaced the monopoly. In the aviation industry, regulation was phased out over 5 years even though the starting point was an environment of reasonably aggressive oligopolistic competition. In both industries, Congress insisted upon the introduction of increased regulatory protections for universal service.

Finally, experience in the deregulation of aviation and telecommunications suggests that a half-hearted effort will not suffice to deregulate a major industry like the postal sector. Sustained, competent leadership from a political leader, an Executive department, or a company appears to be a necessary ingredient.

5. CONCLUSIONS

Consideration of the deregulation of the aviation and telecommunications sectors suggests that deregulation of a major industry is not primarily a thunderbolt of legislative intelligence. Nor is deregulation an exercise in political muscle. Deregulation is the culmination of a long process of intelligent, and intelligible, interaction between regulatory mechanisms, judicial oversight, and scholarly analysis. In the end, deregulation in the aviation and telecommunications industries

proceeded because the courts and independent scholars were able to measure the existing regulatory framework against the legal, economic, and social principles of society, and the regulatory framework was found wanting. Once the public interest was thus clarified beyond reasonable doubt, Congress was able to act even when opposed by powerful incumbent interests.

Those who would encourage deregulation of the postal system must appreciate the deep intellectual roots of a major deregulation. If proponents can use scholarly and judicial analysis to make a clear and convincing case for postal deregulation then there is reason to hope, and believe, that Congress or the courts will embrace the public interest and act accordingly.

3

Remail: Catalyst for Liberalizing European Postal Markets (2001)*

Remail changes the world postal system.

- U. Stumpf[1]

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

1. INTERNATIONAL POSTAL SERVICE C. 1980

By the early 1980s, demands of large customers weighed heavily on domestic postal services but lightly on international services. In the domestic marketplace, major mailers gradually won commitments to better service and discounts for "worksharing", i.e., presorting mail or transporting mail "downstream" to a post office located near addressees prior to tender to the post office. Inexpensive computers allowed mailers to mechanize production of statements of account and raise the efficiency, and hence feasibility, of direct mail solicitations. Suddenly, post offices recognized the special requirements of domestic "bulk mail." International bulk mail received less attention. For most mailers, and for most post offices,

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

international mail was such a small fraction of total mail—less than four percent of mail in most industrialized countries—that reform capital was on each occasion more fruitfully expended on domestic services. Then, too, there were few alternatives to the post office for inexpensive international document delivery. Telex was too cumbersome and courier service too expensive. National post offices could and did charge high rates for poor international service to large mailers and small.

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

As befits a monopoly, transfer pricing for services rendered between production units of the international postal system received little attention. The rate of payment for delivery of international mail seemed unimportant where amounts of international mail were small compared with domestic mail and inbound and outbound volumes were roughly equal, as was true for mail exchanges between most pairs of industrialized countries. Collectively, industrialized countries sent more mail to developing countries than they received, but, given low costs of postal delivery in developing countries, a low fee per kilogram was more than adequate compensation for their extra work. Such a fee, called "terminal dues", was first introduced in 1969. The absolute level of terminal dues was of little significance for mail exchanged between industrialized countries. On paper, an industrialized country post office charged another industrialized country post office much less than domestic postage for delivery of inbound international mail and covered its losses by overcharging customers for outward international mail services. In reality, post office A had no idea of the actual cost incurred by post office B in delivery of AB international mail and very little idea of its own cost in delivery of inbound BA mail. Post office A set international postage rates not to cover the costs of specific services but to maximize the profitability of outbound and inbound international services collectively.[2]

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

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

a general congress that revised the legal framework, the Universal Postal Convention Many UPU delegates had been attending such gatherings for decades.

2. REMAIL AND TERMINAL DUES

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

International postal officials viewed the prospect of remail competition at the international level with the same alarm and antipathy that domestic postal officials reserved for repeal of the postal monopoly. Remail was condemned in the Universal Postal Convention. Since 1924, the Convention had included a provision to discourage mailers from taking domestic mail out of a country A and posting it with the post office in neighboring country B for delivery as international mail to addressees in A. Such a practice, commonly referred to as "ABA remail", was economical case where country A's *domestic* postage rates exceeded the *international* postage rates of country B. In 1979, this provision was extended to cover "ABC remail", mail taken from country A to country B for posting to addressees in country C, a third country. To stop remail, the Convention authorized post offices to intercept remail and return it to the origin post office or charge the *addressee* with domestic postage, even though the sender had already paid international postage when the mail was posted. As a German postal official observed in the 1979 congress of the UPU, "The Convention did not deal with competition between administrations."

Traditionally, the UPU provision that authorized interception or surcharging of remail was known by its number in the Universal Postal Convention; in the 1980s

it was "Article 23." of the 1984 Convention. In the 1989 and 1994 Conventions, the corresponding article was Article 25. Article 23 of the 1984 Convention declared as follows. The first three paragraphs embody the 1924 restriction on ABA remail. The fourth paragraph reflects the 1979 amendment.

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

In essence, Article 23 was a market allocation agreement enforceable through discretionary actions by individual post offices. The purpose was to ensure that international and domestic mail produced by persons resident in country A is tendered to the national post office of country A. Legally, then, the term "remail" referred to any international mail that could be intercepted or otherwise penalized by resort to Article 23.

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

considered resident in every country in which it did business.

With the gloss of the nonphysical remail doctrine, Article 23 permits a post office to intercept virtually any large international or domestic mailing posted by an international company. Of course, no post office applied Article 23 consistently. It was used intermittently, as a means of protecting a post office's revenues and commercial position. Production of a large mailing is expensive, and delay in delivery can dissipate some or all of its value of the mailer. Mere threat of interception was enough to keep most large mailers in line.[3]

As public policy issues, Article 23 and economically incorrect terminal dues were two sides of the same coin. Without Article 23, mailers would shift mail from post office to post office to take advantage of terminal dues that were too low when compared with domestic postage and to avoid terminal dues that are too high compared with domestic postage. Without economically incorrect terminal dues, post offices would hard pressed to justify restrictions on remail that were on their face nakedly anticompetitive.

3. GROWTH OF REMAIL

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

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

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

offices, notably the Belgian post office, began to accept letter remail.

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

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

4. ANTIREMAIL CONSPIRACY

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

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

The first meeting of the Remail Conference, as the U.K. Post Office called the

group, convened at a hotel at Heathrow Airport on 22 April 1987.[4] The U.S. Postal Service sent two representatives bringing the active membership in the Remail Conference to fifteen. Sir Ronald Dearing, chairman of the U.K. Post Office, opened the discussions by noting:

> We are all aware that remail has existed to a degree in the last decade or so—the traffic segment predominantly involved has been printed papers. Until recently, the traffic volumes and revenue dilution involved have not been sufficiently great to cause the level of concern that has brought us there today. In the last two years the situation has changed dramatically. Remailing firms are now seeking systematically to exploit the availability of cheaper rates in some countries, and the limitations of the present systems of imbalance charges, and they will take whatever profitable traffic they can acquire, be it printed papers or much more significantly, airmail.
>
> They have efficient transportation networks, originally established for parcel and bulk consignment distribution, and they are now using their network strength to very good effect in establishing posting facilities throughout the world.
>
> With the concern being expressed by several administrations we have convened this meeting today to discuss how we should respond to the challenge presented by remail in Europe. Our North American colleagues are here with us as observers as they have a particular interest in this problem; North America offers the remailer a vast market and, as you know, it is currently one of the principal sources of such traffic for European destinations.[5]

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

> A new aspect in this matter has come to light through the increasing interest among the international courier services not to limit themselves to the transportation of documents and small goods door-to-door but also to engage in large scale transportation of mailable matter to countries of destination. Additionally and increasingly, they are also arranging the distribution services itself, often multinationally.
>
> These remailing services are born of the fact that the postal services have not been able to keep up a satisfactory standard of service, and of inflexible price setting in the tarification. We may quote as examples the terminal dues, sometimes too high, sometimes too low, and the rates for bulk mail which are not always calculated with regard to the real costs involved.

A contribution by the U.K. Post Office listed the key issues as non-economic terminal dues, non-economic air transportation rates, uncertainty of enforceability

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

[5]Remail Conference, Draft minutes of the 22 April 1987 meeting (28 April 1987).

of Article 23, and lack of agreement amongst postal administrations. Another U.K. Post Office paper (document 4) outlined possible approaches to terminal dues reform, including the competitively neutral option of relating terminal dues to domestic postage rates.

The Remail Conference appointed a working party composed of the post offices of Sweden (spokesman), France, the Netherlands, and the U.K. The Remail Conference met again in September 1987 in conjunction with a meeting of the Conference of European Postal and Telecommunications Administrations (CEPT), an organization European postal administrations. The working party declared it was, "convinced that remail constitutes a serious threat to postal business and that a vigorous response is urgently needed. It has for that purpose worked out a three-part strategy: a new system of terminal dues, a set of aligned practices, and a new business letter service."[6] Two of the three elements of the "competitive strategy" were self-evidently anticompetitive: the new system of terminal dues and the set of aligned practices.

In October 1987, the Remail Conference working party agreed to a new formula for calculating terminal dues on mail exchanged between parties to the agreement. The new scheme would replace the charge of SDR 2.614 per kilogram established in the 1984 Universal Postal Convention (effective for the period 1 January 1986 to 31 December 1990). The new formula provided a terminal dues charge of SDR 1.225 per kilogram plus SDR 0.121 per item. In one important respect, the new formula was an improvement over the UPU scheme. Since the actual cost of postal delivery varied with the number of items as well as the weight of items delivered, introduction of a charge per item implied that the new formula could produce charges that corresponded more closely to actual cost. Under the new formula, the charge for a 20-gram letter, the approximate weight of a typical cross-border letter, would increase from SDR 0.052 to SDR 0.146, or 178 percent. A lightweight, 10-gram letter, would experience a terminal dues rate increase of 410 percent. Heavier weight letters faced smaller rate increases or even decreases: 30-gram (101 percent), 50-gram (39 percent), 100-gram (-7 percent), and 200-gram (-30 percent).

Although introduction of an item factor into the terminal dues formula was an improvement in theory, the actual effect of the new formula was anticompetitive: it would substantially raise the cost of remail but not significantly reform the costs of regular international mail exchanged among postal administrations. This effect was accomplished by modifying the *level* of terminal dues charges without changing the *uniformity* of the terminal dues rate. Since remail represented additional mail for the remail post office, increasing the level of the terminal dues charge increased the marginal cost of all remail. On the other hand, since the uniformity of terminal dues rates was left untouched, postal administrations could still trade inward delivery

[6]Remail Conference, Report by Sweden Post (10 September 1987), quoted in Case IV/32.791 - Remail, Statement of Objections ¶ 36.

services to compensate for outward delivery services, regardless of the unequal economic value of the two services. Thus, the Remail Conference addressed defects in the 1984 UPU terminal dues system which had a minor, but a competitive, impact but ignored the major economic defect in the 1984 terminal dues scheme, its failure to recognize differences in the costs of inward delivery among postal administrations (within Europe, postal delivery costs varied by a factor of three to one).

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

> From the literature we have seen issued by [an express company involved in remail] it would appear that your administration may have some kind of arrangement with that company for forwarding of traffic originating in Great Britain.
>
> While we cannot stop [the express company] taking AO-type traffic out of the UK for remailing, when they take LC . . . I very much hope . . . that your administration will not accept UK-originating LC-type traffic for remailing . . . [W]e would regard it as an unhelpful act on the part of a sister postal administration which would be regrettable in light of our previous excellent relations".

In response to such pleas, in early March 1987, the Singapore post office discontinued accepting all foreign origin mail tendered by private remail companies, citing the objection of the U.K. Post Office. In January 1988, the Japanese post office notified the Hong Kong Post Office that it will not accept international mail remailed through Hong Kong.

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

After initial meetings of the Remail Conference, members extended their efforts to suppress remail competition to the Universal Postal Union.[7] In May 1987, the UPU Executive Council appointed the U.S. Postal Service to conduct a survey of remailing activities. In August 1987, the Director General of the UPU distributed a circular letter to UPU members expressing concern about remail competition.[8] In September, the UPU distributed to members an initial report and questionnaire

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

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

prepared by the U.S. Postal Service.[9] Full results of the survey were reported in March 1988. The report outlined competitive difficulties posed by remailing and noted that about half of postal administrations surveyed favored increased use of Article 23. Postal administrations supported greater cooperation among postal administrations "almost unanimously". The report concluded, "On the whole, the remail issue seems to have become a significant problem." At the same time the UPU distributed a second report, also prepared by the U.S. Postal Service, on "other aspects to be considered in the study of terminal dues". This report addressed, among other things, the rise of international competition and the role of the monopoly in opposing such competition.[10]

The depth of concern felt by major post offices over the rise of remail was reflected, as well, in the establishment of the International Post Corporation. At the CEPT meeting held in Copenhagen in September 1987 (the same occasion as the third meeting of the Remail Conference), the CEPT appointed a special committee to consider a new institutional structure for international postal services. In May 1988, the committee reported to a meeting of postal directors held in Ottawa. The directors approved the committee's proposal to establish a new corporation to take the lead in managing and marketing international postal services. On 5 January 1989, the post offices of Belgium, Cyprus, Denmark, Finland, France, West Germany, Greece, Ireland, Iceland, Italy, Luxembourg, Norway, Portugal, Spain, Sweden, United Kingdom, Canada, Australia, United States, and Japan formed the International Post Corporation (IPC).[11] Its mission included coordination of business policies, harmonization and improvement of international postal services, monitoring of service quality, development of tracking and tracing systems, and planning of competitive responses to remail.[12]

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

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

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

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

5. REMAIL CASE AND POSTAL GREEN PAPER

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

The IECC complaint quickly stimulated preparation of a Postal Green Paper (PGP). As late as December 1987, the European Commission was uninterested in a "green paper" or comprehensive policy review in the field of postal services.[14] By November 1988, however, the Commission had reversed position and resolved to prepare a Postal Green Paper. The Commission's change of heart seems to have been prompted by postal officials concerned with implications of the IECC complaint. It was no secret that European competition authorities were inclined to agree with legal arguments raised by the IECC against the antiremail conspiracy and ready to move quickly.[15] Meanwhile, postal officials were portraying the consequences of unrestrained remail competition in the darkest terms. "Suicide for the postal services" warned a prominent postal official meeting with the head of the Directorate General III (industrial policy and the common market) in May 1988. Manifestly, the strategy of postal administrations was to seek agreement on a high level of socially necessary, universal postal service before a detailed consideration of Community competition law. Who could disagree with good quality postal service for all citizens? Once a high level of universal service was agreed, post offices could use this social goal to justify limitations on application of the competition rules. Moreover, post offices argued that pendency of a major policy review justified a delay in addressing the IECC complaint. The Commission agreed, and work on the Remail Case was suspended.

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

> Taking just the mail service into consideration, there have recently been

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TNT, a worldwide private express company, and shifted their express mail traffic.

[13]Case IV/32.791 - Remail.

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

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

far-reaching changes on the market as a result of a number of events.

- The structure of demand is changing. At the same time as a slight increase in mail between individuals, an enormous increase in mail being received and sent by companies is to be noted.
- Large quantities of articles and documents can even be produced from far way thanks, among other things, to the recent developments in information and printing technology.
- As a result of the subdivision of the market into several sectors, specialization is increasing all the time. This is particularly striking in the case of "direct mail", mail-order business, express mail as well as the changed supply and demand in international correspondence.
- The new services are offered, as least in part, outside the state monopoly by private enterprises, some of which come from countries outside the Community and want to use here the experience they have made elsewhere.
- The coordination between the private enterprises (in the case of the non-monopolized services) and the postal administrations does not always run to satisfaction. Besides, it is not common practice of the postal administrations to differentiate between the use of resources (personnel, material) for monopolized services and that for other services.
- In international relations (including relations with other Community countries) coordination between the postal administrations is disrupted in some cases by
  - problems of the UPU in connection with the structure of "terminal dues" (equalization arrangement between the parties concerned prejudices to a great extent the administration that receives the items of mail),
  - problems with respect to the subsequent mailing of items (if cooperation develops between a private delivery service and an administration on the basis of different national rates and different terminal dues arrangements). [paragraph I.5]

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

The Postal Green Paper was not completed until June 1992. As it turned out, the PGP adopted a more competitive stance than envisioned by its original proponents. Although it addressed many postal policy issues, the PGP returned repeatedly to issues raised by the rise of remail: terminal dues, restrictions on remail, the relationship between European law and the Universal Postal Convention, and liberalization of cross-border mail generally. The PGP concluded that terminal dues should not be set at a uniform rate among Community post offices because of the wide disparity in costs among the administrations. The PGP advocated instead that

terminal dues be related to the domestic postage rates in each Member State.[16]

> With respect to the interception of remail, the Postal Green Paper condemned postal resort to Article 25 (of the 1989 Universal Postal Convention) except in the most limited circumstances. The PGP began by observing that remail benefits the user. It can overcome delays caused by slow cross-border postal procedures and better accommodate the needs of mailers by adding extra services.[17] Given positive economic benefits and the Treaty's protection of competition, the PGP concluded that application of Article 25 against intra-Community ABC remail could never be consistent with the EC Treaty.[18] The PGP also expressed doubts about the lawfulness of using Article 25 to turn back mail that had been physically taken out of Member State A to Member State B and posted back into Member State A. The paper noted that, when applied to such remail, Article 25 could be interpreted as an appropriate means of enforcing the postal monopoly. However, the PGP noted that it was the task of appropriate regulatory authorities, not the post office, to enforce the postal monopoly. Then, too, Article 25 was not limited to postal monopoly items. A third difficulty noted by the PGP was that Article 25 could be used to prevent a company from posting its own mail where it deemed appropriate, a use inconsistent with the view that a person should always be able to post his own mail.[19]

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

> 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

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[16]PGP, chapter 9, recommendations 7, 7.1, 7.2, pages 251-52.

[17]PGP, chapter 5, sections 9-9.3.

[18]PGP, chapter 8, section 11, page 210 (emphasis added).

[19]The PGP left open the question of whether Article 25 could be used to turn back extra-Community ABC remail, i.e., mail that any mailer residing in one Member State posts in a country outside the Community for delivery to addressees in another Member State. The Green Paper considered that such practices posed an obvious financial threat to Community post offices. Green Paper, chapter 8, section1 11, page 211.

> all its direct mail in one location, and post there.
>
> The fact that such mail might formerly have been domestic and therefore subject to domestic monopolies causes some people to contemplate whether such movements of mail thus caused should be considered an infraction of domestic monopolies unless the items concerned are posted in the country of delivery. Briefly, the question that should be put is as follows: should the single market in printing, electronic data and advertising adjust to possible interpretations of postal rules, or the converse?[20]

The PGP recognized that some post offices considered this trend generated "nonphysical" remail but concluded that if mail is produced in a country A, then it is properly posted in country A regardless of the senders "residence". Any other view would allow the post offices to distort the Community printing and mail preparation sectors.[21]

In the end, the two most significant reform proposals of the Postal Green Paper were to liberalize cross-border mail and direct mail. [22] The first was a direct descendent of the Remail Case and precisely what post offices officials feared all along. The demise of the national post office was widely predicted.

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

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

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[20]PGP, chapter 5, section 9.3, page 135 (emphasis added).

[21]PGP, chapter 8, section 8.3, pages 199-200.

[22]PGP, chapter 9, page 245. Section 2.14 provides a similar recommendation for international mail (i.e., mail between a point in the Community and a point outside the Community).

> between individual postal administrations on the one hand, and joint arrangements between postal administrations and remailers on the other. . . .
>
> There is no basis under the EC competition rules for one postal administration to turn back mail posted by a private operator who is competing with another postal administration, whether the exclusive rights of the latter are being infringed or not. If the exclusive rights of the outward administration are infringed, it is for the regulatory body in that country to take legal action - not for that administration to seek assistance from another administration whose exclusive rights are not infringed.
>
> The use of powers under Art. 23 (4) UPU by the Bundespost was contrary to [European competition law]. . . .
>
> The invocation of powers to request enforcement of Art. 23(4) UPU constitutes an abuse of this dominant position. In effect Art. 23 UPU supports a market allocation scheme among postal administrations. . . .
>
> Use of Art. 23(4) UPU has the effect of discouraging competition. The British postal administration's requests to third-country postal administrations to intercept UK-origin mail that has been remailed are evidence of an attempt to protect its dominant position in the outbound market.
>
> The German Bundespost cited Art. 23 UPU to outbound mailers, and in addition protected the position of "sister" postal administrations by intercepting and returning foreign-origin remail entering Germany. . . . This amounts to a refusal to deliver mail merely on the grounds that it had been remailed. Such behaviour similarly limits the market contrary to [European competition law].[23]

6. RETREAT FROM GENERAL POSTAL REFORM

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

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

In regard to terminal dues arrangements, the Commission made clear that it regarded the CEPT agreement as inconsistent with the competition rules.[24] Yet, even though post offices engaged in a price-fixing arrangement on a Community wide scale for seven years, the Commission declined to condemn the price fix because, a month earlier, post offices had reached an agreement which reportedly (the Commission had no copy of the agreement) envisioned a new terminal dues agreement that would, at some point in the future, likely resolve competition law

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[23]Case IV/32.791 - Remail, Statement of Objections (Apr. 5, 1993) at 23-30.

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

issues raised by the IECC complaint. The Commission concluded that requiring the post offices to adhere to the competition rules would, in an unspecified manner, delay correction of competition law violations identified in the complaint.[25]

In regard to the complaint against use of UPU Article 23 to intercept or threaten interception of ABC remail, the Commission declared it would take no action because the post offices had, in 1989, promised not use paragraph 4 of Article 23 to intercept remail and that the IECC had failed to produce subsequent evidence that post offices had failed to live up to this pledge.[26] The Commission's decision is worded carefully at this point. As the Commission was aware, post offices intended to continue interception ABC remail whenever they considered in their commercial interest to do so and were in fact making or threatening such interceptions. Rather than citing paragraph 4 of Article 25, post offices were citing paragraph 1 and the flexible concept of "nonphysical remail."[27] Indeed, in the 1994 congress of the Universal Postal Union, post offices amended Article 25 to ensure broad applicability of the nonphysical remail concept.[28] Notwithstanding the fact that post offices could and did use Article 25 to intercept ABC remail as "nonphysical remail," the Commission held that the IECC had no "legitimate interest" in interception of nonphysical remail, a legal requirement for a complaint.[29] Further, the Commission held that interception of ABA remail was justified because, under the CEPT agreement, post offices charged less than domestic postage on incoming

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[25]Decision SG(95)D/1790 of February 17, 1995 at points 8-9.

[26]Commission Decision SG(95)D/10794 of August 14, 1995 at points 11, 13, and 17.

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

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

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

cross-border mail and therefore lost money on such remail.[30]

The Commission retreated from key reform proposals in the Postal Green Paper in similar fashion. In mid 1993, after a year of consultation, the Commission reported qualified its support for reform; in fact, virtually the only public opponents were post offices and postal unions.[31] In December 1997, after prolonged political struggle, the Commission adopted a Postal Directive that retreated from most of the reforms envisioned in the Postal Green Paper. The Postal Directive placed an upper limit on the postal monopoly law in of all Member States. Member States were permitted to reserve collection, transport, and delivery of "items of domestic correspondence" provided two conditions were met: (i) the price of service for each item is less than 5 times the price of a stamp for a first class letter in the lowest weight step and (ii) the weight of each item carried is less than 350 grams. In theory, a reservation of postal service could only be adopted "to the extent necessary to ensure the maintenance of universal service"; in practice, the ceiling allowed Member States to monopolize 98 percent of letter and direct mail. The major initiatives of the Postal Green Paper, liberalization of cross-border mail and direct mail, were abandoned. Failure to liberalize cross-border mail was particularly unjustified since the Postal Directive explicitly found "cross-border postal links do not always meet the expectations of users and European citizens, and performance, in terms of quality of service with regard to Community cross-border postal services, is at the moment unsatisfactory."[32]

7. CORE ISSUES OF REMAIL ADDRESSED

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

Prompted by the Remail Case, the Commission ultimately required post offices to align terminal dues with domestic postage, a key goal of the IECC complaint. In December 1995, post offices submitted a tentative REIMS terminal dues agreement to the Commission for approval.[33] In late 1996 or early 1997, the Commission apparently rejected the post offices' application for an exemption from the competition rules without public notice.[34] After almost two more years of

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

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

[32]Postal Directive, Recital 6.

[33]Commission approval was required because terms of the REIMS agreement remained inconsistent with European competition law, especially provisions for a lengthy "transition" period.

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

negotiations, on September 15, 1999, the European Commission approved a revised "REIMS II" agreement.[35] The revised version, originally submitted for approval in late 1997, shortened the transition period and made other procompetitive changes. In principle, the REIMS II agreement largely eliminated discrimination in the delivery charges for international and domestic mail. On January 1, 2001, terminal dues were supposed to be set at 70 percent of domestic postage rates. Since domestic postage rates include a charge for collection of mail as well as delivery of mail and since cross-border mail is not collected by the destination post office, this formula appears to represent a plausible alignment of terminal dues and domestic postage.

Meanwhile, two judgements in the European courts have curtailed the authority of post offices to intercept remail under authority of the antiremail provision of the Universal Postal Convention. On 16 September 1998, in an appeal of the Remail Case by the IECC, the Court of First Instance reversed a key element in the Commission's decisions dismissing the complaint. The Court held that neither losses resulting from non-cost based terminal dues nor a need to prevent circumvention of the postal monopoly justified a postal interception of ABA remail. The Court pointed out that post offices cannot reasonably justify interception of remail by citing imperfections in a terminal dues agreement which they drafted.[36] The Court further noted the post offices could use other less restrictive means to prevent losses on inbound remail. An appeal of this holding by the German Post Office was rejected by the European Court of Justice on 11 May 2000.[37]

On 10 February 2000, in the GZS case, the European Court of Justice considered whether the German post office could, under authority of Article 25 of the 1989 Universal Postal Convention, require a mailer to pay domestic postage for delivery of nonphysical ABA remail. The mail in question consisted of credit card statements printed in Denmark and the Netherlands and "posted in large quantities" posted to addressees in Germany by two banks, GZS and Citibank, with offices in Germany. The German post office delivered the letters and sued the banks for payment of German domestic postage, citing UPU Article 25, notwithstanding the fact that mailers had already paid postage to the Danish and Dutch post offices for cross-border postal service and these post offices owed the German post office terminal dues for the delivery of such mail. The Court held it was a violation of European competition rules for the German post office to enforce the remedies provided by UPU Article 25(3), i.e., to return the mail to the origin post office or to charge the sender full domestic postage. On the other hand, the Court found that

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

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

[37]Case C-428/98, *Deutsche Post AG v. IECC*, [2000] ECR I-____.

large scale use of nonphysical ABA remail by mailers resident in Germany could render it impossible for the German post office to fulfill its obligation under the Universal Postal Convention to deliver inward international mail. Therefore, the Court held that the German post office may, by way of an exception from the competition rules, charge the mailer the *difference* between the domestic postage that it would have received and the terminal dues that it actually received. In short, the Court found that the German post office would be justified in treating nonphysical ABA remail as domestic mail and charging domestic postage. [38]

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

8. CONCLUSIONS

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

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

raised by emergence of cross-border postal services. The Commission's 1993 Statement of Objections in the Remail Case promised a dramatic and conclusive application of the competition rules to the post offices' efforts to suppress remail.

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

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