

COMMISSION

COMMISSION DECISION

of 20 March 2001

relating to a proceeding under Article 82 of the EC Treaty

(Case COMP/35.141 — Deutsche Post AG)

(notified under document number C(2001) 728)

(Only the German text is authentic)

(Text with EEA relevance)

(2001/354/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, the first, Regulation implementing Articles 81 and 82 of the Treaty ⁽¹⁾, as last amended by Regulation (EC) No 1216/1999 of 10 June 1999 ⁽²⁾, and in particular Articles 3 and 15(2) thereof,

Having regard to the complaint lodged by United Parcel Service on 7 July 1994, alleging infringements of Article 82 of the EC Treaty by Deutsche Post AG, and requesting the Commission to put an end to those infringements,

Having regard to the Commission Decision of 7 August 2000 to initiate proceedings in the case,

Having regard to the Commission Decision of 4 October 2000 to extend the proceedings initiated on 7 August 2000,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission in accordance with Article 19(1) of Regulation No 17 and with Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 81 and 82 of the EC Treaty ⁽³⁾,

After consulting the Advisory Committee on Restrictive Practices and Dominant positions,

Whereas:

I. THE FACTS

A. THE COMPLAINT

- (1) United Parcel Service ('UPS') is a privately owned American corporation with its head office in Atlanta, Georgia. It is one of Deutsche Post AG's main competitors in respect of 'business-to-business' or 'B-to-B' parcel services. UPS states that it also provides some mail-order parcel services, the 'business-to-consumer' or 'B-to-C' parcel services.

⁽¹⁾ OJ L 13, 21.2.1962, p. 204/62.

⁽²⁾ OJ L 148, 15.6.1999, p. 5.

⁽³⁾ OJ L 354, 30.12.1998, p. 18.

B. THE UNDERTAKING

- (2) Deutsche Post AG (DPAG) is a public limited company that in 1995, succeeded to Deutsche Bundespost Postdienst, which legally was a section of a special Federal fund. Deutsche Bundespost Postdienst was set up by the Organisation of Postal Services Act (*Postverfassungsgesetz, PostVerfG*) on 1 July 1989 to take over the postal services branch of the old Deutsche Bundespost. Before 1 July 1989 postal services were provided by the Deutsche Bundespost itself. In what follows, the term 'DPAG' is used to designate DPAG, Deutsche Bundespost Postdienst, or the Deutsche Bundespost as the case may be. DPAG's main activity is the delivery of letter post. DPAG has a statutory exclusive right to the 'reserved area', that is to say the conveyance of letters weighing less than 200 g ⁽⁴⁾. In 1998 DPAG's turnover in the reserved area was DEM [...] ^(*) billion; this was almost [...] % of its total turnover, which amounted to DEM 28,6 billion. The table showing annual costs and revenues supplied by DPAG shows that the reserved area has been in profit since at least [...] ⁽⁵⁾.

Table 1

DPAG's costs and revenues in the reserved area 1990 to 1999

(in million DEM)

Year	1990	1991	1992	1993	1994	1995	1996	1997	1998
Revenue	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Costs	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Profit	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

C. THE COMPLAINT

- (3) In the application it lodged under Article 3 of Regulation No 17 in July 1994, UPS alleged that DPAG was using revenue from its profitable letter-post monopoly to finance a strategy of below-cost selling in parcel services, which are open to competition. Without the cross-subsidies from the reserved area, DPAG would not have been able to finance below-cost selling there for any length of time. The applicant therefore calls for a prohibition of sales below cost and the structural separation of the reserved area and the parcel services open to competition. Otherwise, UPS contends, an efficient firm would not be able to compete and at the same time cover the cost of providing parcel services, which are open to competition.

D. MAIL-ORDER PARCEL SERVICES

- (4) This Decision is concerned with DPAG's rebates and prices for mail-order parcel services in Germany. Parcel services, including mail-order parcel services, are not the subject of exclusive rights in Germany. Since about 1976 there have been competitors in Germany who have been supplying parcel services, mainly B-to-B services. Within commercial parcel services as a whole, easily the most important segment from DPAG's point of view is that of mail-order parcel services ⁽⁶⁾.

E. THE ECONOMIC CONCEPT OF CROSS SUBSIDIES

- (5) The applicant's main allegation is that DPAG offers its commercial parcel service at below-cost prices with the aim of ousting competitors from the market. DPAG covers the resultant losses with the aid of the profits made in the reserved area. This means that DPAG hinders competition by cross-subsidising commercial parcel services through the reserved letter-post services.

⁽⁴⁾ Section 51 of the Postal Services Act (*Postgesetz*) states that until 31 December 2002 Deutsche Post AG is to enjoy the exclusive right to carry by way of trade letters and addressed catalogues weighing less than 200 g per item at a price per item anything up to five times the price applying on 31 December 1997 for similar items in the lowest class of weight (statutory exclusive licence).

^(*) Business secret.

⁽⁵⁾ DPAG letter of 23.12.1999. Annex 1.

⁽⁶⁾ Annex 2 to the DPAG letter of 6 December 1999.

The relevant cost concepts

- (6) From an economic point of view cross-subsidisation occurs where the earnings from a given service do not suffice to cover the incremental costs of providing that service and where there is another service or bundle of services the earnings from which exceed the stand-alone costs ⁽⁷⁾. The service for which revenue exceeds stand-alone cost is the source of the cross subsidy and the service in which revenue does not cover the incremental costs is its destination. The reserved area is a likely and permanent source of funding as the figures presented by DPAG in Table 1 show that overall revenues in the reserved area exceed its stand-alone costs ⁽⁸⁾.
- (7) This means that, when establishing whether the incremental costs incurred in providing mail-order parcel services are covered, the additional costs of producing that service, incurred solely as a result of providing the service, must be distinguished from the common fixed costs, which are not incurred solely as a result of this service.

The impact of DPAG's public service obligation

- (8) When calculating the share of the common fixed costs it must be borne in mind that DPAG is required by law to maintain a capacity reserve large enough to cover any peak demands that may arise in over-the-counter parcel services while meeting statutory service-quality standards for those services ⁽⁹⁾. Even if DPAG were no longer to offer mail-order parcel services, it would still be obliged vis-a-vis every mail-order customer to provide catalogues and parcels over the counter within a specified delivery target. This follows from the universal service obligation whereby every potential postal user is entitled to receive from DPAG over-the-counter parcel services of the prescribed quality at uniform prices. If DPAG were to stop offering a specific parcel service, it could not, unlike a private firm such as UPS, cut back on staff and equipment in perfect proportion to the reduction in volume. Even if the specific parcel service were stopped, staff and equipment could not be reduced to the full extent of the cut in service, as some staff and equipment are also needed to provide over-the-counter services that meet statutory quality standards (D + 2 for 80 % of the consignments). This obligation to maintain a reserve capacity is known in economic terms as the carrier of last resort ⁽¹⁰⁾.
- (9) Where DPAG maintains an infrastructure to fulfil its public service mission, a distinction must be made between the cost of maintaining capacity and the specific incremental costs of producing individual services:
- The costs of maintaining capacity arise independently of the services provided and the volume of parcels processed only as a consequence of maintaining capacity to allow everyone the standard option of having their parcels sent over-the-counter in the normal way. The legal obligation to remain ready to offer a standard parcel delivery service at a uniform tariff increases the

⁽⁷⁾ The incremental costs solely comprise costs incurred in providing a specific parcel service. They do not include the fixed costs not incurred only as a result of providing a specific service (the common fixed costs). Common fixed costs are not related solely to a specific parcel service and are eliminated only when the company ceases to perform all its services.

⁽⁸⁾ This means that the revenue from the reserved area as a whole is greater than all costs generated there. Therefore the revenue exceeds not only the product-related incremental costs but also the common costs that cannot be attributed solely to the area.

⁽⁹⁾ Pursuant to point 2 of Section 1(1) of the Postal Universal Service Ordinance, DPAG must by reason of its universal service obligation to deliver parcels within a certain time limit (Section 3(2) of the Ordinance: at least 80 % must be delivered within two working days). Before the Ordinance entered into force retroactively as of 1 January 1988, the universal service obligation flowed from Section 8 of the Postal Services Act of 28 June 1969. Under that Act, every person had the right to use the Post Office's facilities. The conditions governing the use of the Post Office's facilities were laid down by regulation. Before the Postal Universal Service Ordinance entered into force, the time-limit was set by Section 20(3) of the Customer Protection Regulations (BGBl. 1995 I, p. 2016 (80 % on the second working day after the working day of posting)).

⁽¹⁰⁾ See in particular William J. Baumol and J. Gregory Sidak, *Toward competition in local telephony* (MIT Press 1994), pp. 108 to 109.

proportion of common fixed costs that a carrier of last resort bears in comparison with companies who do not have this obligation. Costs arising from the legal obligation to maintain an option for everyone to have parcels carried at a geographically averaged tariff also arise even if commercial parcels not dealt with at the postal counter are discontinued. This means that these capacity costs are not attributable to a specific service and must be treated as DPAG's common fixed costs ⁽¹¹⁾. Common fixed costs cease to exist only where the statutory obligation no longer applies,

— On the other hand costs that are attributable to a specific service arise only where services other than over-the-counter parcel services are provided. These costs, which are dependent on the volume posted and arise solely as a function of the specific service, cease to exist if the service at issue is stopped.

- (10) To avoid subsidising mail-order parcel services by using revenue from the reserved area, DPAG must earn revenue on this parcel service which at least covers the costs attributable to or incremental to producing the specific service. Emphasising the coverage of costs attributable to a particular service also makes it possible to take account of the additional burden incurred by DPAG as a result of fulfilling its statutory obligation of maintaining network reserve capacity ⁽¹²⁾. As this emphasis is expressly intended to take account of network capacity costs as an additional burden, DPAG is required only to cover the costs attributable to the provision of mail-order parcel services. This means that these operations are not burdened with the common fixed cost of providing network capacity that DPAG incurs as a result of its statutory universal service obligation ⁽¹³⁾.

The calculation of service-specific costs for mail-order parcel services

- (11) DPAG currently provides mail-order parcel services via its 33 outward and inward freight centres and 476 delivery points ⁽¹⁴⁾. DPAG refers to this infrastructure as its 'freight branch' (*Sparte Frachtpost*). DPAG uses the same infrastructure for its other commercial parcel services, including the B-to-B service. It also uses that infrastructure for parcels sent from one private person to another — 'P-to-P' services, parcels handed in at post office counters and for mail-order returns — 'P-to-B' services ⁽¹⁵⁾. Mail-order parcel services, however, account for 71 % of the total volume of commercial parcel services every year ⁽¹⁶⁾. Its reserved letter-post services, on the other hand, operate largely through a separate infrastructure. The only exception is the joint delivery service ⁽¹⁷⁾. Mail-order parcels are processed in the following stages ⁽¹⁸⁾.

⁽¹¹⁾ See, in particular, William J. Baumol and J. Gregory Sidak, *Toward competition in local telephony* (MIT Press 1994), pp. 108 to 109: 'These obligations are appropriately treated as sources of common fixed costs for the firm ...'

⁽¹²⁾ DPAG repeatedly stresses this additional burden, the 'cost of providing the universal service', see, e.g., letter of 15 May 1997, pp. 4 and 5 and DPAG letter of 6 October 2000, pp. 8 to 10.

⁽¹³⁾ The costs of providing a universal service (a comprehensive network of branches, nationwide deliveries at a standard rate) would only be attributed to mail order parcels in full proportion to their volume, if a 'fully distributed cost' analysis were undertaken. See to DPAG letter of 6 October 2000, pp 4 and 5 to 8 and 11. The aim of covering at least the service-specific incremental costs, however, prevents this apportioning of costs arising as a result of the statutory obligation for non-over-the-counter parcel services.

⁽¹⁴⁾ Mail-order parcels consist primarily of postal packages and mail order catalogues.

⁽¹⁵⁾ DPAG letter of 7 April 2000, p. 3; DPAG letter of 6 December 1999, p.11; DPAG letter of 22 December 1999, p.2.

⁽¹⁶⁾ Source Ctcon GmbH, *Segmenterfolgsrechnung 1990-1999 Frachtpost ohne Kataloge von 200g bis 1000g, ohne Postgut Klein und -leicht sowie ohne Post Express, Stand 23. Juni 2000*.

⁽¹⁷⁾ By way of exception, in rural areas parcels and letters are delivered jointly by the same person. See DPAG letter of 9 March 2000, p. 10. According to information provided by DPAG in 1999 this applied to approximately [...] % of the mail-order parcels delivered. For previous years, the situation was as follows: from 1990 through 1995 mail-order parcels were delivered jointly with letter post, from 1995 through 1998 there were almost no more joint deliveries. Joint deliveries create economies of scope that exist between the reserved product and the competitive product. Due to the reserved area these economies of scope are not available to competitors. As joint deliveries played no role from 1995 through 1998, the result, coverage of incremental costs in this time period, would remain unchanged. As of 1998 the coverage in mail-order deliveries significantly exceeds incremental costs, thus, even a separate calculation for the joint deliveries would not have an impact on the final result.

⁽¹⁸⁾ DPAG letter of 9 March 2000. pp. 9 and 10.

- (12) *Collection*: in the case of large mail-order customers, parcels are not processed at the post-office branches or agencies to be taken to the outward freight centre. Instead, they are collected by DPAG from the customer's premises and transported direct to the centre ⁽¹⁹⁾. If the mail-order parcel service is discontinued, all the costs of collection are fully attributable to the mail order service and would be saved ⁽²⁰⁾.
- (13) *Sorting*: at the outward freight centre the sorting stage comprises the coding and sorting of parcels for transport to the inward freight centre. At the inward freight centre it comprises the sorting of incoming items for onward transport to the delivery points. Large mail-order customers carry out several of the steps involved in the sorting process themselves, such as, for example calculating the appropriate charge or attaching the barcode label. The capital costs of setting up the 33 freight centres and 476 delivery points cannot be attributed to a particular service. These costs will be incurred as long as the statutory obligation to meet demand to legally required service-quality standards applies. The staffing and equipment costs of sorting, on the other hand, are entirely dependent on the actual volume of parcels to be conveyed. Thus the staffing and equipment costs of activities dependent on the volume processed can be attributed in direct proportion to the mail order parcel service.
- (14) *Long-distance transport* consists of transport between the 33 inward and outward freight centres. Even if the volume is small, a certain amount of long-distance transport between the centres must continue in order to maintain the service-quality standards for counter parcels as laid down by law ⁽²¹⁾. Thus the costs of long-distance transport, in terms of staffing, equipment and capital, are not attributable to a particular service and can be eliminated only if the statutory obligation to serve no longer applies.
- (15) *Regional and local transport* between the 33 freight centres and the 476 delivery points ⁽²²⁾. As regards regional and local transport between freight centres and delivery points, a fall in volume would allow some delivery points to be amalgamated. If mail order parcel services were discontinued, regional and local transport costs would be reduced by approximately half, because this percentage is attributable to mail order parcel services.
- (16) *Delivery*: after distribution to DPAG's 476 delivery points, mail-order parcels are delivered. Delivery consists essentially of driving and delivery proper. Half of the operation is taken up with driving, and half with delivery itself. Driving is not attributable to a specific service to the same extent as the delivery proper ⁽²³⁾. The costs of handing over a parcel, on the other hand, are mostly attributable to a specific service. If a large-volume service where as a rule only one parcel is delivered when the delivery vehicle stops (as in the case of mail-order services) is discontinued, the cost of delivery can be attributed to the specific service and saved in its entirety if the particular stop is no longer necessary ⁽²⁴⁾.
- (17) On the basis of the above analysis of the distribution between common fixed costs and costs that are attributable to a particular service, the average incremental costs per item for mail-order parcel services (AIC-MO) have been covered by revenue as of the year 1996.

⁽¹⁹⁾ One large customer delivers parcels direct to the inward freight centre.

⁽²⁰⁾ DPAG letter of 25 January 2001.

⁽²¹⁾ Section 3(2) of the Postal Universal Service Ordinance (*Post-Universaldienstverordnung*, PUDLV) states that on average over the year at least 80 % of parcels handed in on a working day must be delivered by the second following working day. Every freight centre functions both as an inbound and as an outbound centre. To provide a country-wide service at least one trip per day between each centre is necessary, that is to say 32 trips from each outbound centre to the other inbound centres, or at least $(32 \times 33 =) 1\ 056$ trips.

⁽²²⁾ All 33 freight centres are built and equipped to the same design. They all have a dual function, serving as inbound and outbound freight centres concurrently.

⁽²³⁾ Even if mail-order parcels were to be discontinued and the volume of parcels were to fall accordingly, individual delivery rounds could be reduced to a significant extent only if substantially fewer addresses had to be called at on the round. Only if there were substantial reduction in the number on addressees on a round could that round be amalgamated with another (DPAG letter of 25 January 2001). Investigations revealed that a route attributable to a particular service only exists for courier services, which seek out individual addresses for delivery.

⁽²⁴⁾ If several deliveries are made on the same stop, the stop will still have to be made, even when fewer parcels have to be delivered.

Table 3

AIC-MO 1990 to 1999

Year	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Revenue/item	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
AIC-MO	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

DPAG's measures to ensure financial transparency between the reserved area and commercial parcel services

- (18) As the Commission explained in the Statement of Objections of 7 August 2000, only complete transparency of the financial relations between the reserved area on the one hand, and the parcel services which are open to competition on the other, can guarantee that individual competitive parcel services cover the additional costs of producing that service. Only if the DPAG activities which are open to competition are provided separate from those covered by the reserved area, is there a guarantee that competitors are not eliminated by offers which are not based on efficiency or superior performance, but solely on the basis of a price below the additional costs of providing the competitive service⁽²⁵⁾. A structural separation of the reserved area from areas which are open to competition can rigorously prove and hence prevent a situation in which the additional costs of providing a competitive service are not covered.
- (19) In the present proceedings, the Commission further maintained that another requirement for the transparency of financial relations was a transparent system of 'transfer prices' for goods and services, which are provided by the company operating in the reserved area to the company active in competitive services⁽²⁶⁾. The transparency and visibility of transfer prices is effectively guaranteed only, by a system of 'unbundled' prices charged for the main processing steps in the value-added chain, which are procured by the company, operating in competition, from the company operating in the reserved area. Only with a system of 'unbundled' prices charged for individual processing steps can it be ensured that the price charged for using the entire chain of value added also covers the sum of the costs for the individual elements and that discounts given to customers which carry out individual processing steps themselves adequately reflect the economic costs thus saved.
- (20) DPAG takes account of the Commission's above requirements by a commitment to structurally separate its commercial parcel services⁽²⁷⁾. The commitment intends to make it clear, transparently and rigorously, that revenues from the reserved area are not being used to finance mail-order parcel services. In this connection, DP undertook to transfer all its commercial parcel activities, including the delivery of catalogues, to a legally separate company, Newco, by 31 December 2001. The hive-off would include all B-to-B and B-to-C services provided outside the post-office counter system, on the basis of individual contracts at special prices. Once the structural separation becomes effective, DPAG itself will no longer offer any commercial parcel services.
- (21) Newco may itself produce or provide the goods or services required to run its business, or it may procure them from third parties or from DPAG. If Newco does procure goods or services from DPAG, they must be paid for at market prices. If a market price cannot be determined for a particular step in the process, the price charged will be based on the cost attributable to, or incremental to producing the particular service. The attributable costs are to be demonstrated by means of process cost calculation. In the event of dispute DPAG has committed to prove and submit evidence as to the existence of particular market prices or of actual incremental costs to the Commission if it so requests.

⁽²⁵⁾ See Sidak/Spulber *Protecting Competition from the Postal Monopoly*, pages 109 to 124.

⁽²⁶⁾ In the present case the structural separation of the reserved area from the areas which are open to competition requires appropriate account to be taken of the public utility mission. The infrastructure necessary to fulfil this mission must remain with the company which is under an obligation to fulfil it.

⁽²⁷⁾ DPAG letter of 1 February 2001.

- (22) DPAG also undertakes to produce separate statements of its transfer prices charged to Newco for each of the main processing stages, collection, sorting (inward and outward), transport (long-distance regional and local) and final delivery, no later than the end of Newco's first financial year. If Newco does procure one or more of these services from DPAG, DPAG will provide the same service at the same prices and on the same terms within the framework of its available capacity to competitors of Newco. DPAG will provide the Commission with a comprehensive report on transfer prices and Newco's costs and revenue. This obligation is to apply for the first three years of Newco's operation. DPAG guarantees that separate accounting for Newco will ensure the full transparency of the financial relations between Newco and DPAG.

G. DPAG'S REBATE AGREEMENTS FOR MAIL-ORDER PARCEL AND CATALOGUE SERVICES

- (23) Mail-order firms that did not hand in parcels or consignments of catalogues at post-office counters qualified for discounts, as 'self labellers'. The product offered by DPAG at special prices to mail-order parcel customers is the self-labelled parcel (until 1995 there was another self labelled service for small parcels, known as *Postgut parcel* ⁽²⁸⁾) and the distribution of catalogues weighing more than 1 kg, known as heavy Infopost (*Infopost Schwer* ⁽²⁹⁾). Mail-order 'cooperation partners' were entitled to special prices going beyond those granted for self labelling ⁽³⁰⁾. However, the special prices for cooperation partners were conditional on the customer's declared readiness 'to entrust all mail-order items suitable for package and parcel post to Deutsche Bundespost Postdienst' ⁽³¹⁾. Apart from the general terms of sale (AGB FrD Inl), applicable to all cooperation agreements, the following individual cooperation agreements granted the special price only in return for the customer's undertaking to send all or a significant part of his parcels or catalogues via DPAG:

— in an economic cooperation contract that DPAG concluded with one of its biggest mail-order customers on 19 December 1974, the customer [...] undertook to send via DPAG 'at least all non-bulky items up to 10 kg' ⁽³²⁾ dispatched from its main depot 'and suitable for parcel and packet mail'. On 13 February 1987 this obligation was extended to include 'all non-bulky parcels up to 20 kg'. That clause remained in force until 1 July 1995 ⁽³³⁾,

⁽²⁸⁾ Access to the self labelling of parcels is conditional on the customer carrying out certain postal preparations itself (weighing, pricing, labelling, drawing up lists) and every year submitting to DPAG at least 10 000 self-labelled non-bulky items, or until 1995 10 000 *Postgut* parcels. In consideration of the preparaton work done, which otherwise has to be performed at the counter. DPAG reduces the price. The method of calculating the reduced price for self labelled items is described in point 3.3.2 of the General terms of business for inland freight services (*Allgemeine Geschäftsbedingungen für den Frachtdienst Inland* — AGB FrD Inl, 'the General Terms' 1992, at section 3.3 'Special services'. The AGB FrD Inl was submitted by DPAG as Annex 4 to its letter of 24 November 1994.

⁽²⁹⁾ The method of cooperation in respect of heavy Infopost is described in the new point 3.3.4.2 of the General terms which was announced in August 1995 by measure (*Verfügung*) P 777/1993: Senders of large volumes of heavy Infopost may in respect of such consignments by contract agree to take over from the postal service certain sorting functions going beyond the requirements of section 4.2, or the loading of dedicated transport units, or both. In return the postal service will reduce the basic charge for heavy Infopost.

⁽³⁰⁾ The basis for cooperation in connection with parcel dispatch is laid down in point 3.3.4 of the General terms: '3.3.4 Cooperation with senders: parcel cooperation is cooperation between the sender and Deutsche Bundespost Postdienst extending beyond self labelling. Deutsche Bundespost Postdienst concludes a contract transferring sorting, loading and transport functions for packets and parcels to the sender, and stipulating a financial benefit to compensate the sender for carrying out this work'. Under point 3.3.4 of the General terms, cooperation was tied to two requirements: '1. Participation in the self-labelling arrangements and 2. The customer must be prepared to entrust all mail-order items suitable for package and parcel post to Deutsche Bundespost Postdienst.' See *Allgemeine (Geschäftsbedingungen der Deutschen Bundespost Postdienst für den Frachtdienst Inland, Stand 30. März 1992, Abschnitt 3.3 Besondere Leistungsangebote*, submitted by DPAG as Annex 4 to its letter of 24 November 1994. According to DPAG's submission, point 3.3.4 was in force until 28 December 1994, see DPAG letter of 6 October 2000, p. 16.

⁽³¹⁾ See the second requirement in point 3.3.4 of the General terms.

⁽³²⁾ 'Bulky' parcels are defined in section 25(3) of the Postal Services Regulations. see footnote 35.

⁽³³⁾ Since 1994 this customer has sent [...] 1 of its parcels via DPAG, see [...] letter of 4 October 2000 and DPAG letter of 14 July 2000.

- in another cooperation contract concluded on 3 August 1984, a second large customer [...] undertook to send via DPAG ⁽³⁴⁾ at least all items up to 10 kg, with the exception of bulky parcels within the meaning of Section 25(3) of the Postal Services Regulations ⁽³⁵⁾ which were dispatched from its main depot and which were suitable for parcel and packet mail. On 13 February 1987 this obligation was extended to include all parcels up to 20 kg, with the exception of bulky parcels within the meaning of Section 25(3) of the Postal Services Regulation. In exchange for undertaking in future to send via DPAG not only all non-bulky parcels up to 10 kg, but those up to 20 kg, the customer receives with retroactive effect to 1 October 1986, a DEM 0,20 higher price discount per item ⁽³⁶⁾. That clause remained in force until 1 July 1995,

- in a cooperation contract concluded on 16 April 1987, a third large customer [...] undertook to send via DPAG all non-bulky items up to 20 kg which were dispatched from its main depot ⁽³⁷⁾. This arrangement remained in force until 1 July 1995,

- in an additional agreement concluded on 25 June 1995 the special price charged to a cooperation partner [...] for the conveyance of parcels is made dependent on the achievement of an annual volume of some [...] million consignments, in which the volume distributed by the competitor [...] has been included. In the succeeding year, then, the special price will be allowed only if the customer transfers to DPAG the volume it sent via a named competitor the year before. In the succeeding year the customer actually sent [...] million parcels via DPAG ⁽³⁸⁾. The agreement entered into force on 1 July 1995, and remained in force until the customer in question was taken over by another of DPAG's large customers [...] in 1996,

- since November 1997 DPAG has concluded new cooperation agreements with the four largest mail-order customers [...], 1 November 1997, [...] 4 March 1998, [...] 22 July 1998 and [...], 28 September 1998); these agreements cover the entire volume of these customers and of their subsidiaries. Subsidiaries are sometimes included in the agreement itself (in the contract of 22 July 1998, for example), and sometimes in a separate agreement (such as the supplementary agreement of 23 August 1998 to the contract of 1 November 1997). As a result of the consolidation that has taken place in mail order, these four large customers are the main buyers of mail-order parcel services. The standard-form agreements all include the following clauses: 1. clause 1 states that the contract is to apply to all of the customer's freight parcels ⁽³⁹⁾, 2. in clause 2.2 DPAG undertakes to convey the freight parcels within the scope of the contract for payment subject to the discounts laid down in the set of agreements; 3. in clause 2.3, the customer undertakes 'in return', for the duration of the contract, 'to have its own and its subsidiaries' freight parcels conveyed to its customers exclusively by DPAG'; and 4. in clause 6.3, DPAG undertakes to allow the customer what is called a 'volume bonus'. This bonus is graduated according to the outgoing volume. The volume that qualifies is the volume of outgoing postal parcels sent by the customer, provided it reaches and exceeds an individually agreed annual target,

- on 28 September 1998 DPAG concluded an agreement with a large mail-order customer [...] in respect of the conveyance of heavy Infopost ⁽⁴⁰⁾. The customer undertook to send all of its heavy Infopost (catalogues), and at least [...] million items a year, via DPAG. 'In return' DPAG was to charge a reduced price (DEM [...] net) per item of heavy Infopost sent on or after 1 December 1998,

⁽³⁴⁾ Section 25(3) of the Postal Services Regulations (*Postordnung*) of 16 May 1963, as last amended by the 11th amendment of the Postal Services Regulations; 10 August 1988 (published in BGBl.I.S. 1573, Amtsbl. S. 1613), states that a parcel is a 'bulky' parcel if it is 1. longer than 120 cm, broader than 60 cm, or deeper than 60 cm; and 2. requires special handling (that is to say that it cannot be stacked or placed on a conveyor belt, or contains live animals).

⁽³⁵⁾ Some [...] of [...] parcels are sent via the [...] main depot, see [...] letter of 26 September 2000. Altogether all parcels dispatched by [...] from [...] are sent via DPAG, see DPAG letter of 14 July 2000.

⁽³⁶⁾ DPAG (Nuremberg Regional Postal Directorate) letter of 17 February 1987 to [...].

⁽³⁷⁾ This customer sent [...] of its parcels via DPAG: see [...] letter of 4. October 2000 and DPAG letter of 14 July 2000.

⁽³⁸⁾ Annex to DPAG letters of 7 July 2000 and 14 July 2000.

⁽³⁹⁾ In general the contracts applied to all parcels suitable for handling by machine, within the maximum dimensions laid down in the Postal Services Regulations: 120 cm long, 60 cm deep and maximum weight 315 kg; see clause 3.1.2 of each of the cooperation agreements.

⁽⁴⁰⁾ *Infopost Schwer* is DPAG's description for catalogues weighing more than 1 000 g. Since 1993 *Infopost Schwer* has formed part of the infrastructure of *Sparte Frachtpost*.

- on 2 November 1998 DPAG concluded an agreement on the conveyance of Infopost (commercial consignments weighing more than 50 g) with a second large customer [...]. The customer undertook to send at least [...] million Infopost items via DPAG every year. Provided the firm met this obligation, DPAG would allow it a discount of [...] %. It emerges from Annex 4 to the agreement that the minimum annual volume of [...] million items is exactly [...] % of the total volume sent by the customer and its associated companies. If the customer exceeds the minimum volume of [...] million, a graduated rebate is granted, which rises to [...] % if a volume of [...] million (= 100 % of requirements) is reached. On the other hand, Annex 4 to the agreement states that the customer is to receive the [...] discount even if its volume falls, provided that the volume sent via DPAG continues to amount to [...] % of the total volume sent by the customer and its associated companies. This clause was in force until June 1999,
 - on 26 March 1999 and 3 January 2000 DPAG concluded agreements with two large customers [...] and [...] on cooperation in respect of heavy Infopost. The customers undertook to send at least [...] % of all their heavy Infopost via DP. As proof of volume the customers would allow DPAG access to their internal records. In return DPAG would allow the customers a rebate on all of the items sent via DP within the scope of the contract: this was to be a linear rebate varying from [...] % (at [...] % of requirements) to [...] % (at 100 % of requirements). One large customer [...] received an advance payment of DEM [...] million: against the rebate payments which were expected to fall due later. In June 2000 DPAG terminated the contracts of 26 March 1999 and 3 January 2000; it did so by means of a termination contract under which the parties agreed to put an end to the cooperation between them in respect of heavy Infopost with immediate effect.
- (24) Immediately after receiving the supplementary Statement of Objections of 4 October 2000 DPAG announced in a press release of 19 October that by way of precaution it was terminating all the agreements on rebates referred to by the Commission in the supplementary Statement of Objections. DPAG also announced that in future it would operate a system of prior vetting of contracts for mail-order parcel services, to ensure that they did not include any clauses that conflicted with the requirements of competition law. DPAG confirmed this at the hearing on 9 November 2000.

II. LEGAL ASSESSMENT

A. APPLICABILITY OF ARTICLE 82 OF THE EC TREATY

- (25) DPAG is an enterprise which offers services for remuneration on markets in a number of postal services. It is therefore an 'undertaking' within the meaning of Article 82 of the EC Treaty. This is so irrespective of the way in which it is organised, and regardless of whether it is governed by public or private law ⁽⁴¹⁾.

B. RELEVANT PRODUCT AND GEOGRAPHIC MARKET

- (26) By reason of their characteristics, costs and uses, mail-order parcel services form one relevant product market. As mentioned previously, mail-order parcels are not processed through the postal counter system but are collected by DPAG directly at the customers' premises. Furthermore, DPAG offers special prices to mail-order customers, who do not use the postal counter system for their parcel and catalogue deliveries. This distinguishes mail-order parcel services from over-the-counter parcels, which are processed against payment of a standard tariff through the postal counters.
- (27) A distinction has to be drawn between mail-order parcels for domestic delivery and similar parcels for delivery abroad. Domestic parcels are carried entirely by DPAG's own infrastructure. There is no cooperation with providers of the same service in other Member States, so there are no interfaces. The present case concerns only parcels for domestic delivery by DPAG.

⁽⁴¹⁾ Case C-41/90 *Höfner and Elser v. Macoton*, [1991] ECR I-1979. at paragraph 21.

- (28) Mail-order firms expect nationwide delivery of parcels up to 31,5 kg and catalogues over 1 kg (heavy Infopost) or over 50 g (Infopost) to a large number of private addressees scattered throughout the country⁽⁴²⁾. As a rule mail-order parcels weigh on average up to 2 kg; the maximum weight is 31,5 kg. Mail-order parcels are almost always in the category of so-called 'non-bulky' parcels⁽⁴³⁾. These are parcels which, because of their maximum dimensions of 120 cm × 60 cm × 60 cm and 31 kg maximum weight, are 'machine-handleable', i.e. they can be stacked and lend themselves during sorting to being processed on a conveyor belt.
- (29) Although they share the infrastructure at the sorting and transport stages, final delivery to private addressees makes much greater use of vehicles and postal delivery staff than do B-to-B services. In the case of mail-order services the dispersed addressee structure produces a very low 'stop factor' (i.e. number of parcels delivered per delivery vehicle stop), one parcel per stop being the rule. In the case of parcel services between business customers, i.e. B-to-B services, the stop factor is much higher, as here several parcels are normally delivered whenever the delivery vehicle stops⁽⁴⁴⁾. In addition, in this particular case the German market in mail-order parcel services is characterised by a price structure determined solely by the pricing policy of DPAG. The price level is not determined by the offer by different competitors who bid against one another, but solely by DPAG's pricing policy. This becomes clear as soon as one compares the prices and costs of mail-order parcel services at agreed special rates with those for B-to-B delivery. Throughout the period from 1990 to 1999, the costs per item for the collection, transport and delivery of a mail-order parcel were substantially higher than the costs per item for collection, transport and delivery of a B-to-B parcel. But DPAG's revenue per item was substantially higher on B-to-B services than it was on the mail-order parcel services for which special rates were agreed. DPAG's price structure distinguishes mail order parcel services from all other commercial parcel services.
- (30) The relevant geographic market in mail-order parcel services is Germany. All the services provided by DPAG on the relevant product market are provided in Germany, using the nation-wide parcel infrastructure. The Court of Justice has consistently held that the territory of a Member State may constitute a 'substantial part' of the common market within the meaning of Article 82 of the EC Treaty⁽⁴⁵⁾.

C. DOMINANT POSITION

- (31) DPAG is the only significant provider in Germany of nation-wide parcel and catalogue delivery services which meet the specific requirements of the mail-order trade⁽⁴⁶⁾. Neither UPS nor the other competitors providing B-to-B services, that is to say Deutscher Paket Dienst and German Parcel, provide mail-order parcel services to any appreciable extent. Until 1999 inclusive, Hermes Versand Service (Hermes) delivered parcels only for Otto Versand⁽⁴⁷⁾. Apart from Hermes, there is no alternative nation-wide infrastructure for the mail-order trade⁽⁴⁸⁾.

⁽⁴²⁾ In a survey conducted by *Verbraucher Analyse 92 West & Ost*, in the old *Länder* 29 % of people over 14 said that they had placed an order with a mail-order company in the last 12 months, while in the new *Länder*, it was more than 66 %. The *Versandhauskäufer* study four years later (1996) showed that in the old *Länder* 30,8 % of the total population (aged over 14) had placed mail orders in the previous year, while the proportion in the new *Länder* was 51,9 %. See page 33 of the Federal Association of German mail-order companies' information brochure *Versandhandel in Deutschland*.

⁽⁴³⁾ In 1999 bulky parcels accounted for less than 1 % of all mail-order parcels. Source: Ctcon. *Segmenterfolgsrechnung Sparte Frachtpost, Übersicht Mengen, Stand 13.4.2000*, submitted by DPAG by letter dated 20 April 2000.

⁽⁴⁴⁾ DPAG estimates its own stop factor, including mail-order parcel services, statistically at approximately [...], while that of competitors who concentrate mainly on 'company deliveries' in the B-to-B services field is put at somewhere between 1,8 and 2,1. See the Ctcon report. *Ergebnisbelastungen Frachtpost 1995*, p. 7, published on 13 May 1997, submitted by DPAG by letter of 15 May 1997.

⁽⁴⁵⁾ See most recently the judgment in Case T-228/97 *Irish Sugar* [1999] ECR II-2969. at paragraph 99.

⁽⁴⁶⁾ See *Sparte Frachtpost der Deutschen Post AG* (1996), op. cit., Annex 1, p. 10.

⁽⁴⁷⁾ This own delivery (some 140 million parcels in 1999) does not form part of the relevant market.

⁽⁴⁸⁾ DPAG does not deny being the only operator of a nationwide infrastructure in Germany.

- (32) Between 1995 and 1999 DPAG carried the following volumes for the mail-order trade: [...] million parcels in 1995, [...] million in 1996, [...] million in 1997, [...] million in 1998 and [...] million in 1999. Out of a total volume of somewhat more than [...] million parcels a year, these figures correspond to a volume share of the market for DPAG of more than 85 %. DPAG's dominant position is also apparent from the following:
- DPAG's volume share of the German mail-order parcel services market was stable throughout the period for which figures are available (1990 to 1999), at over 85 %⁽⁴⁹⁾. (The remaining 10 to 15 % of the volume was accounted for by regional operators: apart from DPAG no firm is active at national level),
 - the creation of an alternative infrastructure for the mail-order trade would require the setting-up of a system of interconnected inward and outward freight centres and associated delivery points. This represents, including in the opinion of the DPAG expert, considerable sunk costs⁽⁵⁰⁾. Investment in setting up a countrywide infrastructure allowing daily deliveries becomes profitable only when the 'critical mass' of some 100 million parcels a year is exceeded⁽⁵¹⁾ (see the example of Hermes Versand, mentioned above),
 - DPAG has the possibility of cross-subsidising activities subject to competition which are not available to competitors. Since at least [...] its earnings from the reserved letter-post area consistently exceed the stand-alone costs of the reserved services as a whole (see Table 1⁽⁵²⁾). The reserved area is therefore a likely source of cross-subsidisation⁽⁵³⁾. This situation is a lasting one in view of the exclusivity granted by statute for letter mail conveyance. At least until the end of 2002, the legal monopoly will result in competitors being excluded from most of the conveyance of letters up to 200 g.

D. ABUSE OF DOMINANT POSITION

Fidelity rebates

- (33) As was held in *Hoffmann-La Roche*⁽⁵⁴⁾, an undertaking which is in a dominant position on a market may not conclude an agreement with a customer whereby that customer promises to obtain all or most of its requirements of a product exclusively from the dominant undertaking⁽⁵⁵⁾. In *Hoffmann-La Roche*, the Court of Justice drew the following distinction between 'fidelity rebates' and 'quantity rebates':
- the quantity rebate is linked exclusively to the volume of purchases from the producer concerned. It is calculated on the basis of quantities fixed objectively and applicable to all possible purchasers,
 - the fidelity rebate is linked, not to a specific quantity, but to the customer's requirements or a large proportion thereof. The reduction is granted 'in return' for the exclusivity in satisfying the demand⁽⁵⁶⁾,

⁽⁴⁹⁾ See *Sparte Frachtpost der Deutschen Post AG* (1996), op. cit., Annex 1, p. 10, and p. 17 of the Federal Association of German mail-order companies' information brochure *Versandhandel in Deutschland*, according to which DPAG carries 92 % of mail-order parcels in Germany.

⁽⁵⁰⁾ See the report *Eigenzustellung im Versandhandel als Alternative zur Zusammenarbeit mit der Post*, 15 September 2000, submitted as Annex 8 to DPAG's letter of 6 October 2000, p. 7.

⁽⁵¹⁾ See the report *Eigenzustellung im Versandhandel als Alternative zur Zusammenarbeit mit der Post*, 15 September 2000, submitted as Annex 8 to DPAG's letter of 6 October 2000, p. 5: 'Countrywide, daily delivery is scarcely feasible in Germany under 100 million parcels a year'.

⁽⁵²⁾ The stand-alone test is used by economists to determine the source of cross-subsidisation. In the present case the reserved area is a guaranteed source of income exceeding stand-alone costs.

⁽⁵³⁾ The occurrence of cross-subsidies requires that there is a product or group of products whose revenue exceeds their stand-alone costs. On a medium-term basis, cross-subsidy rests on the basis that this product or group of products is of stable nature. In order to be stable, this source of revenues must be protected either by economic or institutional barriers to entry. The reserved area for letter mail conveyance is an institutional barrier to entry.

⁽⁵⁴⁾ Case 85/76 [1979] ECR 461.

⁽⁵⁵⁾ *Hoffmann-La Roche*, at paragraph 89.

⁽⁵⁶⁾ *Hoffmann-La Roche*, at paragraphs 95 and 96.

- even where the fidelity rebate is linked to a specific quantity, it is given on the basis, not of that quantity, but of the assumption that the quantity represents an estimate of each customer's presumed capacity of absorption, the rebate being linked, not to the largest possible quantity, but to the largest possible percentage of the requirements⁽⁵⁷⁾.
- (34) The arrangements agreed by DPAG since 1974 in the parcel delivery field and contained in the standard-form contracts described above are fidelity rebates within the meaning of the judgment in *Hoffmann-La Roche*:
- the cooperation contracts of 19 December 1974, 3 August 1984, 13 February 1987 and 16 April 1987 contained provisions whereby a firm is obliged to entrust all non-bulky parcels weighing up to 10 or 20 kg to DPAG. As stated above, the expression 'non-bulky' parcel basically corresponds to a mail-order parcel⁽⁵⁸⁾. The contracts thus contained a clause which obliges the customer to purchase all parcel services up to 10 or 20 kg exclusively from DPAG. This calculation method, based as it is solely on the customer's requirements, corresponds to the calculation method described by the Court of Justice in paragraphs 94 to 96 of its judgment in *Hoffmann-La Roche*,
- the cooperation contract of 25 June 1995 contained a provision whereby the special price stipulated therein is dependent on the customer transferring the following year to DPAG the quantity it dispatched the previous year via a competitor in addition to the quantity already dispatched via DPAG. The contract's wording referred, not to the quantity posted, which was estimated only roughly at [...] million, but to an increase in the percentage of the customer's requirements to be dispatched in future via DPAG. This calculation method, based as it is, solely on the customer's requirements, corresponds to the calculation method described by the Court of Justice in paragraphs 94 to 97 of its judgment in *Hoffmann-La Roche*,
- the four new cooperation contracts concluded since November 1997 contain a provision which is linked, not to a specific quantity, but exclusively to the requirements of the customer concerned, and which grants the discount 'in return' for the exclusive purchase of services from DPAG. This calculation method, linked exclusively to overall requirements, corresponds to the contracts with 'uniform' rebates described by the Court of Justice in paragraphs 94 to 96 of its judgment in *Hoffmann-La Roche*⁽⁵⁹⁾,
- the contract of 28 September 1998 made the reduced price per item dependent on the transfer of the entire volume of heavy Infopost parcels. The rebate thus depends on a calculation method which is linked within the meaning of paragraphs 94 to 96 of the *Hoffmann-la-Roche* judgment to the customer's requirements,
- the contract of 2 November 1998 made the price reduction of [...] % dependent on the customer entrusting at least [...] % of its Infopost parcels to DPAG. Although the contract's reference to a volume of [...] million parcels at first sight is an element which appears to be of quantitative nature, an examination of Annex 4 to this contract reveals that this quantity corresponds to exactly [...] % of this customer's annual requirements in the reference year 1997. In addition, the fact that the customer received the rebate of [...] %, even if his yearly parcel volume fell short of the [...] million pieces as long as [...] % of its annual demand was delivered through DPAG, further militates in favour of a system where the percentage of demand and not its absolute volume is relevant. Finally, the amount of the rebate increased in accordance with the percentage of requirements which are shipped through DPAG. This method of calculating rebates corresponds to the method which the Court of Justice described in *Hoffmann-La Roche* (paragraphs 97 to 100) as contracts which provide for rebates at progressive rates. The price reduction increases according to the percentage of the customer's estimated requirements that is covered in the course of a year,

⁽⁵⁷⁾ *Hoffmann-La-Roche*, at paragraph 98, in which the Court describes the linkage to an estimated annual requirement and the giving of a rebate which increases in line with the extent to which that requirement is met as a 'specially worked-out form of fidelity rebate'.

⁽⁵⁸⁾ Bulky parcels (see the above commentary on Section 25(3) of the Postal Services Regulations) are used for items of clothing or such things as furniture and kitchen fittings. As a rule they weigh over 20 kg and quantity-wise they play a negligible role. (In 1999 bulky parcels accounted for 0,06 % of the total volume of mail-order parcels. Source: Ctcon, *Segmentserfolgsrechnung Sparte Frachtpost, Übersicht Mengen, Stand 13.4.2000*, submitted by DPAG by letter of 20 April 2000).

⁽⁵⁹⁾ The 'volume bonus' agreed in addition to the fidelity obligation has no other binding effect beyond the existing obligation to send all requirements by DPAG.

- the cooperation contracts of 26 March 1999 and 3 January 2000 made the rebate dependent on the customer entrusting at least [...] % of all heavy Infopost items to DPAG. The higher the proportion that the customer sends via DPAG, the greater the price reduction. This corresponds to the method which the Court of Justice described in *Hoffmann-la Roche* (paragraphs 97 to 100) as contracts which provide for rebates at progressive rates. In addition, the cooperation contract of 26 March 1999 contains a provision concerning advance payment of DEM [...] million rebate against payments which were expected to fall due only later. This advance payment was made on 30 March 1999, only three days after the contract was concluded and before the remainder of the contract took effect on 1 June 1999, without DPAG having provided any service or the beneficiary having to provide DPAG with any economically valuable service in return.

Predatory pricing

- (35) Predatory pricing occurs where a dominant firm sells a service below cost with the intention of eliminating competitors or deterring entry, enabling it to further increase its market power. Such unjustifiably low prices infringe Article 82 of the EC Treaty. According to the case-law of the European Court of Justice, pricing below average variable costs must be regarded as abusive⁽⁶⁰⁾. This principle was established in *AKZO*, where the Court defined average variable costs as 'costs which vary depending on the quantities produced'⁽⁶¹⁾. In determining which costs vary depending on the quantities produced, the division between common fixed costs and costs attributable to a specific service set forth earlier must be borne in mind in DPAG's favour. Given the public universal service obligation, only the additional costs of providing a particular service vary with volume produced.
- (36) On the basis of relationship between the costs of maintaining capacity and the incremental costs of providing a particular service, the following may be said about DPAG's activities other than its over-the-counter business: In the period 1990 to 1995 DPAG's revenue from mail-order parcels was below the incremental costs of providing this specific service (see table 3). This means that in the period 1990 to 1995 every sale by DPAG in the mail-order parcel services business represented a loss which comprises all the capacity-maintenance costs and at least part of the additional costs of providing the service. In such circumstances, every additional sale not only entailed the loss of at least part of these additional costs, but made no contribution towards covering the carrier's capacity-maintenance costs. In the medium term, such a pricing policy is not in the carrier's own economic interest. This being so, DPAG had no economic interest in offering such a service in the medium term. DPAG could increase its overall result by either raising prices to cover the additional costs of providing the service or — where there is no demand for this service at a higher price — to discontinue providing the service, because revenue gained from its provision is below the additional costs incurred in providing it. However, DPAG, by remaining in this market without any foreseeable improvement in revenue restricted the activities of competitors which are in a position to offer this service at a price that covers their costs.

Effects on competition

- (37) Contrary to what DPAG maintains, all of the disputed fidelity rebates are likely to have an effect on the opportunities that other suppliers of mail-order parcel services have to compete. Successful entry into the mail-order parcel services market requires a certain critical mass of activity (some 100

⁽⁶⁰⁾ Case C-62/86 *AKZO v Commission* [1991] ECR I-3359 and Case T-65/89 *BPB Industries and British Cypsum* [1993] ECR II-389.

⁽⁶¹⁾ Paragraph 71 of the judgment.

million parcels or catalogues) and hence the parcel volumes of at least two cooperation partners in this field. By granting fidelity rebates to its biggest partners, DPAG has deliberately prevented competitors from reaching the 'critical mass' of some 100 million in annual turnover. This fidelity rebating policy was, in precisely the period in which DPAG failed to cover its service-specific additional costs (1990 to 1995), a decisive factor in ensuring that the 'tying effect' of the fidelity rebates for mail-order parcel services maintained an inefficient supply structure:

- in that economic resources were wasted in such a way that the dominant supplier does not cover the incremental costs of providing a specific service and thus created a permanent need for 'cross-subsidisation' from the reserved area,
- in that economically efficient alternatives that would cover costs without such: 'subsidisation' were hindered,
- in that, as a result, scarce resources beyond what is strictly necessary were used to provide mail-order parcel services ⁽⁶²⁾ and
- in that customers in the reserved area were forced to finance unnecessary wastage of scarce resources.

(38) The fidelity rebates agreed between DPAG and four of its partners since November 1997 demonstrably had the same effect as the exclusive purchase obligations. The parcel volumes actually delivered by DPAG as part of the cooperation arrangement made up almost [...] % of each customer's requirements in all the years for which the Commission has figures ⁽⁶³⁾. The fidelity rebate policy has also hindered competition from the mail-order trade itself. Alternative delivery services, even if they initially serve to cover their own parcel or catalogue delivery requirements, might subsequently develop into competing infrastructures ⁽⁶⁴⁾. Once an infrastructure reaches the critical mass, it can become a comprehensive, complete alternative to DPAG ⁽⁶⁵⁾. The agreements on fidelity rebates deterred mail-order traders from setting up alternative delivery structures as long as this might conflict with their duty of fidelity and thus jeopardise the special price. This prevented the development of potential competition from alternative infrastructures.

(39) The systematic agreeing of fidelity rebates with cooperation partners leads, according to the case-law of the European courts, inevitably to the conclusion that DPAG is seeking to tie customers to it and hence is preventing or eliminating competition ⁽⁶⁶⁾. It is settled European case-law that rebate arrangements which are linked to meeting a percentage of customer requirements have, solely by reason of the method by which they are calculated, an anti-competitive tying effect. Customers who

⁽⁶²⁾ See William J. Baumol and J. Gregory Sidak, *Toward competition in Local telephony*, page 66: '... the result will be that more resources than the minimum necessary will be expended in bringing [product] X to consumers, which clearly violates economic efficiency.'

⁽⁶³⁾ See the overview of turnover, sales and net revenue per item achieved between 1996 and 1999 with the eight biggest mail-order customers, submitted by DPAG on 14 July 2000.

⁽⁶⁴⁾ This may be illustrated by the example, cited by DPAG, of Otto-Versand. Hermes Versand Service, a subsidiary of Otto-Versand active in the parcel delivery sector, is now, with 141,6 million parcels delivered in 2000 (the firm's own data), the sixth largest courier, express mail and parcels operator in Germany (turnover in 1999: EUR 337 million). This example shows that alternative facilities created originally for the mail-order trade's own use may, once they have started to deliver a certain volume of items, develop into a competitor of DPAG which, the better to exploit its capacity, will also convey parcels for third parties.

⁽⁶⁵⁾ In 2000 Hermes Versand Service opened, according to its own data, its 3 000th 'PaketShop'. These parcel acceptance points have been installed as 'shops within a shop' in other commercial premises such as newsagents, tobacconists, copy shops, off licences and dry-cleaners. Hermes Versand thus provides a comprehensive service to the mail-order trade, including the carriage of items returned by customers.

⁽⁶⁶⁾ See the judgment of the Court of First Instance in Case T-228/97 *Irish Sugar* [1999] ECR II-2969, at paragraph 213; Hoffmann-La Roche, at paragraph 90; and the judgment of the Court of Justice in Case 322/81 *Michelin*, [1983] ECR, 3461, at paragraph 85.

have entered into such a rebate agreement will generally be inclined to have their parcels distributed exclusively by the company giving that rebate. Rebate arrangements linked to a percentage of customer requirements, moreover, owing to the method by which they are calculated, have an obstructive effect that is not linked to anything actually performed. This can be seen by the fact that competitors are compelled to offer discounts to offset the loss which customers suffer if they have a smaller percentage of their parcels distributed by DPAG and hence fall into a lower rebate bracket.

- (40) Again according to the case-law of the European courts, the concept of abuse is 'an objective one' and, accordingly, the conduct of an undertaking in a dominant position, may be regarded as abusive within the meaning of Article 82 of the EC Treaty even in the absence of any fault⁽⁶⁷⁾. DPAG cannot therefore argue that during its conversion from a State-run administrative body to a private enterprise, its officials misjudged in excusable ignorance the particular responsibility of a dominant firm.
- (41) Nor can DPAG argue in this case that the agreements on fidelity rebates were forced on it by the large customers themselves because of their volume of business. As was held in *Hoffmann-La Roche*, an undertaking which is in a dominant position on a market must not tie purchasers by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking, even if it does so at their request⁽⁶⁸⁾. Lastly, DPAG cannot argue that neither the customer nor DP itself regarded the fidelity rebate agreements at issue as having any binding effect. The facts show that, in keeping with their contractual obligations, large mail-order customer satisfied all, or a large percentage, of their parcel requirements via DPAG.

E. EFFECT ON TRADE BETWEEN MEMBER STATES

- (42) The policy of giving fidelity rebates, between 1990 through 1995 reinforced by prices below the additional costs of providing specific mail-order parcel services, affected trade between Member States because the tying effect of fidelity rebates prevented the German mail order companies from seeking suppliers in other Member States. In the case at issue, it has proved impossible for parcel service providers from other Member States to gain a significant foothold on the mail-order parcel services market in Germany. The German market for such parcel services was thereby sealed off from competitors from the other Member States. DPAG's rebating and pricing policies have thus had a negative impact on trade between Member States to an extent which is both considerable and contrary to the common interest in a functioning single market.

F. ARTICLE 86(2) OF THE EC TREATY

- (43) DPAG does not rely on the restriction in Article 86(2) in order to justify its rebate policy in the area of mail-order parcel services at agreed special rates. Nor has it been able to explain how terminating the fidelity rebates agreed with its cooperation partners and increasing its price to at least cover the incremental cost of providing mail-order parcel services would prevent it from complying with its duty to perform a service of general economic interest. On the contrary, revenue above incremental costs is, on DPAG's own admission, the best means of contributing to cover the costs of the infrastructure which must be made available as reserve capacity owing to the public service obligation⁽⁶⁹⁾. Sales below this threshold make no such contribution, however, and therefore detract from fulfilment of the public service obligation.

⁽⁶⁷⁾ Judgment of the Court of First Instance in Case T-65/89 *BPB Industries and British Gypsum* [1993] ECR II 389, at paragraph 70.

⁽⁶⁸⁾ *Hoffmann-La Roche*, at paragraph 89.

⁽⁶⁹⁾ DPAG letter of 9 March 2000, pp. 5 to 7.

- (44) Furthermore, no state measure seems to be involved such as might require DPAG to offer to conclude contracts for non-over-the-counter parcel services at agreed special prices which do not as much as cover the incremental costs generated by those services. DPAG's submission and the Commission's investigation do not identify a single state measure obliging DPAG to offer such prices when agreeing special rates for the mail-order trade. The instruments cited by DPAG, such as the Telecommunications and Postal Services Regulation Act (*Gesetz zur Reglementierung der Telekommunikation und des Postwesens*), contain general prescriptions only, and are silent about the specific price level to be applied in individual cases ⁽⁷⁰⁾. Indirect indications on the level of prices could only be derived from Section 37 of the 1989 Act establishing the Post Office (*Postverfassungsgesetz*). Under this Act, DPAG must normally cover the full costs of its individual services and make a reasonable profit ⁽⁷¹⁾. This target goes beyond the covering of service-specific costs required here ⁽⁷²⁾.
- (45) At all events the Commission finds that fidelity rebates, sometimes combined with below service-specific-cost prices, affect the development of trade to an extent contrary to the interests of the Community. As stated above, this conduct completely seals off the German mail-order parcel services market. This walling-off of a national market affects the development of trade to an extent highly inimical to the Community's interests.

G. ARTICLE 3 OF REGULATION No 17

- (46) Even if there are no grounds for believing that DPAG still applies fidelity rebates in the mail order business, the Commission must ensure with certainty that DPAG has genuinely and permanently terminated its fidelity rebate policy and that it will also refrain from agreeing such rebates in future ⁽⁷³⁾.
- (47) With respect to prices below the additional costs of providing mail order services in the period from 1990 through 1995 the Commission will not seek to impose a fine, because the relevant measure of cost that a 'multi-product' or 'multi-service' postal operator benefiting from a reserved area has to meet in competitive activities has not been clarified previously. In addition, a fine is not appropriate in view of the fact that, as soon as it was confronted in the Statement of Objections of 7 August 2000 and in the ensuing proceedings with the economic principles on the relevant measure of cost to be covered, DPAG undertook to provide full transparency on the financial relationship between the reserved area and the parcel services subject to competition.
- (48) Although there is no evidence that DPAG's mail-order parcel services are currently priced below the incremental cost of providing them, the Commission still considers it necessary — for the reasons set out below — to adopt a decision in this respect ⁽⁷⁴⁾:

— this Commission Decision establishes that prices below the incremental costs of providing specific services outside the statutory over-the-counter services constitute a breach of Article 82 of the EC Treaty. Contrary to its position with respect to fidelity rebates, DPAG has not acknowledged that prices below the additional costs of providing a service infringes Article 82 of the Treaty,

⁽⁷⁰⁾ Pursuant to Section 2 of the Act, the Act's purpose is to 'ensure equality of opportunity between rural areas and built-up areas in postal services having regard to tariff unity in respect of monopoly and public service tasks.'

⁽⁷¹⁾ In the official explanatory memorandum the Federal Government explains the purpose of this provision as follows: 'Paragraph 2 contains the important principle, applicable, *inter alia*, to the level of charges, that the individual services should as a rule earn enough to cover the full costs and generate a reasonable profit. This is not always possible. In the case of universal services, for example, market conditions may, owing to infrastructure constraints, exceptionally allow only part of the costs to be covered. In that event, at least the variable costs should be covered'. (German Parliament, lower house, 11th legislative period, circular 11/2854).

⁽⁷²⁾ Section 6(4) of the Order on the protection of postal customers (*Post-Kundenschutzverordnung*), cited by DPAG in its letters of 6 June 2000 (pp. 4 to 6) and of 6 October 2000 (pp. 7 and 16) refers only to payments for monopoly services and does not apply to non-reserved parcel services. This provision also requires prices to be set in proper accordance with cost levels and structure.

⁽⁷³⁾ See Case T-62/98 *Volkswagen AG*, judgment of 6 July 2000, paragraph 199, not yet reported.

⁽⁷⁴⁾ See Case 7/82 *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)* [1983] ECR 483.

— the Commission takes the view that a formal decision on this matter clarifies its position, and thus deters from such conduct not only DPAG but also any other undertakings that might be implementing or contemplating similar practices. Likewise, it is in the interest of other potential competitors to provide the legal certainty that follows from a Commission Decision of this kind.

H. ARTICLE 15 OF REGULATION No 17

- (49) Under Article 15 of Regulation No 17, infringements of Article 82 of the EC Treaty may be punishable by a fine of up to EUR 1 million or up to 10 % of turnover in the preceding business year, whichever is the higher. The duration, permanence and considerable extent of the fidelity rebates agreed by DPAG for mail-order parcel services lead to the conclusion that the infringement was committed intentionally in fixing the amount of the fine, the Commission must have regard to the gravity and duration of the infringement.

Gravity of the infringements

- (50) A fidelity rebate policy pursued by a dominant undertaking in the market in which it is dominant constitutes a serious infringement⁽⁷⁵⁾. Fidelity rebates given by an undertaking in a dominant position have already been condemned by the Community courts on a number of occasions. In the present case these abuses were committed with the object and effect of excluding private competitors of DPAG from the German parcel services market and of preventing the emergence of alternative delivery structures within the mail-order trade ('own-account distribution')⁽⁷⁶⁾. DPAG's rebate and pricing policy has had a powerful negative impact on competition in mail-order parcel services. Despite the economic advantages that would have arisen from the operation of cost-efficient and cost-covering alternative delivery structures, DPAG has managed to maintain a stable market share of more than [...] % on the German market for mail-order parcel services and to prevent the development of any more cost-efficient alternative infrastructure. Given these circumstances, the amount for the gravity of the infringement is set at EUR 12 million, reflecting the serious nature, the scale and the impact of the infringement.

Duration of the infringements

- (51) The infringements were repeated and committed systematically. Altogether they lasted from 1974 until 2000, the infringement was intensified (as described at recital 23) in the period directly after November 1997 through October 2000. In accordance with the guidelines on the methods of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and of Article 65(5) of the ECSC Treaty, the amount fixed for the gravity of an infringement can be increased by a percentage of up to 10 % per year of the infringement. For the period between November 1997 and October 2000, the Commission considers that an increase of 30 % is appropriate. For the period from 1974 through 1997 the Commission considers that an increase of the amount arrived at for gravity by 70 % is appropriate. This gives a basic fine of EUR 24 million.

Aggravating and mitigating circumstances

- (52) There are no aggravating or attenuating circumstances. As a general rule the Commission can consider the fact that an undertaking, after having received a statement of objections, informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations as a mitigating circumstance. However, it does not appear appropriate to apply this rule in the present case. This is because in the present case the relevant contracts, which contain the agreement or fidelity rebates, are the factual basis upon which the Commission concludes that DPAG granted such rebates. Under these circumstances, the fact that DPAG did not challenge the very existence of these contracts in the hearing of 9 November 2000 cannot be considered as a mitigating circumstance,

⁽⁷⁵⁾ See the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17, (OJ C 9, 14. 1.1998, point A).

⁽⁷⁶⁾ On the part played by cost-efficient alternative delivery infrastructures as a source of competition desirable for the economy as a whole, see above at recitals 37 and 38.

HAS ADOPTED THIS DECISION:

Article 1

1. From 1974 to 2000, Deutsche Post AG (DPAG) infringed Article 82 of the EC Treaty by granting a special price to customers for mail-order parcel services only in exchange for requiring the customer to send via Deutsche Post AG its entire requirements or a high percentage of those requirements of non-bulky parcels weighing up to 20 kg or 31,5 kg as the case might be or of catalogues weighing over 1 kg (heavy Infopost).
2. From 1990 to 1995, DPAG infringed Article 82 of the EC Treaty by supplying mail-order parcel services at prices below the additional costs of providing those services.

Article 2

1. DPAG AG shall immediately bring to an end the infringements referred to in Article 1(1) and shall refrain in future from repeating any act or conduct described in Article 1(a).
2. At the end of each accounting year of its new commercial parcel services subsidiary (Newco), DPAG shall submit to the Commission a statement of the costs and revenue of Newco. In addition DPAG shall each year submit an itemised statement of the transfer prices paid by Newco for all goods or services procured from DPAG. This obligation shall begin with Newco's first accounting year, and shall end with Newco's third accounting year.

DPAG shall submit to the Commission any agreements providing for rebates which Newco concludes with its six largest mail-order customers. This obligation shall begin with Newco's first accounting year, and shall end with Newco's third accounting year.

Article 3

1. For the infringement referred to in Article 1(1), a fine of EUR 24 million is hereby imposed on Deutsche Post AG.
2. The fine shall be paid in euro, within three months of the date of notification of this Decision, into bank account No 642-0029000-95 (IBAN BE 76 6420 0290 0095, code SWIFT: BBVABEBB) of the European Commission with Banco Bilbao Vizcaya Argentaria BBVA Avenue des Arts 43, B-1040 Brussels.

After the expiry of that period interest shall be automatically payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first working day of the month in which this Decision is adopted, plus 3,5 percentage points, resulting in an overall interest rate of 8.28 %.

Article 4

This Decision is addressed to:

Deutsche Post AG
Heinrich-von-Stephan-Straße 1
D-53175 Bonn.

Article 5

This Decision shall be enforceable pursuant to Article 256 of the EC Treaty.

Done at Brussels, 20 March 2001.

For the Commission

Mario MONTI

Member of the Commission
