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**COMMISSION DECISION**

**of [...] 2004**

**on the German postal legislation relating to mail preparation services, in particular to the access of self-provision intermediaries and consolidators to the public postal network and related special tariffs**

**(BdKEP – Restrictions on mail preparation)**

(Only the German text is authentic)

(00/00/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 86(3) thereof,

Having given the German authorities and Deutsche Post AG the opportunity, by letters of 28 November 2003, 4 December 2003, 24 May 2004, 25 May 2004 and 13 July 2004 and by meetings held on 24 May 2004 and 30 June 2004 respectively, to make known their views on the objections raised by the Commission with regard to German postal legislation relating to mail preparation services, in particular to the access of self-provision intermediaries and consolidators to the public postal network and related special tariffs,

Whereas:

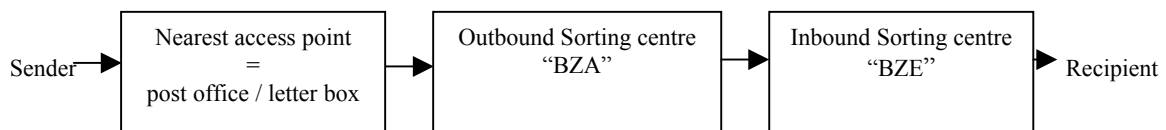
**1. THE FACTS**

**1.1 The State measure in question**

1. Article 51 paragraph 1 of the German Postal Law (“PostG”) grants an exclusive licence to Deutsche Post AG (“DPAG”) for the commercial transport of postal items weighing less than 100 grams and costing less than three times the basic tariff. This provision does not apply to senders who wish to take care of the transport of their reserved mail items themselves, provided they do not do so on a commercial basis, acting for others. Transport is defined as the clearance, routing and delivery of postal items to the recipient (Article 4 no. 3 PostG).
2. By way of exception, Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 of the PostG authorises commercial providers to pick up reserved postal items on the sender’s behalf (“*im Auftrage des Absenders*”) and deliver them to the nearest access point of the DPAG network or to another access point within the same municipality.

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- Article 28 PostG paragraph 1 enables customers to feed mail items into the postal network at access points located downstream to the nearest access point. This downstream access gives rise to discounted postal tariffs, reflecting the costs avoided by DPAG as compared to the standard service covering the complete range of features offered for the clearance, transport sorting and delivery.
- Upon application of several DPAG clients, the German Telecommunications and Postal Regulatory Authority (“RegTP”) laid first down the conditions under which customers can hand over mail items and earn discounts at one of DPAG’s 83 sorting centres across Germany.<sup>1</sup> The decisions distinguish between the outbound sorting centre (Briefzentrum Abgang, “BZA”), the centre located next to the sender of a given mail item, and the inbound sorting centre (Briefzentrum Eingang, “BZE”), the centre located next to the recipient.



- The discounted rates vary depending on whether mail items are handed over at the outbound sorting centre or the inbound sorting centre. In case of delivery at the outbound centre, the discount depends on the number of items per category (e.g. standard letters):

<b>Discount</b>	<b>Number of items per category</b>
5%	5,000 – 10,000
8%	10,001 – 15,000
12%	15,001 – 20,000
16%	20,001 – 25,000
20%	> 25,000

At the inbound centre, the discount is fixed 23% starting from 500 mail items per category.

- The above discounts are granted only if the mail items are prepared in compliance with certain quality requirements, e.g. pre-sorted according to the first two digits of the postal code, franked, machine-readable and conveyed in bar-coded, DPAG-specific containers.

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<sup>1</sup> Decision BK 5b-00/076 dated 15 September 2000, decisions BK5a-00/110 (Stuttgarter Lebensversicherung) and BK5a-00/114 (Württembergische Gemeindeversicherung) dated 16 October 2000 and decision BK 5a-01/004 dated 12 March 2001, hereinafter referred to as the “RegTP Decisions”.

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7. In the framework of the general price regulation of postal tariffs, RegTP slightly lowered the applicable discounts as of 1<sup>st</sup> January 2004 by a decision dated 24 September 2003.<sup>2</sup>

At the outbound sorting centre, the new discounts are as follows:

<b>Discount</b>	<b>Number of items per category</b>
3%	5,000 – 10,000
6%	10,001 – 15,000
10%	15,001 – 20,000
14%	20,001 – 25,000
18%	> 25,000

At the inbound centre, the discount is 21% starting from 500 mail items per category.

8. Outside the reserved area, the above discounts apply to both senders and their intermediaries. Within the reserved area, however, the RegTP Decisions limit the access to DPAG's outbound and inbound sorting centres (i.e. BZA and BZE centres) and the applicable discounts to mail items handed over by the senders themselves (self-delivery). "Commercial transporters" of mail items are excluded from the access to the sorting centres and the related discounts. According to RegTP's interpretation of Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 of PostG, the transport from the nearest access point or from another access point located in the same municipality to the outbound sorting centre falls within the reserved area.
9. RegTP points out, however, that Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 PostG allows commercial transporters to earn a discount on behalf of one specific sender if they (i) hand over mail items to DPAG at the nearest access point of the DPAG network or to another access point within the same municipality; (ii) do so on behalf and in the name of one sender; and (iii) the sender has entered into an access and discount agreement with DPAG.<sup>3</sup>
10. In practice, however, DPAG's local access points (other than the sorting centres) are not equipped to process bulk mail. Large amounts of mail are typically delivered by a lorry which backs against a specific platform to hand over the items packed in containers. Post offices do not have such platforms at their disposal. Consequently, sorting centres are the only access points which are prepared to receive and process large amounts of postal items, the handing over of which gives rise to favourable (discounted) postal charges. Commercial firms are therefore prevented from earning discounts even at the local level.
11. To conclude, under the current legal regime, commercial mail preparation firms, whether they act as an intermediary for self-delivery solely on behalf of one

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<sup>2</sup> Decision BK 5b-03/101.

<sup>3</sup> RegTP Annual Report 2001, page 91.

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originator or as a consolidator on behalf of several originators, are prevented from earning any quantity-based discounts for handing over postal items at outbound or inbound sorting centres and, given the prevailing logistic situation at DPAG's local access points, from earning quantity based discounts for downstream network access altogether.

### 1.2 The application of Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 in practice

#### 1.2.1 Consolidators: physical access to sorting centres but no discounts

12. Since bulk mail cannot physically be delivered at local access points, and despite Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5, DPAG does in practice accept mail items handed over by commercial mail preparation firms at sorting centres. However, no discounts are granted if the postal service providers hand over bundled and pre-sorted mail items stemming from several originators (consolidated mail).

#### 1.2.2 Self-provision intermediaries: physical access to sorting centres and discounts on behalf of the sender but no access and discount agreements

13. In contrast, DPAG grants self-provision intermediaries the applicable discounts even within the reserved area, provided that (i) the firm acts solely on behalf of one sender and (ii) that the sender has concluded a discount and access agreement with DPAG. In such a case, the firm must prove that the mail items originate from one single sender and produce a so-called committal list ("*Einlieferungsliste*") which contains information on the addressees, in particular the first two digits of the postal code.
14. However, on the basis of the RegTP Decisions, DPAG refuses to enter into access and discount agreements ("*Teilleistungsverträge*") with self-provision intermediaries. DPAG interprets the wording of Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 ("on the sender's behalf") in such a way that access and discount agreements, offering the discounted tariffs set out above, should only be concluded with the bulk senders themselves, not with their intermediaries. Consequently, the mail preparation firm has to pay to the full postal tariff, the discount is reimbursed directly to the sender itself.<sup>4</sup>

#### 1.2.3 Conclusion

15. As a result, the actual practice is somewhat more lenient than the legal regime itself. Commercial intermediaries of self-provision and consolidators are thereby subject to the following restrictions:
  - (1) **Intermediaries of self-provision** are prevented from entering into access and discount agreements with DPAG. They are thus obliged to disclose the identity and the sending patterns of their clients in order to benefit from the applicable discounts. Moreover, the discounts are paid directly to their clients, thereby preventing the intermediaries from deciding autonomously

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<sup>4</sup> Information provided by DPAG in its letters dated 25 May 2004 and 13 July 2004 and during a meeting held on 30 June 2004.

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whether they pass on the discount in its totality or only part of it, keeping a certain margin for themselves.

- (2) **Consolidators** are barred from the benefit of any quantity-based downstream access discount altogether.

### 1.3 The services concerned

16. The services in question are mail preparation services in respect of mail items sent from the territory of Germany. These services are made up of a series of operations which, in the process of handling postal items, take place between the determination of the content by the originator of the mail and the acceptance of the mail item by DPAG in the context of its reserved services.<sup>5</sup> Mail preparation may cover one or several of the following operations: making up items (printing, enveloping, labelling, franking), collecting, placing them in mailbags or containers complying with certain standards, bundling (consolidating) and sorting them to a greater or lesser degree by destination and delivering them to access points of DPAG.
17. Mail items were traditionally prepared and routed to suitable access points by the senders themselves. With the advent of liberalisation, however, large senders increasingly outsource these operations to intermediaries which prepare and pre-sort mail before handing it over to the postal operator for final distribution. In doing so, large customers no longer see mail, distribution and logistic services as isolated elements of support but part of an integrated supply-chain offering. Driven by workflow, Enterprise Resource Planning (ERP) Systems and outsourcing such companies seek state-of-the-art processes, improved cash flow and process simplification. A key driver for outsourcing is cost reduction, including savings on the cost of postage itself.
18. Accordingly, larger mail preparation service providers aim at offering the whole range of preparation services from making up postal items to their routing to a DPAG access point. Smaller mail preparation firms offer a more or less extensive and sophisticated range of services targeted at certain market segments: there are bundling firms which perform exclusively mail sorting and preparation tasks; integrators which offer a more or less extensive range of services in the direct marketing field from market surveys to the management of mailings etc.
19. In addition, in Germany there exists a variety of regional mail conveyance firms, many of them former dedicated delivery departments of regional newspapers (so-called "*Briefdienste*"), which provide both mail preparation and full conveyance services.<sup>6</sup> They collect mail items at their clients' premises, bundle and pre-sort them according to destination. Mail items addressed to the same postal code region or to a neighbouring postal code region are typically not fed into the public postal

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<sup>5</sup> The Commission has first delimited a service market for mail preparation services concerning mail items sent from the territory of France in its decision COMP/37.133 (Snelpd / France) dated 23 October 2001 on the lack of exhaustive and independent scrutiny of the scales of charges and technical conditions applied by La Poste to mail preparation firms for access to its reserved services (at paragraph 54 *et seq.*), OJ L 120, 7.5.2002, p. 19.

<sup>6</sup> E.g. Darmstädter Echo, Sächsische Zeitung, Mainpost.

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network but distributed by the conveyance firm itself. Despite DPAG's exclusive licence, mail conveyance firms are authorised to do so if their distribution constitutes a so-called added-value service under Article 51 paragraph 1 2<sup>nd</sup> sentence no. 4, e.g. same-day distribution, overnight distribution (collection after 5 pm of day 1, distribution before 12 am of day 2), date-specific distribution or item tracking.<sup>7</sup> Mail items addressed to the neighbouring postal code region are typically conveyed to a cooperating mail conveyance firm with a distribution network in the region concerned. Only the remainder of the collected mail items is handed over to DPAG for further conveyance.

20. On the basis of the information made available to the Commission, the 2001 market potential of the German market for mail preparation services is estimated to amount to a range between 5 and €17 billion.<sup>8</sup> DPAG offers labelling, franking and other preparation services and acts as a default service provider for sorting and further conveyance if the sender (or its intermediary) chooses to deposit the item at one of the nearest access points. Like in the case of other incumbent universal service providers, the move up in the mails' industry value chain is perceived as a tool to maintain the loyalty of very large customers by responding to their integrated requirements.<sup>9</sup> Other players include smaller regional firms such as the above mentioned *Briefdienste* and regional letter-shops, with the exception of the Bertelsmann group which offers mail preparation services for some large customers, in some cases also in combination with call-centre services.
21. Economically speaking, performance of mail preparation activities gives rise to two types of remuneration: (i) direct remuneration by the sender for services involving the making up of mail items, the supply of address lists, the routing to a public postal access point, etc.; and (ii) an additional financial advantage through access to favourable (discounted) postal charges. Discounted postal charges are available (subject to certain quantity requirements) *inter alia* for franking, machine readability, pre-sorting, bar code-labelling and (currently for senders and their self-provision intermediaries only) handing over postal items directly at outbound or inbound sorting centres.

### 1.3 The undertakings concerned

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<sup>7</sup> Companies providing value-added service hold a so-called D-licence. At the end of 2003, 1,200 companies held D-licences, and approximately 740 of them were actively providing services. In 2003, DPAG's competitors had sales of €180 million in the area of value-added services and €9 million by transporting postal items to one of DPAG's access points (RegTP annual report 2003, page 85 *et seq.*).

<sup>8</sup> Unlike in the US, where the preparation of 60% of the total mail volume is outsourced, in Europe outsourcing of mail preparation is a recent phenomenon. Reliable market data are thus difficult to obtain. The study "Mehrwertdienstleistungen in der postalischen Wertschöpfungskette" commissioned by BvDP (Bundesverband Deutscher Postdienstleister e.V.) estimates the potential at approximately €4.8 million whilst the information submitted by the complainant, confirmed by Manner-Romberg Unternehmensberatung, a consultancy specialised in the postal sector, points to a higher potential of approximately €17 billion.

<sup>9</sup> In its Annual Report 2003, page 34, DPAG describes the aim of the Mail Division as follows: "We offer our customers end-to-end solutions tailored to their needs, and develop separate offerings for each industry. We consider it our responsibility to help our customers achieve their goals. In short: We no longer merely transport letters, but support our customers' business success."

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### 1.3.1 DPAG

22. DPAG is the public operator appointed as universal postal service provider in Germany. As such, it acts as the default service provider for clearance, sorting, consolidation and further conveyance from the access point which the sender chooses to hand over its mail items to the public postal network.
23. DPAG also offers a whole range of upstream mail preparation services from printing, enveloping, labelling (“ePost”), franking (“Frankierservice”) and home collection (“Hin+Weg”) up to the operation of whole mail rooms. The different modules of mail preparation can be combined and tailored to the individual sender’s needs.

### 1.3.2 The complainant

24. The complainant, the Bundesverband der Kurier-Express-Postdienste e.V. (“BdKEP”), is a German association of courier and express postal services, including the whole range of mail preparation services. BdKEP has currently approximately 180 members, which are mainly medium-sized companies but also include German subsidiaries of foreign incumbents such as the Dutch TPG Post.

## 1.4 The proceedings

25. The complaint was submitted by BdKEP on 6 May 2003 alleging that Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 of the PostG infringes Article 86 of the EC Treaty. Moreover, the complainant suggests that this provision goes beyond what is permissible under Article 7 of the Directive on common rules for the development of the internal market of Community postal services and the improvement of quality of service (“Postal Directive”)<sup>10</sup>. Referring to the wording of the Postal Directive and the Commission decision in the *SNELPD / France* case<sup>11</sup>, the complainant argues that a postal monopoly may only cover the public postal network and not activities that occur before the mail enters that network at the reception point. According to the complainant, there is no obligation to deliver mail to the nearest reception point of DPAG. The complainant calls on the Commission to require the German government to interpret “transport” in Article 51 PostG in such a way that mail preparation and consolidation services do not fall within the reserved area.
26. By letter dated 2 and 3 October 2003 respectively, the complaint was forwarded to DPAG, RegTP and the German government for comments.
27. The German government replied on 28 November 2003, stating that it intended to amend the PostG in order to bring it in line with European rules later in 2004 in the context of general overhaul of the German Telecommunications Act (TKG).

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<sup>10</sup> Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15/14 of 21.1.1998 as amended by Directive 2002/39 of 10 June 2002, OJ L 176/21 of 5.7.2002.

<sup>11</sup> See footnote 5.



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28. DPAG replied on 4 December 2003, claiming that the conditions to act on a basis of Article 86(3) in conjunction with Article 82 EC Treaty were not fulfilled and that Article 51 of the PostG did not go beyond the reserved area laid down in Article 7 of the Postal Directive.
29. By letter dated 8 January 2004 the Commission asked the German government to specify the timetable of the preparation and entry into force of the amended PostG as well as any intended interim and publicity measures.
30. During a telephone conference on 13 February 2004 between the Commission (DG COMP) and a representative of the German ministry for economic affairs, the representative indicated that the government could not change its administrative practice as long as the current version of the PostG was in force.
31. By a letter of formal notice of 1<sup>st</sup> April 2004, the Commission requested the German government to submit observations on the situation on the German market for mail preparation services. The Commission pointed out that Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 PostG prevents commercial mail preparation service providers from consolidating correspondence from senders located in different municipalities, depositing the mail items at any of DPAG's central access points and from receiving a discount for the work-sharing performed. It considered that, first, the incriminated provision induced DPAG to extend its dominant position on the basic postal services market to the market for mail preparation services by putting commercial firms, for which quantity-based discounts are much more difficult to obtain, at a competitive disadvantage as compared to DPAG. Second, the Commission took the view that the contemplated provision of the PostG induced DPAG to discriminate between major senders, who are free to hand over mail items to DPAG at any access point they think suits best, and commercial consolidators. On that basis, the Commission drew to the preliminary conclusion that the German government infringed Article 86 in conjunction with Article 82 of the Treaty by continuing to apply the incriminated provision. The letter of formal notice also indicated that, if the Commission's interpretation proved correct, the Commission might adopt a decision under Article 86(3) of the Treaty. A copy of the letter of formal notice was sent to DPAG on 29 April 2004.
32. The German government replied on 24 May 2004. It reiterated its intention to amend the PostG in the context of general overhaul of the German Telecommunications Act (TKG) without delay. In the meantime, the incriminated provision would be applied "*as hitherto*" by DPAG in such a way that "*the acceptance and delivery of mail items is not restricted*".
33. The same day, representatives of the German government also had the opportunity to express their views during a meeting with the Commission. They stated that the new version of the PostG would realistically only be adopted after the summer 2005.
34. DPAG submitted its comments by letter of 25 May 2004, in which it disputes a number of the points made in the letter of formal notice. As a starting point, it demonstrated that the incriminated state measure and its application in practice do not treat self-provision through intermediaries and consolidation alike. DPAG explained that it grants intermediaries acting solely on behalf of one sender full access to sorting centres and all applicable discounts even though it would not be

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obliged to do so under Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 PostG. Referring to the recent *ASEMPRE* judgment<sup>12</sup>, DPAG conceded that the transport of mail items solely on behalf of one originator is clearly excluded from the scope of Article 7 of the Postal Directive. The German government would therefore amend the incriminated PostG provision accordingly while DPAG would pursue its open access policy towards self-provision intermediaries even in the absence of such amendment.

35. In contrast, DPAG opposed the Commission's entire line of reasoning as far as consolidation is concerned. First, DPAG raised a series of objections against the application by the Commission of Article 86(1) read in conjunction with Article 82. DPAG submitted, in particular, that the statutory extension of a dominant position only infringes Article 86(1) read in conjunction with Article 82 of the Treaty where (i) the dominant undertaking which is granted an exclusive or special right is manifestly not in a position to satisfy the demand prevailing on the neighbouring market; and (ii) where the effective pursuit of such activities by private companies is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited. It also asserted that the incriminated state measure does not infringe Article 86 read in conjunction with Article 82 since DPAG does not enjoy any exclusive rights on the market for mail preparation services.
36. DPAG's second line of reasoning related to the justification of the incriminated provision under Article 86(2). DPAG argued that the transport of consolidated mail items originating from several senders to one of DPAG's sorting centres falls within the reserved area under Article 7 of the Postal Directive. As a consequence, the barring of commercial firms from this sector of activity and from the discounts available for work-sharing cannot infringe Article 86 in conjunction with Article 82 EC-Treaty. DPAG also claimed that the granting of discounts to consolidators would endanger its financial equilibrium and thereby the provision of the universal service. A copy of DPAG's letter was sent to BdKEP on 16 June 2004 and to the German government on 29 July 2004.
37. During a meeting with the Commission on 30 June 2004, DPAG was granted the opportunity to present its point of view in more detail. DPAG stressed once again that self-provision intermediaries are in practice not limited to delivering mail items to the nearest access point or to another access point located in the same municipality; DPAG had always accepted mail items delivered at sorting centres by intermediaries acting on behalf of solely one sender and granted them the applicable discounts. Only consolidators were excluded from the discounts (but not from the physical access to the sorting centres) because their activity falls into the reserved area, both under German law and the Postal Directive. Detailed minutes of the meeting were sent to the German government and to DPAG on 29 July 2004.

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<sup>12</sup> Judgment of 11 March 2004 in Case C-240/02 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia (Asempre) and Asociación Nacional de Empresas de Externalización y Gestión de Envíos y Pequeña Paquetería v Entidad Pública Empresarial Correos y Telégrafos and Administración General del Estado*, not yet published in the ECR.

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38. By a letter dated 13 July 2004, DPAG reiterated a number of the arguments which it had put forward during the 30 June meeting. A copy of this letter was sent to the German government on 20 August 2004.
39. On 18 July 2004, BdKEP responded to DPAG's previous comments. BdKEP argued, in particular, that under the current legal regime many mail preparation firms, which are barred from quantity-based discounts, are in practice under the obligation to provide free services to DPAG. Indeed, such firms have to bundle mail items of several customers and pre-sort the consolidated mail in order to determine which items can be distributed without recourse to DPAG and which items must be handed over to DPAG for further conveyance. The consolidated mail items are delivered to DPAG's sorting centres but do not lead to any discounts even though the firms' performance spares DPAG several steps in the processing chain, i.e. the collection, the transport to the sorting centre, the franking and the pre-sorting. A copy of BdKEP's letter was sent to the German government and to DPAG on 5 August 2004.
40. By a letter dated 24 September 2004, the German government informed the Commission that it would still this autumn issue a draft bill in order to amend Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 PostG so as to enable self-provision intermediaries to deliver postal items at any access point of the public postal network. However, the government made also clear that it was not its intention to extend this possibility to consolidators.
41. On 29 September 2004, DPAG submitted two series of comments. The first series related to substance and largely reiterated the arguments already put forward in the 25 May 2004 letter and during the meeting on 30 June 2004. The second series related to a request for preliminary ruling on the interpretation of Article 12 5<sup>th</sup> indent of the Postal Directive issued by the Administrative Court of Cologne. DPAG claimed, in particular, that the fact that the ECJ was to rule on this question, which DPAG considers to be related with the case at hand, prevents the Commission to take a decision before the ECJ has rendered its ruling.

## 2. THE COMMISSION'S ASSESSMENT

### 2.1 Applicability of Article 86(1) of the Treaty

42. Article 86 (1) applies to 'public undertakings' and those undertakings to which Member States grant special or exclusive rights. A public undertaking is defined as "*any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.*"<sup>13</sup> DPAG, a public limited company incorporated under German law, provides the universal postal service in Germany under an exclusive licence comprising mail and parcels (international and domestic) and over-the-counter services. Approximately 63% of DPAG's shares are directly or indirectly held by the Federal Republic of Germany (of which 43%

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<sup>13</sup> Article 2 of the Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings ("Transparency Directive"), OJ L 195, 29.7.1980, p.35.

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indirectly through Kreditanstalt für Wiederaufbau), the remaining 37% are held by private investors (free float). DPAG is thus a public undertaking within the meaning of Article 86(1) of the EC Treaty.

43. DPAG also enjoys exclusive rights within the meaning of Article 86 (1). Pursuant to Article 51 paragraph 1 of the PostG, DPAG has the postal monopoly which covers the “transport on a commercial basis” of “mail items and addressed catalogues weighing up to 100 grams and the price of which is less than three times the public charge for an item of correspondence in the first weight step of the same category.”
44. Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 PostG and the implementing RegTP Decisions relate to DPAG since they prevent commercial mail preparation firms from earning any quantity-based discounts when handing over postal items at outbound or inbound sorting centres.

Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 and the RegTP Decisions thus constitute state measures within the meaning of Article 86(1) of the EC Treaty.

## 2.2 The relevant service markets

### 2.2.1 The mail preparation or ‘upstream’ services market

45. The market to which the state measures in question relate is the market for mail preparation services in respect of mail items sent from the territory of Germany.<sup>14</sup> These services are made up of a series of operations which, in the process of handling postal items, take place between the determination of the content by the originator of the mail and the acceptance of mail by DPAG in the context of its reserved services. Mail preparation may cover one or several of the following operations: making up items (printing, enveloping, labelling, franking), collecting, placing them in mailbags or containers complying with certain standards, bundling and sorting them to a greater or lesser degree by destination and delivering them to access points of DPAG. These services are a market which is situated upstream of the services reserved for DPAG.<sup>15</sup>
46. Mail preparation services can be performed solely on behalf of one originator (hereinafter referred to as “self-provision” or “self-delivery”) or on behalf of several originators, the items of which are bundled and sorted together (hereinafter referred to as “consolidation”). In practice, however, mail preparation firms tend to be relatively small and regional and work for a variety of clients in order to reach a critical mass of daily mail flow.
47. In its reply to the Commission’s letter of formal notice, DPAG argues that the proposed market definition is in contradiction with the principles laid down in the *SNELPD / France* decision.<sup>16</sup> According to DPAG, the decision distinguishes

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<sup>14</sup> As mentioned above, the Commission has first delimited a service market for mail preparation services concerning mail items sent from the territory of France in the *Snelpd / France* decision (at paragraph 54 *et seq.*).

<sup>15</sup> See above-mentioned decision *Snelpd / France*, at paragraph 54.

<sup>16</sup> See, in particular, DPAG’s letter dated 25 May 2004, page 13.

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between the preparation of mail on the one hand and “transport and distribution” on the other, the latter falling within the reserved basic postal services market.<sup>17</sup> DPAG also seems to suggest that from a demand point of view one would have to distinguish between “typical activities of a mail preparation firm”<sup>18</sup> and the transport of the prepared mail items.

48. According to the information made available to the Commission, the demand side regards the whole range of services including transport to the DPAG network as a continuum of interlinked tasks which are best procured from a single source. As mentioned above, large customers no longer see mail, distribution and logistic services as isolated elements of support but part of an integrated supply-chain offering. This is best demonstrated by some of DPAG’s own product brochures which stress the advantages of a seamless service ranging from printing to the delivery to the network access point.<sup>19</sup> Distinguishing between “typical” mail preparation services such as franking and the delivery to the network access point does therefore not correspond to the economic reality.
49. The Commission also takes the view that the proposed market definition fully complies with the principles laid down in the *SNELPD* decision. According to this decision, only the transport performed after the handing over of mail to La Poste falls under the statutory monopoly. To illustrate this fact, it is worthwhile to place the *SNELPD* / France quote invoked by DPAG in its context:

*“(58) This monopoly (i.e. the postal monopoly provided for in the French legislation) does not cover the preparation of mail prior to transport and distribution, i.e. the making up, collection and sorting of mail handed over to La Poste. Mail preparation services may therefore be provided by firms other than La Poste, although, in the vast majority of cases such provision presupposes access to the relevant services of the postal monopoly [...] (59) This basic postal services market, for which La Poste has a monopoly, must therefore be deemed, in the context of this Decision, to constitute a related market situated downstream of the market described.” (emphasis added)*

In contrast, the “*handing over*” or “*delivery*” of the prepared items to the offices of La Poste forms part of the range of mail preparation services:

*“[...] [T]he [mail preparation] activity involves making up items (printing, enveloping or plastic wrapping, labelling, addressing and franking),*

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<sup>17</sup> DPAG refers to paragraphs 58 and 59 of the *Snelpd* / France decision.

<sup>18</sup> Page 2 of DPAG’s letter dated 13 July 2004 and argument raised during the 30 June 2004 meeting.

<sup>19</sup> “Hier erreichen wir eine Prozessbeschleunigung, indem wir den Druck, die Kuvertierung sowie den Versand komplett für Sie übernehmen.“ (Brochure „Wir bringen Ihnen nicht nur die Post, sondern auch Entspannung in den Haushalt“ addressed to municipalities). „Sie senden die Daten Ihrer Briefsendungen elektronisch, zum Beispiel online via Internet oder ISDN, an unsere Produktionszentren. Dort werden Ihre Briefe ausgedruckt, gefalzt, kuvertiert, freigemacht und dem meist benachbarten Briefzentrum zur Zustellung übergeben.“ (Brochure „Geschäftskommunikation einfach online“, page 2.)

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*collecting, bundling and sorting them and delivering them to the offices of La Poste.*” (emphasis added)<sup>20</sup>

50. The Commission’s market definition is further corroborated by the definition of “*intermediary*” or mail preparation services in the Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services<sup>21</sup>. There an “*intermediary*” is defined as “*any economical operator who acts between the sender and the universal service provider, by clearing, routing (or “transporting” in the German version) and/or pre-sorting postal items, before channelling them into the public postal network of the same or another country*” (emphasis added).

2.2.2 *The basic postal services market or the market in ‘downstream services’, reserved for DPAG*

51. DPAG has the postal monopoly pursuant to Article 51 paragraph 1 of the PostG which covers the “transport on a commercial basis” of “mail items and addressed catalogues weighing up to 100 grams and the price of which is less than three times the public charge for an item of correspondence in the first weight step of the same category.” This basic postal services market constitutes a related market situated downstream of the services market described in the previous paragraph.

### 2.3 The relevant geographic market

52. The geographic scope of the markets concerned is Germany.

The fact that the monopoly granted to DPAG by Article 51 paragraph 1 of the PostG covers only the German territory makes the geographic dimension of the basic postal services market coincide with this territory.

A similar line of argument applies to the mail preparation services market. Even though mail preparation services can be provided cross-border, the specific restriction of Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 only applies to the German territory.<sup>22</sup> This regulatory constraint therefore leads to different objective conditions of competition in Germany as opposed to those in other Member States.<sup>23</sup>

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<sup>20</sup> Paragraph 2 of the Snelpd / France decision. Paragraph 5 is very similar.

<sup>21</sup> Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (98/C 39/02) (hereinafter referred to as “Commission Postal Notice”).

<sup>22</sup> Also in other large Member States, consolidators are not restricted by similar provisions: The UK for example, the consolidation of mail to be delivered by Royal Mail is explicitly permitted since 1<sup>st</sup> January 2003 and DPAG’s subsidiary Deutsche Post Global Mail (UK) Ltd. holds a licence to provide consolidation services (see Postcomm’s Annual Report 2001/2002, page 9). In France, a bill is in the process of officialising the La Poste’s current practice to grant consolidators downstream access and related discounts. The new Article L.2-1 of the French Law on Post and Telecommunications as proposed by the “Projet de loi relative à la regulation des activités postales” is modelled very closely after the wording of Article 12 5<sup>th</sup> indent of the Amended Postal Directive: “The universal service provider can conclude contracts with bulk mailers, consolidators of mail from different customers and other service providers holding a licence pursuant to Article L.3, which depart from the general conditions of the universal service, including special tariffs for services for businesses. The tariffs

## 2.4 Dominant Position

53. According to consistently confirmed case law, an undertaking holding a statutory monopoly on a substantial part of the common market is considered to occupy a dominant position within the meaning of Article 82 of the Treaty.<sup>24</sup> Germany is a substantial part of the common market<sup>25</sup> within which, as demonstrated earlier, DPAG has been granted an exclusive statutory licence to provide basic postal services.

## 2.5 Infringement of the competition rules

54. Article 86(1) of the Treaty lays down that, in the case of undertakings to which Member States grant special rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaty, in particular to those laid down by Articles 12 and 81 to 89.
55. In the letter of formal notice, the Commission stated that Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 PostG prevents commercial mail preparation service providers from depositing mail items at any of DPAG's central access points and from receiving a discount for the work-sharing performed and concluded that this restriction is in violation of Article 86(1) read in conjunction with Article 82. On the basis of the comments submitted by DPAG, it appears that the state measures in the case at hand and their application in practice do not treat self-provision through intermediaries and consolidation alike. The remainder of this section is designed to address DPAG's comments and will therefore examine these two cases separately.

### 2.5.1 Self-provision through intermediaries

56. As explained earlier, the current legal regime for self-provision intermediaries differs from its application in practice.

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shall take account of the avoided costs, as compared to the standard service covering the complete range of features offered. The universal service provider fixes the tariffs and conditions of these services in an objective and non-discriminatory manner. Upon request, these contracts are submitted to the *Autorité de régulation des communications électroniques et des postes* (regulatory authority).” (see bill adopted by the French Sénat on 28 January 2004).

<sup>23</sup> Regulatory constraints leading to different conditions of competition are one of the elements for defining geographic markets listed in the Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C/ 372/03), at paragraph 50.

<sup>24</sup> See, inter alia, judgment of 23 April 1991 in Case C-41/90 Höfner v Macrotron [1991] ECR I-1979, point 28; judgment of 18 July 1991 in Case C-260/89 ERT [1991] ECR, I-2925, point 31; judgment of 19 May 1993 in Case C-320/91 Criminal proceedings against Paul Corbeau [1993] ECR I-2538, point 9; judgment of 10 December 1991 in Case C-179/90 Mercati convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA [1991] ECR I-5889, point 14; judgment of 12 February 1998 in Case C-163/96 Criminal proceedings against Silvano Raso and others [1998] ECR, I-533, point 25.

<sup>25</sup> The territory of a Member State may form a substantial part of the common market: see e.g. judgment of 9 November 1983 in Case 322/81 NV Nederlandse Banden-Industrie-Michelin v. Commission [1983] ECR 3461, at point 28; judgment of 26 November 1998 in case C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and others [1998] ECR I-7791, point 36.

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### 2.5.1.1 The current legal regime

57. Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 PostG and the RegTP Decisions prevent self-provision intermediaries from handing over mail items at outbound and inbound sorting centres and earning quantity-based discounts at these centres. Given that DPAG's local access points, to which self-provision intermediaries are authorised to deliver mailings, are not equipped to process bulk mail, the regime prevents the intermediaries to earn quantity-based discounts for downstream network access altogether.
58. These state measures infringe Article 86(1) read in conjunction with Article 82 in two ways:

#### **Extension of a dominant position**

59. State measures which assist the undertaking enjoying exclusive rights to extend its market power into a neighbouring market, violating thereby the principle of equal opportunities between different economic operators, are prohibited in themselves by Article 86(1) read in conjunction with Article 82 of the Treaty. Such measures can consist e.g. in granting a dominant telephone operator, which also markets telephone equipment, the power to approve its competitors' telephone equipment<sup>26</sup> or in imposing specific financial burdens on new entrants which increase their costs of access as compared to those of the dominant undertaking<sup>27</sup>. In such circumstances, the dominant undertaking cannot avoid abusing its dominant position.
60. In the case at hand, Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 PostG induces DPAG to extend its market power into the market for mail preparation services. DPAG as the operator of the public postal network is able to procure its clients the benefit of the downstream access discounts. When providing mail preparation services to major senders, the processed items are delivered directly to a sorting centre if this triggers a discount. In that context, it is interesting to note that DPAG's ePost Classic brochure<sup>28</sup> invites clients to send their mail electronically to one of DPAG's production centres, and goes on to state: "*There your letters are printed, folded, enveloped, franked and delivered to the sorting centre, which is in most cases adjacent to the production centre.*" Another example is DPAG's "Hin+Weg" service. If major senders wish to produce their mailings themselves, DPAG offers to collect the items at the sender's premises and take them to an "access point" ("Hin+Weg"). Under Article 2 (2) the Hin+Weg general terms and conditions<sup>29</sup>, "access point" is defined as a post office ("Filiale, Agentur") or an outbound sorting centre ("Brief- oder Paketzentrum mit Abgangsbearbeitung").

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<sup>26</sup> Judgment of 13 December 1991 in Case C-18/88 GB-Inno-BM [1991] ECR I-5941, point 25.

<sup>27</sup> See the two Commission decisions concerning GSM radiotelephony services in Italy and Spain: 95/489/EC of 4 October 1995 and 97/181/EC of 18 December 1996.

<sup>28</sup> Page 3 of the brochure, available on DPAG's website at [http://www.deutschepost.de/download/broschueren/epost\\_classic.pdf](http://www.deutschepost.de/download/broschueren/epost_classic.pdf).

<sup>29</sup> Available on DPAG's website at [http://www.deutschepost.de/download/agb/AGB\\_Hin\\_Weg.pdf](http://www.deutschepost.de/download/agb/AGB_Hin_Weg.pdf).



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61. In contrast, as far as mail items within the reserved area are concerned, the incriminated state measures prevent self-provision intermediaries from earning any quantity-based discounts for downstream access on behalf of their clients. Indeed such intermediaries are limited to delivering their clients' mail items to the nearest access point of the DPAG network or to another access point within the same municipality. As explained previously (*supra* paragraph (10)), only outbound or inbound sorting centres are logistically equipped to process bulk mail.<sup>30</sup> Accordingly, one of the requirements laid down in the RegTP Decisions, mirrored in the access and discount agreements concluded by DPAG, is the handing over of the mail items at one of DPAG's 83 sorting centres.
62. The possibility to procure downstream access discounts is a key argument on the market for mail preparation. As mentioned above, the main motivation for outsourcing is cost reduction, including savings on the cost of postage itself. In that context, the Commission has received evidence that DPAG makes aggressive use of the availability of quantity-based discounts as a marketing tool to win back clients from mail preparation and full services conveyance competitors. A case was reported to the Commission where DPAG offered a regional tax office a 21% discount on the standard tariff for all mail items processed by DPAG. The discount (normally granted for the pre-sorted delivery of at least 500 mail items of the same category to the inbound sorting centre) was based on two fictitious assumptions: (i) In order to reach the quantity threshold, letters issued by all local tax authorities belonging to the tax region concerned were counted in by way of "virtual" consolidation; (ii) The tax authorities did not have to perform any pre-sorting, it was simply considered that their letters were already "pre-sorted" since the majority of letters issued by a local tax authority is addressed to recipients living in the same municipality.<sup>31</sup>
63. To conclude, the current legal regime bars self-provision intermediaries from any quantity-based discounts for downstream access. The possibility to procure clients downstream access discounts, i.e. savings on postage, is a key argument in the market for mail preparation services. The legal regime thus places commercial self-delivery service providers at a serious competitive disadvantage as compared to DPAG and thereby induces DPAG to extend its market power on the market for basic postal services into the market for mail preparation services.

### **Discrimination**

64. Moreover, as far as self-provision is concerned, the incriminated measures induce DPAG to apply dissimilar conditions to major senders on the one hand, who have access to outbound and inbound sorting centres and all applicable quantity-based discounts for downstream network access on the basis of access and discount

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<sup>30</sup> Besides the information provided by DPAG during the meeting on 30 June 2004, this logistical situation is also illustrated by DPAG's brochure on infopost mailings and catalogues which advises clients that only bulk mail up to 5,000 items (corresponding to 100 kg or 10 containers) can be handed over at normal access points (post offices), see page 23 of the "Infopost, Infobrief und Kataloge national" brochure, which is available at [http://www.deutschepost.de/download/broschueren/infopost\\_brief\\_042304.pdf](http://www.deutschepost.de/download/broschueren/infopost_brief_042304.pdf).

<sup>31</sup> Page 9 and 10 of BdKEP's letter dated 19 July 2004.

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agreements concluded with DPAG, and self-provision intermediaries acting on their behalf of the latter on the other hand, who do not have access to these advantages.

65. Such state-induced behaviour infringes Article 86(1) read in conjunction with Article 82, because it amounts to not treating like cases alike. Commercial self-provision firms act as mere intermediaries on behalf of the senders. However, both groups are not treated in the same way. Senders are free to hand over mail items to DPAG at any access point they think suits best. Conversely, commercial service providers are limited to depositing mail items collected at the sender's premises at the nearest access point or at another access point located within the same municipality.
66. This finding is corroborated by the fact that the Commission Postal Notice explicitly stipulates that postal operators should provide the universal service by affording non-discriminatory access to customers or intermediaries at appropriate public points of access, in accordance with the needs of those users. Access conditions including contracts (when offered) should be transparent, published in an appropriate manner and offered on a non-discriminatory basis.<sup>32</sup> It goes on to say that it should in particular be ensured that intermediaries, including operators from other Member States, can choose from amongst available access points to the public postal network.

### **DPAG's general objections against the application of Article 86 by the Commission**

67. In its replies to the complaint and to the letter of formal notice, DPAG submits a series of general objections relating to the application of Article 86 of the Treaty by the Commission. First, DPAG asserts that merely creating a dominant position by the grant of special or exclusive rights is not in itself incompatible with Articles 86 and 82 of the Treaty. On that basis, DPAG claims that the exclusive license granted to DPAG under Article 51 paragraph 1 1<sup>st</sup> sentence PostG does not as such infringe Article 86 of the Treaty.<sup>33</sup>
68. In that regard, it should be pointed out that the current proceedings do not challenge Article 51 paragraph 1 1<sup>st</sup> sentence PostG, i.e. the granting to DPAG of exclusive rights on the basic postal services market, but specific restrictions on the upstream market for mail preparation services under Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 PostG. The question whether merely creating a dominant position is itself incompatible with Articles 86 and 82 of the Treaty is therefore of no relevance for the case at hand.
69. DPAG also submits that the statutory extension of a dominant position only infringes Article 86(1) read in conjunction with Article 82 of the Treaty where (i) the dominant undertaking which is granted an exclusive or special right is manifestly not in a position to satisfy the demand prevailing on the neighbouring market; and (ii) where the effective pursuit of such activities by private companies is rendered impossible by the maintenance in force of a statutory provision under

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<sup>32</sup> Commission Postal Notice at point 8 (b) (vii).

<sup>33</sup> Page 31 of the study by Professor von Danwitz.

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which such activities are prohibited.<sup>34</sup> To that effect, DPAG refers to the ECJ judgments in the cases *Höfner and Elser*<sup>35</sup> and *Ambulanz Glöckner*.<sup>36</sup>

70. DPAG's reading of the Commission's powers under Article 82 in conjunction with Article 86(3) of the Treaty is too restrictive. First, not only the impossibility for private companies to operate on a market which is adjacent to the market on which the undertaking concerned is dominant is caught by Article 86 of the Treaty, but also the granting to the dominant undertaking of "*an obvious advantage over its competitors*" which is contrary to "*a system of undistorted competition, as laid down in the Treaty*".<sup>37</sup> The Commission has stated in the past that "*such equality of opportunity is particularly important for new entrants to a market in which a dominant operator on a related but separate market*" is active and already enjoys major advantages (in the case at hand the operation of a universal clearance and distribution network).<sup>38</sup> The distortion of chances incriminated under Article 86 can take many forms: in one case, the mere ability of the dominant undertaking to control aspects of its competitors' business on a downstream market where it was equally operating was considered infringing Article 86 and 82 of the Treaty<sup>39</sup>.
71. Second, the inability to satisfy demand on a reserved market is only one instance in which the granting of an exclusive right is found to inevitably lead the undertaking to abuse its position. Article 82 (b) defines as abusive the behaviour of undertakings which consists in "*limiting production, markets or technical development to the prejudice of consumers*". The fact that an activity is reserved to an entity which is not in a position to carry it out is necessarily going to lead to abuses of this type being committed. This is however only one of several possible abuses to which a dominant undertaking can be induced by the applicable national legislation.
72. DPAG goes on to say that as far as the postal sector is concerned, the Commission has only taken action on the basis of Article 86(3) where the extension of the reserved area to a neighbouring market led to an inability of the postal incumbent operator to satisfy demand.<sup>40</sup>
73. The fact that the Commission, as yet, has only had to decide postal sector cases where the incumbent operator was unable to satisfy demand on a neighbouring market does in no way limit its powers under Article 86(3) of the Treaty. The

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<sup>34</sup> Page 3 of the DPAG memorandum replying to the complaint, page 32 of the study by Professor von Danwitz, page 2 of DPAG's letter dated 13 July 2004.

<sup>35</sup> Judgment of 23 April 1991 in Case C-41/90 *Hoefner und Elser* [1991] ECR I-1979, paragraph 31.

<sup>36</sup> Judgment of 25 October 2001 in Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089, paragraph 39.

<sup>37</sup> Paragraph 25 of the above mentioned *GB-Inno-BM* judgment.

<sup>38</sup> See the GSM radiotelephony services in Italy mentioned above, paragraph 15.

<sup>39</sup> Judgment of 12 February 1998 in Case C-163/96 *Raso* [1992] ECR I-5833, paragraphs 28 and 29.

<sup>40</sup> To that effect, DPAG quotes the Commission Decisions 90/16/EEC of 20 December 1989 (OJ L 10 of 12.1.1990 page 47), 90/456/EEC of 1<sup>st</sup> August 1990 (OJ L 233 of 28.8.1990 page 19) and COMP/37.721 of 3 March 2001, *Consorzio Risposta+1/Italie*, OJ L 63, 3.3.2001, page 59.

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Commission is empowered to take action on the basis of Article 86(3) if and where the conditions of that Article as specified in the relevant Court case law are fulfilled.

74. Finally, DPAG asserts that the incriminated state measures do not infringe Article 86 read in conjunction with Article 82 since DPAG does not enjoy any exclusive rights on the market for mail preparation services.<sup>41</sup>
75. As explained earlier, the relevant question at hand is whether Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 PostG and the RegTP Decisions induce DPAG to extend its market power on the basic postal services market - where such power is undisputed - into the upstream market for mail preparation services. The Commission does not contend that DPAG holds any exclusive rights on the market for mail preparation services but intends to examine whether the incriminated measures grant it obvious advantages over its competitors. DPAG's assertion is therefore not relevant to the question at hand.

### 2.5.1.2 DPAG's practice

76. DPAG has informed the Commission that it does in practice accept mail items handed over by self-provision intermediaries at sorting centres if the sender has concluded a discount and access agreement with DPAG.<sup>42</sup> In such a case, the same discounts are granted as if the sender hands over the mail items itself. This information has been confirmed by the complainant.
77. DPAG also draws the Commission's attention to the fact that the German government has committed itself to clarify the incriminated provision and adapt it to DPAG's current practice. In DPAG's view, this intended clarification addresses the main concerns raised in the BdKEP complaint "at the latest upon its implementation".<sup>43</sup>
78. The Commission takes note of these explanations but cannot endorse the analysis. First, according to established case law, a Member State cannot rely on a mere (administrative) practice to demonstrate its compliance with Community law since practices can by their nature be modified and are not publicised widely enough.<sup>44</sup> An infringement of the competition rules is therefore only removed once the corrected national legislation has been adopted. Second, it depends on the compatibility of the current DPAG practice with the competition rules whether a mere adaptation of the legal regime to the practice will remove the concerns. This compatibility will therefore be examined below.

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<sup>41</sup> Page 14 of the DPAG memorandum replying to the letter of formal notice and page 32 of the study by Professor von Danwitz.

<sup>42</sup> Page 5 of DPAG's memorandum replying to the letter of formal notice, page 1 of DPAG's letter dated 13 July 2004 and information submitted during the meeting held on 30 June 2004.

<sup>43</sup> Page 5 of DPAG's memorandum.

<sup>44</sup> See e.g. judgment of 25 May 1982 in Case C-96/81 Commission v. Netherlands [1982] ECR 1791 and judgment of 15 December 1982 in Case 160/82 Commission v. Netherlands [1982] ECR 4637.

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79. DPAG admittedly accepts mail items handed over by commercial self-provision intermediaries at outbound or inbound sorting centres. However, on the basis of the RegTP decisions, DPAG does not enter into access and discount agreements with intermediaries. When handing over mail items, the intermediaries therefore have to disclose the identity of their client(s) and submit a so-called committal list (“*Einlieferungsliste*”) which contains information on the addressees, in particular the first two digits of the postal code. The access to this type of information constitutes an invaluable competitive advantage for DPAG. It allows DPAG to contact major clients and offer them its own mail preparation services on the basis of its knowledge of the client’s sending patterns.
80. To conclude, it would not be sufficient to adapt the legal regime applicable to self-provision intermediaries to the current practice in order to bring it in line with Community law. The corrected regime should ensure that self-provision intermediaries enjoy full control of their client relationships, in particular by enabling them to enter themselves into access and discount agreements with DPAG.<sup>45</sup>

### 2.5.2 Consolidation

81. The state measures in question prevent commercial mail preparation firms from obtaining any quantity-based discounts for downstream network access of consolidated reserved mail items. This infringes Article 86(1) read in conjunction with Article 82 in two ways.

#### 2.5.2.1 Extension of a dominant position

82. As explained above (*supra* paragraphs (19) and (43)), the majority of mail preparation firms services a multitude of medium-size senders the mail items of which are consolidated, pre-sorted and distributed within the same region to the extent to which such distribution is authorised under Article 51 paragraph 1 2<sup>nd</sup> sentence no. 4 PostG. The remainder of the (necessarily consolidated) mail items is handed over at a DPAG sorting centre even though the pre-sorting and downstream delivery does not give rise to any remuneration under the current legal regime.
83. The failure to qualify for quantity-based discounts through consolidation benefits directly to DPAG. Not only can DPAG charge the full postal tariff but it also avoids the costs of pre-sorting, franking and transporting the mail items from the nearest access point to the sorting centre. Since it would be more labour-intensive for the commercial mail preparation firms to de-consolidate the pre-sorted mail items and bring them back to the local post offices concerned, they are in practice obliged to provide a “free” service to DPAG. At the same time, they do not have the possibility to procure their clients savings on postage, which is, as explained previously, a key argument in the market for mail preparation services. In contrast, DPAG was at least in one case, by way of a broad interpretation of the current regime, prepared to

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<sup>45</sup> It might be useful to recall in that context that paragraph 8 (b) (vii) of the Commission Postal Notice stipulates that “*access conditions including contracts (when offered) should be [...] offered on a non-discriminatory basis.*” (emphasis added)

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allow for a “virtual” consolidation of its clients’ mail items in order to procure them savings on postage.<sup>46</sup>

84. In this context, DPAG clarifies that it is possible for a mail preparation firm to bundle the mail items of several of its customers in order to achieve synergies and cost benefits which flow from its own processing of more significant quantities as opposed to the processing of the mail items of each customer separately.<sup>47</sup> The Commission considers, however, that the possibility of bundling mail items and transporting them to a sorting centre is of little value if any remuneration for providing those services is excluded from the outset.
85. DPAG’s competitors are therefore operating under more onerous constraints than DPAG. To conclude, the state measures in question, by distorting the cost structure of the private mail preparation firms, assist DPAG in extending its dominant position on the market for basic postal services into the market for mail preparation services.

### 2.5.2.2 Discrimination

86. In the field of consolidation, the incriminated measures lead DPAG to discriminate between major senders on the one hand, who have access to outbound and inbound sorting centres and all applicable quantity-based discounts for downstream network access on the basis of access and discount agreement concluded with DPAG, and commercial mail preparation firms with comparable (consolidated) volumes of mail items on the other, who do not have access to any discounts for downstream access. Indirectly, the discrimination against mail preparation firms induces DPAG to discriminate between major senders who fulfil the requirement for quantity-based discounts on an individual basis and smaller business senders who do not meet these requirements on an individual basis but could collect and pre-sort comparable volumes of mail if they had access to consolidation.
87. Such state-induced behaviour infringes Article 86(1) read in conjunction with Article 82, because it amounts to not treating like cases alike. Major senders and commercial firms can hand over similar volumes of mail, pre-sorted and presented the same way and leading to the same savings in handling operations and efficiency gains for DPAG. The same reasoning applies to major senders as opposed to smaller business senders. The latter could reach exactly the same volumes and the same quality of preparation if they had the possibility to consolidate their items through a commercial mail preparation firm.
88. This finding is corroborated by the fact that the Commission Postal Notice explicitly stipulates that “*postal operators should provide the universal service by affording non-discriminatory access to customers or intermediaries at appropriate public points of access, in accordance with the needs of those users. Access conditions including contracts (when offered) should be transparent, published in an appropriate manner and offered on a non-discriminatory basis.*”<sup>48</sup> The Notice thus

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<sup>46</sup> See the example of the regional tax office mentioned above at paragraph (58).

<sup>47</sup> Page 2 of DPAG’s letter dated 13 July 2004.

<sup>48</sup> Commission Postal Notice at point 8 (b) (vii).

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clearly calls for equal treatment of intermediaries and customers and of different groups of customers. An “intermediary” is defined as “*any economical operator who acts between the sender and the universal service provider, by clearing, routing and/or pre-sorting postal items, before channelling them into the public postal network of the same or another country*” (emphasis added). This definition clearly encompasses intermediaries who consolidate mail items, since the consolidation takes place between the definition of the content by the sender and the channelling into the public postal network.

89. The Commission’s interpretation is also in line with the amended version of the Postal Directive.<sup>49</sup> Article 12 5<sup>th</sup> indent of the Amended Postal Directive states: “*Whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different customers, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions.*” (Emphasis added).
90. Recital 29 of the Amending Directive reads: “*The universal service providers normally provide services, for example to business customers, consolidators of mail for different customers and bulk mailers, enabling them to enter the mail stream at different points and under different conditions by comparison with the standard letters service. In doing this, the universal service providers should comply with the principles of transparency and non-discrimination, both as between different third parties and universal service providers supplying equivalent services.” (Emphasis added) This clearly demonstrates that consolidators of mail for different customers and business customers/bulk mailers and different groups of business customers are supposed to enjoy the same access conditions and associated tariffs.*
91. DPAG raises two types of objections against the Commission’s line of reasoning. The first type relates to the application of Article 82 (c) by the Commission, the second to the principle of non-discrimination laid down in the Amended Postal Directive. As regards Article 82 (c) of the Treaty (“*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*”), DPAG argues that neither commercial mail preparation firms nor major senders can be considered as “trading partners”. Indeed, according to DPAG, mail preparation firms only act as intermediaries on behalf of their respective clients and are therefore not contracting partners of DPAG. Senders are end consumers, who can also not be classified as “trading partners”. Moreover, DPAG asserts that applying dissimilar conditions to senders and commercial firms cannot place one of these groups at a “competitive disadvantage”, since there is no competitive relationship between the two groups, which is in DPAG’s view a prerequisite under Article 82 (c).
92. The Commission does not share the above analysis. First, there is no Commission or Court precedent – and DPAG does not quote any - to support DPAG’s view that “*trading partners*” should be construed in a narrow way as “contracting parties”. Mere business contacts between the dominant undertaking and its “*trading partners*” are generally considered to be sufficient. The question whether

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<sup>49</sup> Amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June, OJ L 176/21 of 5.7.2002 (hereinafter referred as “Amending Directive”). The version of the Postal Directive as amended by the Amending Directive is referred to as “Amended Postal Directive”.

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discrimination against end consumers is caught by Article 82<sup>50</sup> is of no relevance to the case at hand, since business customers, who use DPAG's services as an input for their products or services to end consumers, cannot be qualified as end consumers.

93. Second, DPAG's interpretation of the concept of the "*competitive disadvantage*" is too restrictive. Article 82 (c) requires that the dominant firm's trading parties be placed at a competitive disadvantage as a result of the discrimination. The wording covers three types of discrimination, the first two of them exclusionary and the last one exploitative: (i) the customer of the dominant firm is placed at a competitive disadvantage *vis-à-vis* the dominant firm itself; (ii) in relation to other customers of the dominant firm; or (iii) the customer suffers commercially in such a way that its ability to compete in whatever market is impaired. It is obvious that type (i) and (iii) do not require a competitive relationship between the two comparator groups.
94. It has already been demonstrated above (point 80 *et seq.*) that the automatic failure of mail preparation firms to qualify for quantity-based discounts through consolidation puts those firms at a competitive disadvantage *vis-à-vis* DPAG. DPAG's competitors do not have the possibility to procure their clients savings on postage whereas DPAG was at least in one case, by way of a broad interpretation of the current regime applicable to major senders, prepared to allow for a "virtual" consolidation of its clients' mail items in order to procure them savings on postage. The discrimination thus constitutes an exclusionary abuse of the first type mentioned in the precedent paragraph.
95. As to the exploitative type of abuse covered by Article 82 (c), numerous precedents demonstrate that both the Commission and the Courts apply a broad interpretation of this provision, condemning dominant undertakings for exploitative discrimination between customers who are not competing on the same market. This is especially true where the discrimination at stake is also prohibited by other principles of Community law (e.g. discrimination based on nationality or geographical market partitioning). In *Corsica Ferries*, the Court of Justice found that pilot tariffs had been set in such a way as, indirectly, to discriminate against certain ships on the basis of nationality.<sup>51</sup> In *GVL*, the Court held that a refusal by a dominant company to supply a category of customers, defined according to those customers' nationality or domicile, was contrary to Article 82.<sup>52</sup> In *United Brands*, UBC had a long-standing policy of supplying bananas to ripeners-distributors in the various Member States where it operated, at considerably varying price levels. The Court held that "a rigid partitioning of national markets was thus created at price levels, which were artificially different, placing certain distributors/ripeners at a competitive

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<sup>50</sup> It is interesting to note in that context that one of the German commentaries quoted by DPAG (Grabitz/Hilf, paragraph 167) has revised its views on the end consumer question in its latest edition and now asserts that Article 82 prevents dominant undertakings from discriminating against end consumers. The other commentary quoted by DPAG (Lange/Bunte) claims that, if discrimination against end consumers is not caught by Article 82 (c), it falls at least under the general abuse prohibition laid down by Article 82 paragraph 1.

<sup>51</sup> Judgment of 17 May 1994 in Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783, paragraph 45.

<sup>52</sup> Judgment of 2 March 1983 in Case C-7/82 *Gesellschaft zur Verwertung von Leistungsschutzrechten GmbH (GVL) v Commission* [1983] ECR 483, paragraph 56.



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disadvantage, since compared with what it should have been, competition had thereby been distorted.”<sup>53</sup> In *Tetra Pak II*, the Commission, upheld by the Court, condemned geographical price discrimination by a vertically integrated firm selling to customers in a variety of national markets.<sup>54</sup>

96. The same line of reasoning is applicable in the case at hand. As stated above, the Postal Directive causes Member States to prevent universal service providers from discriminating between business senders and consolidators of mail from different customers on the one hand side and between different groups of business customers on the other. The same discrimination can therefore also be condemned as an (exploitative) abuse under Article 82 (c).
97. Finally, it must be pointed out in that context that Article 82 (c) is just one example in a non-exhaustive list of abusive practices. In the *Tetra Pak II* case, *Tetra Pak* argued that the tied sales of cartons and filling machines were not caught by the wording of Article 82 (d) since there was a natural link between the two and tied sales were in accordance with commercial usage. The Court ruled, however, that “*the list of abusive practices set out in the second paragraph of Article [82] of the Treaty is not exhaustive.*” It concluded that even where tied sales of two products are not covered by the exact wording, “*such sales may still constitute abuse within the meaning of Article [82] unless they are objectively justified.*”<sup>55</sup> Consequently, in any event, DPAG’s arguments based on a tight reading of the wording of Article 82 (c) are not relevant.
98. In its reply to the Commission’s letter of formal notice<sup>56</sup>, DPAG also claims that the non-discrimination principle enshrined in Article 12 5<sup>th</sup> indent of the Amended Postal Directive is not applicable to the case at hand. DPAG, referring to its wording and position in Chapter 5 (Tariff principles and transparency of accounts) rather than 4 (Conditions governing the provision of non-reserved services and access to the network) of the Postal Directive, argues that the provision is not concerned with the access of third parties to the public postal network, but only with the applicable tariffs.<sup>57</sup> Thus Article 12 5<sup>th</sup> indent should only be applicable where under national law a universal service provider allows for the consolidation of mail from different customers.<sup>58</sup> DPAG goes on to state that the way in which Member States treat senders and the self-provision of postal services can in any event way

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<sup>53</sup> Judgment of 14 February 1978 in Case C-27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207, paragraph 233.

<sup>54</sup> Judgment of 6 October 1994 in Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-755, paragraph 207: “such differences were unquestionably discriminatory”.

<sup>55</sup> Judgment of 14 November 1996 in Case C-333/94 P *Tetra Pak International SA v Commission* [1996] ECR I-5951, paragraph 37.

<sup>56</sup> The argument was reiterated during the meeting on 30 June 2004 and in DPAG’s letter dated 13 July 2004, page 3.

<sup>57</sup> Page 24 *et seq.* of the study by Professor von Danwitz.

<sup>58</sup> Page 3 of DPAG’s letter dated 13 July 2004.

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not be taken as a reference for the treatment of commercial mail preparation firms since self-provision does not fall into the scope of the Postal Directive.<sup>59</sup>

99. The Commission takes due note of these observations, but cannot endorse DPAG's analysis. In that context, it is useful to recall the wording of Article 12 5<sup>th</sup> indent and Recital 29 of the Amended Postal Directive: "*Whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different customers, they shall apply the principles of transparency and non discrimination with regard both to tariffs and to the associated conditions.*" (Article 12 5<sup>th</sup> indent, emphasis added); "*The universal service providers normally provide services, for example to business customers, consolidators of mail for different customers and bulk mailers, enabling them to enter the mail stream at different points and under different conditions by comparison with the standard letters service. In doing this, the universal service providers should comply with the principles of transparency and non-discrimination, both as between different third parties and as between third parties and universal service providers supplying equivalent services.*" (Recital 29, emphasis added).
100. It is clear from the wording of these provisions that the Postal Directive does not impose upon the Member States to grant any of the above groups access to their network or to special tariffs. However, as is equally clear from the wording, if a Member State decides to grant special tariffs for downstream access to one group, it has to apply equal tariffs and conditions to the other groups. Germany has made the choice to grant major senders downstream access and related discounts under Article 28 *et seq.* PostG without being obliged to do so under EC law. It is now obliged – this time under EC competition law - to treat consolidators in the same way.
101. This finding is not impaired by the position of Article 12 5<sup>th</sup> indent in Chapter 5. It is true that Commission, in its initial proposal for the Amending Directive, intended to add the provision as a 6<sup>th</sup> paragraph to Article 9 within Chapter 4. The reason stated by the European Parliament to shift the provision to Article 12 ("*It is Article 12 which deals with tariffs*"<sup>60</sup>) is simply one of good law drafting: a provision which primarily deals with tariffs and conditions and non-discrimination between different actors, should be moved to the Chapter dealing with tariff principles.
102. Moreover, it is incorrect to state that the relationship between a postal universal service provider and major senders which may transport their own mail items by way of self-provision is not caught by the Postal Directive. Admittedly, self-provision does not fall within the category of services which can be reserved to universal service providers. Originators are thus free to organise the transport of their mail items by themselves. However, if and to the extent to which they choose to use the services of the universal service providers, the provision of these services clearly falls within the scope of the Postal Directive. The Commission therefore takes the view that it is admissible to take the treatment that business and bulk mail

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<sup>59</sup> Page 26 *et seq.* of the study by Professor von Danwitz.

<sup>60</sup> Legislative 1<sup>st</sup> reading report by the European Parliament dated 22 November 2000 (A5-0361/2000), page 27.

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customers enjoy on a national level as a reference for the treatment of commercial mail preparation firms.

103. In conclusion, the Commission takes the view that the state-induced discrimination between major senders and commercial mail preparation firms which indirectly leads to a discrimination between major senders and smaller business senders infringes Article 86(1) read in conjunction with Article 82.

### 2.6 No justification under Article 86(2) of the Treaty

104. Under Article 86(2) of the Treaty, undertakings entrusted with the operation of services of general economic interest are subject to the competition rules laid down in the Treaty, insofar as the application of such rules does not obstruct the performance, in law or fact, of the particular tasks assigned to them.
105. The service for which Member States can reserve exclusive or special rights, to the extent necessary to ensure the maintenance of the universal service, is harmonised in the Postal Directive.<sup>61</sup> There is thus a presumption that special or exclusive rights which fall within the limits of the reserved area as defined in Article 7 of the Postal Directive will be *prima facie* justified under Article 86(2) of the Treaty.<sup>62</sup> Any special or exclusive rights which go beyond the maximum limits set by Article 7 of the Postal Directive<sup>63</sup> can in contrast not be justified under Article 86(2) of the Treaty.
106. In that context, DPAG raises two series of arguments. First, DPAG claims that its financial equilibrium would be eroded should the Commission come to the conclusion that consolidators must be given access to and granted the applicable discounts at any of DPAG's sorting centres. In such a case, the provision of the universal service would be in danger. Second, DPAG is of the opinion that the incriminated provision of the PostG is in line with and justified by Article 7 of the Postal Directive since the transport of reserved mail items for the nearest access point to a sorting centre and the so-called "*rebate consolidation*" fall into the reserved area.<sup>64</sup>
107. The Commission considers that the fact of granting consolidators special tariffs for downstream access would not obstruct the performance of the particular tasks assigned to DPAG since the discounted tariffs are precisely designed to take into account DPAG's specific costs of providing the universal service. This point is examined in more detail in Section 2.6.1 below. Second, the Commission takes the view that the provision of mail preparation services, including the transport of mail

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<sup>61</sup> See paragraph 8.2 of the Commission Postal Notice.

<sup>62</sup> See paragraph 5.4 of the Commission Postal Notice.

<sup>63</sup> See Recital 2 of the Amending Directive: "[The Postal Directive] established a regulatory framework for the postal sector at Community level, including measure to guarantee a universal service and the setting of maximum limits for the postal services which Member States may reserve to their universal service provider(s) [...]."

<sup>64</sup> E.g. page 3 of DPAG's letter dated 13 July 2004 and arguments submitted during the meeting on 30 June 2004.

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items on behalf of several senders (consolidated items) from the sender's premises to the nearest access point, to the outbound sorting centre or to the inbound sorting centre does not fall within the ambit of services that can be reserved under Article 7 of the Postal Directive (*infra* Section 2.6.2). Third, in any event, DPAG's arguments relating to the scope of Article 7 of the Postal Directive are not relevant since even if the German government could have reserved certain types of transport of mail items under Article 7, it has renounced this right by granting advantages to one group of customers (senders) for which a strict principle of non-discrimination has been laid down at the Community level (see *infra* Section 2.6.3).

### 2.6.1 Impact on DPAG's financial equilibrium

108. In its reply to the Commission's letter of formal notice, DPAG claims that its financial equilibrium would be eroded should the Commission come to the conclusion that consolidators must be given access to and granted the applicable discounts at any of DPAG's sorting centres. All business customers, which currently represent 80% of DPAG's total turnover in the reserved area, would be taken over by competitors and DPAG would be left with only 20% of its turnover.<sup>65</sup> In such a case, DPAG goes on to state, the provision of the universal service would be in danger and, in view of the unbalanced utilisation of the network, the quality of service would be bound to decrease.
109. In order to illustrate its line of reasoning, DPAG puts forward the example of a sender located in Munich who wants to send a letter to Hamburg. If consolidators had access to DPAG's outbound sorting centres, the consolidator would collect the letter at the sender's premises and take it to the Munich sorting centre. DPAG would stay in charge of its transport to Hamburg and of the final distribution to the addressee in Hamburg. If consolidators had access not only to the outbound, but also to the inbound sorting centres, the consolidator could collect the letter at the sender's premises and take it – in theory – to Hamburg where it would hand over the letter to the DPAG sorting centre for final distribution. DPAG asserts that this would constitute an inadmissible duplication of the public DPAG network.
110. The Commission observes that the system of discounted postal tariffs is precisely designed not to obstruct the performance of DPAG's universal service obligations, in particular the obligation to maintain a network of points of access which takes into account the need of users. Article 12 5<sup>th</sup> indent of the Amended Postal Directive provides that the discounted tariffs "*shall take account of the avoided costs, as compared to the standard service covering the complete range of features offered for the clearance, transport, sorting and delivery of individual mail items [...].*" (emphasis added) In Germany, discounted tariffs are subject to a specific price regulation pursuant to Article 31 paragraph 2 of the PostG which is ruled by the general principles of price regulation in the postal sector (Article 20 PostG). Article 20 PostG engages RegTP to take account *inter alia* DPAG's obligation to provide postal services on a nation-wide basis. Thus, according to the RegTP decisions mentioned earlier, the discounted postal tariffs mirror the avoided costs in each case and, in particular, already take into account the fixed network costs (including those

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<sup>65</sup> Figures mentioned during the meeting on 30 June 2004.

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of smaller access points) which DPAG continues to bear even if part of it is not used because of upstream consolidation.<sup>66</sup>

111. The RegTP decision *Stuttgarter Lebensversicherung v. DPAG* dated 16 October 2000 is a particularly good example of how carefully RegTP has determined the incremental benefits which accrue to DPAG and the additional costs incurred by it because of granting downstream network access to major senders. It is interesting to note that DPAG, despite several formal requests for information from RegTP, has chosen not to provide any actual cost data which might have allowed an even more comprehensive calculation of the avoided costs.
112. The impact of the “avoided cost” tariff scheme becomes particularly clear if one takes the above mentioned Munich-Hamburg example. The highest available discount for delivering mail items to the Munich outbound sorting centre is 18%. If the consolidator takes the mail items to the inbound sorting centre in Hamburg, the highest possible discount he could earn would amount to 21%, i.e. only 3 % more than in Munich. That means that DPAG would still earn 79% of the standard tariff even though it only has to perform the final sorting and distribution.
113. Moreover, the Commission deems it unrealistic that DPAG would lose all or even a substantial share of its business customers, as predicted in its reply to the Commission, if consolidators could claim the same discounts and the same access conditions as major senders. The German government has recently stated that DPAG is in an excellent position to hold its ground even in the scenario of a full liberalisation of the postal sector.<sup>67</sup> This being said, even the switching of a sizeable share of DPAG’s business customers to competitors would have no impact on DPAG’s ability to perform the universal service. The tariff scheme is precisely designed to ensure the coverage of fixed network costs whatever proportion of customers uses the option of downstream access. The discounts are regularly reviewed in the framework of the general postal tariff regulation and such review will take into account the number of customers making use of downstream access as well as any decrease of DPAG’s avoided costs or increase of its costs of handling downstream access.<sup>68</sup>
114. The Commission therefore takes the view that DPAG has failed to demonstrate that granting consolidators special tariffs for downstream access would obstruct the performance of the particular tasks assigned to DPAG.

### 2.6.2 *Scope of the reserved area under Article 7 of the Postal Directive*

115. As mentioned above, DPAG is of the opinion that the incriminated provision of the PostG is in line with and justified by Article 7 of the Postal Directive since the transport of reserved mail items for the nearest access point to a sorting centre and the so-called “*rebate consolidation*” fall into the reserved area.

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<sup>66</sup> See RegTP’s press release dated 18 September 2000, available at <http://www.regtp.de/aktuelles/pm/00153/index.html>.

<sup>67</sup> German government’s statement dated July 2004, mentioned above, page 8.

<sup>68</sup> RegTP decision *Stuttgarter Lebensversicherung v. DPAG* dated 16 October 2000, page 27.

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116. The service for which Member States can reserve exclusive or special rights within the meaning of Article 86 (1), to the extent necessary to ensure the maintenance of the universal service (Article 86 (2)), is harmonised in the Postal Directive.<sup>69</sup> If DPAG's allegation was correct, there would thus be a presumption that the incriminated provision is *prima facie* justified under Article 86(2) of the Treaty. In contrast, if the provision went beyond the maximum limits set by Article 7 of the Postal Directive<sup>70</sup>, it could not be justified under Article 86(2) of the Treaty.
117. For the reasons set out below, the Commission considers that, the provision of mail preparation services does not fall into the ambit of services which can be reserved under Article 7 of the Postal Directive and that, as a consequence, the incriminated provision is not justified under Article 86 (2).
118. It is undisputed that operations such as printing, labelling, enveloping and the collecting and routing of mail items solely on behalf of the originator (self-provision) do not fall within the reserved area. The Court has recently clarified in its *ASEMPRE* judgment that self-provision is excluded from the outset of the scope of Article 7 of the Postal Directive.<sup>71</sup>
119. The question remains whether the pre-sorting, packaging in DPAG-specific containers and the transport of mail items on behalf of several senders (consolidated items) from the senders' premises to the nearest access point, to the outbound sorting centre or to the inbound sorting centre falls within the reserved area. Pursuant to Article 7(1) of the Postal Directive, the scope of reserved services includes the "*clearance, sorting, transport and delivery*" of certain items of correspondence. Clearance is defined as the "*operation of collecting postal items deposited at access points*" (Article 2(4) of the Postal Directive, emphasis added). Access points are "*physical facilities, including letter boxes provided for the public either on the public highway or at the premises of the universal service provider, where postal items may be deposited with the public network by customers*" (Article 2(3) of the Postal Directive). There is no legal definition for sorting, transport and delivery.
120. It is undisputed that DPAG's outbound and inbound sorting centres are "*physical facilities*" "*where postal items may be deposited with the public network by customers*", i.e. senders, under Article 28 of the PostG. They must therefore be considered as access points within the meaning of the Directive. Thus the clearance activity reserved to DPAG and all subsequent reserved activities such as sorting, transport and distribution only start at the access point where the sender(s) choose to hand over the correspondence to the public network.

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<sup>69</sup> See paragraph 8.2 of the Commission Postal Notice.

<sup>70</sup> See Recital 2 of the Amending Directive: "[The Postal Directive] established a regulatory framework for the postal sector at Community level, including measure to guarantee a universal service and the setting of maximum limits for the postal services which Member States may reserve to their universal service provider(s) [...]."

<sup>71</sup> *ASEMPRE* judgment mentioned above, at paragraph 22.

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121. On that basis, the Commission has in its previous practice already taken the view that the pre-sorting and the transport from the senders premises to the chosen access point does not fall within the reserved area, even where mail items are consolidated before they are deposited at an access point. In *SNELPD / France* for example, the Commission ruled that “*the collection and sorting activities of mail preparation firms which take place before mail items are handed over at the access points to the postal network do not in any way encroach upon the area of services reserved to La Poste*” (emphasis added).<sup>72</sup> The *SNELPD* decision also stipulates that the “*delivery*”, i.e. the transport, of prepared mail items to the access points of La Poste forms part of the range of non reserved mail preparation services.<sup>73</sup>
122. It is also clear from previous Commission statements that users are free to choose the access point where they deposit their items: The Commission Postal Notice stipulates that “*Operators should provide the universal postal service by affording non-discriminatory access to customers or intermediaries at appropriate public points of access, in accordance with the needs of those users. [...] It should particularly be ensured that intermediaries, including operators from other Member States, can choose from amongst available access points to the public postal network and obtain access within a reasonable period at price conditions based on costs, that take into account the actual service required.*”<sup>74</sup>
123. The approach has recently been confirmed by the European legislator through the Amending Directive. Recital 29 of the Amending Directive provides: “*The universal service providers normally provide services, for example to business customers, consolidators of mail for different customers and bulk mailers, enabling them to enter the mail stream at different points and under different conditions by comparison with the standard letters service. In doing this, the universal service providers should comply with the principles of transparency and non-discrimination, both as between different third parties and universal service providers supplying equivalent services.*” It is interesting to note that the European Parliament requested that this principle of non-discrimination between business customers and consolidators as regards entering the mail stream at access points differing from the standard letter service be removed from the Amending Directive. The Parliament believed that this provision would “*make competition in the sphere of universal services even more unbalanced.*”<sup>75</sup> This amendment was however deliberately rejected by the Commission and the Council and has therefore definitely become a part of the new legal regime for the postal sector.

### 2.6.3.1 No “*underlying pattern of service*”

124. In its reply to the complaint, DPAG contends that the definitions laid down in the Postal Directive point to an “*underlying pattern of service*” pursuant to which

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<sup>72</sup> See above-mentioned decision *Sneld / France*, at paragraph 55.

<sup>73</sup> See e.g. paragraphs 2 and 5 of the *Snelpd / France* decision.

<sup>74</sup> Commission Postal Notice at point 8 (b) (viii).

<sup>75</sup> Legislative 1<sup>st</sup> reading report of the European Parliament dated 22 November 2000, document A5-0361/2000, page 21.

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senders hand over postal items at an access point located close to their premises. It concludes that mail consolidation services which hand over postal items at access points located in other municipalities therefore clearly encroach upon the area of services reserved for DPAG.<sup>76</sup>

125. In the Commission's view, in contrast, the extracts from the Amending Directive and the Commission Postal Notice mentioned above clearly demonstrate that both senders and intermediaries, including consolidators, must have the free choice as to where they deposit postal items. It may be true that, for the sake of convenience, most senders choose to deposit correspondence at the nearest access point. This does, however, not imply that there is an "*underlying pattern of service*" laid down by the Directive which extends the scope of reserved services beyond the wording of Article 7 of the Postal Directive.

### 2.6.3.2 Arguments derived from the wording of the Directive

126. In its reply to the Commission's letter of formal notice, DPAG argues that the mere wording of Article 7 of the Postal Directive ("*clearing, sorting, transport and delivery*") shows that taking consolidated items from the senders' premises to the access point falls within the reserved area, since such activity must be classified either as "clearing" or as "transport". DPAG also points to the different terminology in Article 7(1) of the Directive ("*transport*") and Article 2 no. 2 ("*public postal network: the system of organisation and resources of all kinds used by the universal service provider(s) for the purposes in particular of [...] routing and handling of [postal items covered by a universal service obligation] from the postal network access point to the distribution centre*"). DPAG argues that the word "transport" should be understood in a broader sense, i.e. encompassing any kind of transport of reserved mail items from the sender's premises to the network access point, whilst "routing" means only the conveyance from the access point to the distribution centre.<sup>77</sup>
127. In that context it should first be recalled that "*clearance*" is defined as "*collecting postal items deposited at access points*" (Article 2(4) of the Postal Directive, emphasis added). The concept of clearance does therefore not encompass the collection of mail items at the sender's premises. DPAG itself offers its "Hin+Weg" collecting service as an additional value-added service in addition to its standard services in the reserved area.
128. Second, the different language versions show that no conclusions can be drawn from the use of the term "*transport*" rather than "*routing*" in Article 7(1) of the Postal Directive. Indeed, the term "*routing*", which is first used in Recital 21 ("*provision of postal services by the natural or legal person who is the originator of the mail, or collection and routing of these items by a third party acting solely on behalf of that person*"), is translated as "*Transport*" in the German version and "*acheminement*" in the French version. In contrast, in Article 2 no. 2, the next occurrence of "*routing*", the term is translated as "*Weiterleitung*" in the German

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<sup>76</sup> Page 8 of DPAG's reply to the complaint.

<sup>77</sup> Argument put forward during the meeting on 30 June 2004, reiterated in the letter dated 13 July 2004.



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version whilst again as “*acheminement*” in the French version. The term “*transport*” is translated as “*T(t)transport*” in both the German and French versions throughout the Directive whereas in the Commission Postal Notice the German translation used is mainly “*Beförderung*”<sup>78</sup> (sometimes “*Transport*”<sup>79</sup>) and the French translation “*transport*”<sup>80</sup> (sometimes “*acheminement*”<sup>81</sup>). The English term “*routing*” is again translated as “*Transport*” in the German version and as “*acheminement*” in the French version.<sup>82</sup>

129. To conclude, the English term “*transport*” is translated as “*Transport*” or “*Beförderung*” in German and as “*transport*” or “*acheminement*” in French. The English “*routing*” is translated as “*Transport*” or “*Weiterleitung*” in German and “*acheminement*” in French. The French “*acheminement*” and the German “*Transport*” are used equally for “*transport*” and for “*routing*” and show that both concepts are interchangeable. The Commission therefore considers that it is impossible to infer any conceptual difference from the terminological difference in the English version between “*transport*” and “*routing*”.
130. It is also clear from the context that “*transport*” within the meaning of the Postal Directive does not encompass “*any activity of transporting mail from the sender’s premises to the network access point*”, as claimed by DPAG<sup>83</sup>. Article 3 of the Directive lays down the minimum requirements of the universal service which covers *inter alia* the “*clearance, sorting, transport and distribution of*” postal items up to two kilograms and postal packages up to 10 kilograms. The universal service involves, in particular, the provision of postal services at all points in the Member State’s territory ensuring at least one clearance every working day (Article 3(3)). Consequently, if “*transport*” was interpreted to include the transport from the sender’s premises to the network access point, DPAG would be under the obligation to pick up mail items at every household anywhere in the German territory at least once a working day. This is of course not realistic and would go far beyond DPAG’s current obligation to maintain 108,000 letter boxes throughout Germany and one post office or agency for every 2,000 inhabitants living in a contiguous residential area.<sup>84</sup>
131. Finally, as regards the interpretation of “*transport*”, DPAG fails to take note of the fact that Article 7(1) of the Postal Directive displays the reserved operations in a clear chronological order: clearance, sorting, transport and delivery. Thus not every form of physical transport of mail items can be reserved, but only transport which

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<sup>78</sup> E.g. in the preface, page 3, 3<sup>rd</sup> paragraph; section 1, definition of “essential requirements”.

<sup>79</sup> E.g. section 2.2.

<sup>80</sup> E.g. in the preface, page 3, 3<sup>rd</sup> paragraph; section 2.2.

<sup>81</sup> E.g. section 1, definition of “essential requirements”; section 2.5.

<sup>82</sup> Section 1, definition of “intermediary”.

<sup>83</sup> Page 3 of DPAG’s letter dated 13 July 2004.

<sup>84</sup> See summary of DPAG’s obligation in the German government’s statement of July 2004 mentioned above.

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takes place after clearance and sorting. The same holds true for sorting activities: It is undisputed that mail preparation firms can pre-sort mail items before they are handed over to the postal network, even though “sorting” is one of the reserved operations. Likewise, mail items can be “pre-transported” before they enter the mail stream.

### **2.6.3.3 All postal services which go beyond self-provision are not automatically caught by Article 7**

132. DPAG submits that the only exception to the rule that transport of mail items may be reserved for the universal service provider is the situation of self-provision as defined in Recital 21 of the Directive, i.e. acting solely on behalf of one sender. A firm which would offer transport services for mail items in a scenario where it would act on behalf of several senders is therefore automatically caught by the reserved area under Article 7 of the Postal Directive.<sup>85</sup>
133. The Court has recently clarified in the *ASEMPRE* case that self-provision is excluded from of the scope of Article 7 of the Postal Directive. In order to assess DPAG’s argument it is necessary to examine which considerations led the Court to its finding. The Court states that self-provision is excluded “*from the outset*” and refers to the Advocate General’s opinion for further reasoning. Therein the Advocate General explains that self-provision cannot even be regarded as a “service” since it does not involve the provision of a service to a third party: the postal services, or more correctly, the postal activities are performed within the ambit of the sender itself.<sup>86</sup> Thus, without even entering into the discussion which services (provided to third parties) can legally be reserved under Article 7 of the Directive, self-provision can be excluded from its scope from the outset.
134. By no means did the Court state that a postal activity, e.g. the transport of letters, falls automatically into the reserved area under Article 7 as soon as is not performed by the sender itself. There is a gap between one extreme, self-provision, which is not even considered to be a service, and the other extreme, postal services which are reservable under Article 7. The scope of these reservable services has been determined in detail at Sections 2.6.3.1 and 2.6.3.2 *supra*.

### **2.6.3.4 Discounts must be granted for services legally provided in lieu of the universal service provider**

135. DPAG finally argues that according to the Commission’s classification of the transport of mail items from the sender’s premises to a DPAG sorting centre as a (liberalised) mail preparation service, operators offering such transport, if it were admissible under German law, would in any event not be eligible to receive any discounts on the standard postal rates.<sup>87</sup>

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<sup>85</sup> Page 2 of DPAG’s letter dated 13 July 2004.

<sup>86</sup> Opinion of Advocate General Tizzano of 23 October 2003, at paragraph 27 *et seq.*

<sup>87</sup> Page 20 *et seq.* of the study by Professor von Danwitz.

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136. The fact that the current legal regime in Germany does not provide for a quantity-based remuneration for consolidators is precisely at stake in the case at hand, but is of no relevance as to how Article 7 of the Postal Directive should be interpreted. The argument put forward by DPAG is therefore a circular one.
137. The economic rationale for special tariffs for downstream access is to remunerate a sender or a service provider for services (legally) provided in lieu of the universal service provider, at the level of the avoided costs of the latter. Against this background, there are only two alternatives: (i) A given service is reservable and has actually been reserved at the national level. In such a case, only the universal service provider is authorised to provide such service and the question of remunerating a third party does not arise. (ii) The service is not reserved. In such a case, service providers providing such service must be remunerated accordingly. DPAG's behaviour is therefore contradictory: On the one hand, it accepts that mail preparation firms provide services which it considers to be reserved under German law (pre-sorting, transporting mail items from the senders' premises to the sorting centres). On the other, it refuses to remunerate the service providers for the services rendered on the grounds of the same German law. It has been demonstrated previously that the transport of consolidated mail items from the sender's premises to a DPAG sorting centre cannot be reserved under the Postal Directive. The German government must therefore not only officially authorise the provision of such services (which are already being rendered in practice) but also ensure that they are remunerated in the same as those provided by business customers or their (self-provision) intermediaries.<sup>88</sup>

### 2.6.3 *The reserved area does not constitute an absolute boundary*

138. Lastly, in arguing that Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 PostG is in line with and justified by Article 7 of the Postal Directive, DPAG fails to take into account that the so-called "reserved area" under Article 7 of the Postal Directive is in fact only reservable and not per se reserved. Member States are free to open up their postal markets more than required by the Postal Directive, in particular given the fact that the postal services market is in any event due to be fully liberalised in the near future.<sup>89</sup> In the same vein, The German government has recently confirmed its plan to fully open up the German postal market after the expiry of DPAG's exclusive licence on 31 December 2007.<sup>90</sup>
139. By granting major senders downstream access and related discounts under Article 28 *et seq.* PostG, the German government has inevitably made the choice to open its network to consolidators in the same way. This obligation exists regardless of the question whether Germany could have reserved certain types of transport of mail

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<sup>88</sup> Article 12 5<sup>th</sup> indent of the Amended Postal Directive.

<sup>89</sup> The postal services market is one of the markets on which the European Council focused at its Lisbon meeting on 23 and 24 March 2000 and for which action was required by the Commission, the Council and the Member States to speed up liberalisation.

<sup>90</sup> Statement of the German government dated July 2004 concerning the RegTP activity report 2002/2003 and the Monopoly Commission's special issue report "Intensification of competition in telecommunications, cementation of the postal monopoly".

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items. The fact is that the government has renounced the right – if any - to reserve the activities concerned by granting advantages to one group of customers (senders) for which a strict principle of non-discrimination was already enshrined in the Commission Postal Notice and has been confirmed in the Amended Postal Directive. It is interesting to note in that context that the German government itself has never argued that the barring of consolidators from effective downstream access was in line with Article 7 of the Postal Directive, but that this argument was only raised by DPAG.

### **2.7 Arguments on the Commission’s choice to challenge the German Postal Law on the basis of the competition rules**

140. DPAG argued on several occasions that it would be more appropriate for the Commission to challenge the German Postal Law on the basis of its being contrary to Article 7 of the Postal Directive and initiate proceedings under Article 226 of the Treaty).<sup>91</sup> In DPAG’s view, by challenging the PostG on the basis of the competition rules, the Commission circumvents Article 226 and the procedural guarantees enshrined therein for the Member State concerned.
141. It is established case law that the Commission exercises its supervisory task of its own motion in the general interest of the Community. It itself assesses whether it is appropriate to bring proceedings and has no obligation to do so in the event of an alleged infringement of the Treaty.<sup>92</sup> Consequently, in cases of parallel infringements of several Treaty provisions it is at the Commission’s discretion to pursue only one, both or none of those infringements. At hand, the Commission has decided to bring proceedings on the basis of the competition rules without excluding, however, any future action challenging the infringement of the Postal Directive on a separate basis. DPAG’s argument must therefore be rejected.

### **2.8 Argument derived from the pending request for a preliminary ruling**

142. In its letter dated 29 September 2004, DPAG argued that the fact that the Administrative Court of Cologne has requested on 30 June 2004 a preliminary ruling concerning the interpretation of the non-discrimination principle laid down in Article 12 5<sup>th</sup> indent of the Amended Postal Directive prevents the Commission from adopting a decision in the case at hand. DPAG claims, in particular, that the *Delimitis* and *Masterfoods* judgments<sup>93</sup> lay down a general prohibition on the Commission to adopt decisions which could give rise to conflicts with future ECJ case law.

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<sup>91</sup> Letter dated 25 May 2004, page 21 and argument put forward during the meeting on 30 June 2004.

<sup>92</sup> Judgment of 22 June 1993 in Case 243/89 Commission / Denmark [1993] ECR .I-3353, paragraph 30; judgment of 27 November 1990 in Case 200/88 Commission / Greece ECR [1990] I-4299, paragraph 9; Judgment of 17 May 1990 in Case C-87/89 Sonito and others / Commission [ECR] 1990 I-1981, paragraphs 6 and 7.

<sup>93</sup> Judgment of 28 February 1991 in Case C-234/89 Delimitis / Henninger Bräu [1991] ECR I-935, paragraphs 47; judgment of 14 December 2000 in case C-344/98 Masterfoods and HB [2000] ECR I-11369, paragraphs 52 and 56.

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143. The judgments quoted by DPAG emphasise the primacy of the Commission's role in competition matters vis-à-vis national courts: When national courts rule on agreements or practices which are already the subject of a Commission decision, they cannot take decisions running counter to that of the Commission. When they rule on agreements or practices which may subsequently be the subject of a decision by the Commission, it follows from the obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings until the Commission has adopted a decision. These principles are, however, not applicable to the Commission's role vis-à-vis the European Courts. Whilst there is no hierarchical relationship between the national courts and the Commission and conflicting decisions can only be avoided through the obligation of sincere cooperation, all Commission decisions can be challenged before the European Courts. There is thus no risk of conflicting decisions between the Commission and the European Courts in the last instance and no obligation on the Commission to stay its proceedings. DPAG's argument must therefore be rejected.

### 2.9 Effect on trade between Member States

144. The state measures set out above are likely to affect trade between Member States. Mail entrusted to mail preparation firms may originate from companies based in other Member States, whose cross-border activities may thus be affected by the distortion of competition, as could the business of mail preparation firms based in Member States other than Germany which might want to establish themselves in Germany or provide their services there.<sup>94</sup> The ability to consolidate correspondence is even particularly attractive for non-German competitors which handle a comparatively small volume of postal items addressed to Germany and might need the consolidation in order to reach the volume-based discounted tariffs. The prohibition to provide these services may therefore act as a barrier to entry to the German market.

## 3. CONCLUSION

145. The Commission acknowledges that the Federal Republic of Germany intends to amend the PostG with a view to eliminating the infringement. However, it cannot be excluded that the amendment, if its intention is to merely adapt the legal regime to DPAG's current practice, would only partially solve the problems encountered by self-provision intermediaries and would not address at all the legal situation of consolidators. Moreover, the Commission notes that the German government plans to apply Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 PostG as interpreted in its legislative context by RegTP until the amendment enters into force. The Commission considers, therefore, that the Federal Republic of Germany, by not taking any binding interim measures setting aside the application of the incriminated provisions and maintaining the restriction limiting the deposit of postal items by self-provision intermediaries to the access point nearest to the sender or to another

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<sup>94</sup> See judgment of 1 February 1978 in Case 19/77 Miller v Commission [1978] ECR 131, point 15, and paragraph 48 of the opinion of Advocate General Jacobs prior to the judgment of 23 April 1991 in Case C-41/90 Höfner v Macrotron [1991] ECR I-1979.

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access point located in the same municipality and denying commercial consolidators discounts for any kind of downstream access to the postal network, infringes Article 86(1) in conjunction with Article 82 of the Treaty.<sup>95</sup>

HAS ADOPTED THIS DECISION:

### Article 1

Article 51 paragraph 1 2<sup>nd</sup> sentence no. 5 of the German Postal Law, as interpreted in its legislative context by RegTP, is contrary to Article 86(1), read in conjunction with Article 82 of the EC Treaty, to the extent that the provision bars commercial mail preparation firms, whether they act as an intermediary for self-delivery solely on behalf of one originator or as a consolidator on behalf of several originators, from earning quantity-based discounts for handing over postal items at outbound or inbound sorting centres, and, given the prevailing logistic situation at DPAG's local access points, from earning quantity-based discounts for downstream network access altogether.

### Article 2

Germany shall inform the Commission, within two months of being notified of this Decision, of the measures it has taken to put an end to the infringement identified in Article 1.

### Article 3

This decision is addressed to the Republic of Germany.

Done at Brussels, [...].

For the Commission

Mario Monti

Member of the Commission

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<sup>95</sup> The fact that an amendment to national legislation is underway is irrelevant if it is not implemented before the expiry of the period set by the Commission: Judgment of 11 August 1995 in Case C-433/93 Commission of the European Communities v Federal Republic of Germany [1995] ECR I-2303.