

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 19 June 2002

on measures implemented by the Federal Republic of Germany for Deutsche Post AG

(notified under document number C(2002) 2144)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/753/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those provisions ⁽¹⁾ and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) By letter dated 17 August 1999 the Commission informed the German Government that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty with respect to several measures implemented by the Federal Republic of Germany in support of Deutsche Bundespost Postdienst ('DB-Postdienst'), which, in 1995, was transformed into Deutsche Post AG ('DPAG').
- (2) In initiating the procedure, the Commission expressed the belief that the amount of compensation DB-Postdienst and DPAG received from the State for the provision of services in the general interest exceeded the specific net additional costs that these services entailed for DPAG. In particular, the Commission expressed its intention to investigate the following possible aid measures.
- (3) *The financing of the 1998 acquisition of Postbank AG:* According to the decision to initiate the procedure, one of the complainants alleges that DPAG acquired Postbank AG in 1998 from the German authorities by setting off the purchase price against a claim held by DPAG against the State. The complainant alleged that DPAG had no such claim against the State, no such claim being indicated in DPAG's balance sheet. The Commission argued in the decision to initiate the procedure that paying for an acquisition by setting off the purchase price against a claim which does not exist or whose existence is doubtful is in reality a donation equivalent to State aid.
- (4) *The financing of a postal pension fund, the Post-Unterstützungskasse:* In 1999 the State took over the deficit of the *Post-Unterstützungskasse* (postal pension fund), which at that time amounted to approximately DEM 8 billion. This deficit accrued on account of an early retirement scheme introduced by DPAG in 1995 under which 25 % of civil servants retired before the normal retirement age.

⁽¹⁾ OJ C 306, 23.10.1999, p. 25.

- (5) *Possible State guarantees covering the liabilities of the former Deutsche Bundespost:* According to the decision to initiate the procedure, complainants allege that Article 40(6) of the Postal Organisation Act might constitute a guarantee by the State covering all liabilities existing at the time when the former Deutsche Bundespost was split into three distinct administrative bodies, Deutsche Bundespost Postdienst, Deutsche Bundespost Telekom and Deutsche Bundespost Postbank.
- (6) *The circumstances surrounding the transformation of DB-Postdienst from a State administrative body into the limited company DPAG:* According to the decision to initiate the procedure, complainants allege that DB-Postdienst, as part of its transformation into the limited company DPAG in 1995, was endowed with more capital than strictly necessary to fulfil its public service mission.
- (7) *Financial or administrative assistance granted to DPAG by the State:* The complaints by United Parcel Service ('UPS') and the Bundesverband Internationaler Express- und Kurierdienste eV ('BIEK') raise the general issue that DPAG was using revenues from its profitable letter-post monopoly or from other assets received from the State to finance a strategy of below-cost selling in parcel services, a segment which is open to competition from private operators. According to the complainants, without the cross-subsidies from the reserved area or other forms of State assistance, DPAG would not have been able to finance below-cost selling in parcel services. UPS contends that an efficient firm would not be able to compete with DPAG and at the same time cover the cost of providing parcel services. In the light of these complaints, in its decision to initiate the procedure, the Commission requested Germany to provide detailed information on all forms of financial or administrative assistance that the State provided to DB-Postdienst (until 1995) and DPAG (after 1995).
- (8) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽²⁾. By letter dated 16 September 1999, received on 6 October 1999, Germany submitted its comments and provided the information requested.
- (9) Following publication, the Commission received comments from 14 interested parties, which were duly transmitted to the German Government by letter dated 15 December 1999 providing it with an opportunity to make its own observations concerning these comments. The German authorities responded by letter dated 1 February 2000, which was registered as received on 2 February 2000.
- (10) On 18 December 2001, the German authorities, responding to a request from the Commission, submitted further clarification on the system of transfer payments under Article 37(3) of the Postal Organisation Act ⁽³⁾. These clarifications were received on 31 January and 13 February 2002 respectively.
- (11) On 20 March 2001, in parallel proceedings conducted under Article 82 of the EC Treaty, the Commission adopted Decision 2001/354/EC ⁽⁴⁾ finding that DPAG had infringed Article 82 of the EC Treaty by granting a special price to customers of mail-order parcel services only on condition that the customer sent its entire requirements or at least a high percentage of those requirements via DPAG. Furthermore, the Decision held that DPAG had infringed Article 82 by supplying mail-order parcel services at prices below the additional costs of providing those services.

II. COMMENTS FROM GERMANY

A. The acquisition of Postbank AG

- (12) With respect to the acquisition of Postbank AG, the German authorities produced documents which, in their view, were sufficient to demonstrate that, contrary to these assertions, the purchase price was not set off against a non-existent claim, but was actually paid by DPAG to the German authorities ⁽⁵⁾. Furthermore, the German authorities submitted documentation showing that the purchase price reflected the economic value that Postbank represented to DPAG. Under these circumstances, Germany considers that the acquisition of Postbank involved no grant of State aid.

⁽²⁾ OJ C 306, 23.10.1999, p. 25.

⁽³⁾ *Postverfassungsgesetz* of 8 June 1989, BGBl. 1989, part I, p. 1026.

⁽⁴⁾ OJ L 125, 5.5.2001, p. 27.

⁽⁵⁾ Annex 4 to the German authorities' letter of 16 September contains the purchase contract and proof of actual payment of the purchase price by DPAG.

B. The financing of the pension fund

- (13) According to the German authorities, the State contribution to the pension fund was confined to what was necessary to offset an objective disadvantage imposed by the State on DPAG. According to the German authorities, financing the early retirement of civil servants recruited before the privatisation of DPAG remained a basic obligation of the State vis-à-vis its civil servants. DPAG's co-responsibility for the financing of a pension fund for these civil servants therefore entailed atypical special costs. Assuming the pension obligations only partly offset an objective disadvantage previously imposed by the State on DPAG. Therefore, Germany considers that there is no advantage to DPAG and also no distortion of competition or trade if the State makes a contribution toward the pension fund for civil servants.

C. Article 40(6) of the Postal Organisation Act

- (14) The German authorities provided the Commission with the legal provisions governing the liabilities of the formerly State-owned Deutsche Bundespost. The following provisions were submitted:
- Article 2(1) of the Postal Organisation Act: This provision limits the States liability to the special asset (*Sondervermögen*) Deutsche Bundespost,
 - Article 40(6) of the Postal Organisation Act: Article 40(6) stipulates that debt instruments issued by Deutsche Bundespost have the same legal value as debt instruments issued by the State. According to the German authorities, the State was liable for debt instruments issued by Deutsche Bundespost ⁽⁶⁾ because it was a special asset (*Sondervermögen*) integrated into the State administration ⁽⁷⁾. However, pursuant to Article 2(1) of the Postal Reorganisation Act, such liability was confined to Deutsche Bundespost,
 - Article 2(4) of the Postal Reorganisation Act ⁽⁸⁾: This provision again limits the States liability to the special asset Deutsche Bundespost and the three legal entities that succeeded it.

D. The transformation of DB-Postdienst into DPAG

- (15) The German authorities provided the Commission with the legal provisions governing the transfer of assets between the former DB-Postdienst and the new limited company DPAG. According to the relevant Article 2(1) of the 1994 Postal Reorganisation Act, the newly incorporated limited companies DTAG, DPAG and Deutsche Postbank AG are the legal successors to the special assets DB-Postdienst, DB-Telekom and DB-Postbank. Assets are passed on according to actual use. Whereas a real-estate asset was used by two companies concurrently, property was to be transferred to the principal user.

E. The transfer payments under Article 37(3) of the Postal Organisation Act

- (16) In response to the request, contained in recitals 80 and 81 of the decision to initiate the procedure, that detailed information be supplied with respect to any form of financial or administrative assistance granted to DB-Postdienst or DPAG by the State, the German authorities, in their submissions of 16 September 1999 and 25 April 2000, made detailed comments on the system of transfer payments between the legal successors to Deutsche Bundespost provided for in Article 37(3) of the Postal Organisation Act ⁽⁹⁾.

⁽⁶⁾ According to the German authorities, the principle of continuity of existing liability requires that a transfer of assets to a new legal entity does not worsen the legal position of existing creditors. This would be the case if a transfer of assets were to deprive existing creditors of a debtor. This principle applies independently of the fact that the entity taking over the assets becomes a new debtor.

⁽⁷⁾ As of 1924, the postal operator's assets were legally separated from the general budget, see German authorities' letter of 25 April 2002, p. 6.

⁽⁸⁾ *Postumwandlungsgesetz* of 14 September 1994, BGBl. 1994, part I, p. 2339. Section 1 of this Act transforms the former Deutsche Bundespost into three share companies, Deutsche Post AG ('DPAG'), Deutsche Telekom AG ('DTAG') and Deutsche Postbank AG ('Postbank AG').

⁽⁹⁾ *Postverfassungsgesetz* of 8 June 1989, BGBl. 1989, part I, p. 1026.

- (17) The German authorities explained the origins of Article 37(3) of the 1989 Postal Organisation Act as follows:
- until 1 July 1989 the German Post Office was a public postal administration known as Deutsche Bundespost. On 1 July 1989, by virtue of Article 1(2) of the 1989 Postal Organisation Act, the operational functions of the public postal administration were divided into three distinct public entities: DB-Postdienst, DB-Telekom and DB-Postbank⁽¹⁰⁾. DB-Postdienst took over the postal services hitherto provided by Deutsche Bundespost⁽¹¹⁾,
 - in 1989 DB-Postdienst thus became a separate entity from DB-Telekom. Nevertheless, according to Germany, the transfer payments under Article 37(3) were justified as an emanation of the principle of 'financial unity' between the universal service providers succeeding Deutsche Bundespost⁽¹²⁾. Financial unity implies that, should one of the three legal successors to the former Deutsche Bundespost, on account of its public service mission, not be able to cover expenditure from out of the revenue it achieves, it is entitled to receive corresponding financial transfer payments from another legal successor that is profitable. The purpose of the entire financial transfer system set up by Article 37(3) was thus to maintain the financial equilibrium of the postal service provider once it was separated from the telecom operator.
- (18) In summary, the German authorities submit that, solely on account of their unprofitable non-reserved postal activities provided in the general interest, the undertakings DB-Postdienst and later DPAG incurred enormous losses annually⁽¹³⁾. In order to cover the huge revenue shortfalls of the postal operator, which, according to the German authorities, were attributable solely to the obligation to provide services in the general interest, Article 37(3) and (4) of the Postal Organisation Act provided for a system of financial transfers between the three legal successors to Deutsche Bundespost. Article 37(3) and (4) provides as follows:
- '3. Should one of the undertakings be unable, especially having regard to its obligations under Article 4(1)⁽¹⁴⁾, to cover expenditures by its own revenues, there shall be a financial compensation between the undertakings. The financial compensation should be reflected in the undertakings' income statements and their balance sheets.
4. Cross-subsidisation between a monopoly and services open to competition and between the undertakings mentioned in paragraph 3 is allowed. Should, however, an appropriate long-term undercoverage of cost in competitive services impair the competitive opportunities of other undertakings without objective justification, the Federal Minister for Posts and Telecommunications, in agreement with the Minister for Economic Affairs, ... shall take appropriate measures to remedy the distortion.'
- (19) The German authorities do not contest that, pursuant to Article 37(3), from 1990 to 1994 DB-Telekom paid DEM [...] (*) million to DB-Postdienst in order to compensate for losses incurred by the latter⁽¹⁵⁾. Because of outstanding transfer payments, DB-Telekom was obliged, at the time of the transformation of the three undertakings into limited companies, to contribute an additional DEM [...] million to the equity capital of the newly incorporated DPAG. According to the German authorities, this last outstanding transfer payment was implemented by means of a set-off pursuant to Article 7, second sentence, of the Postal Reorganisation Act⁽¹⁶⁾.
- (20) As confirmed by the German Government in additional submissions of 25 April 2000 and 31 January 2002, DB-Telekom and DTAG paid, between 1990 and 1995, a total of DEM [...] million in transfer payments to DB-Postdienst and DPAG. It is not contested that this financial transfer between

⁽¹⁰⁾ Article 1(2) of the Postal Organisation Act.

⁽¹¹⁾ Article 65(2) of the Postal Organisation Act stipulated that the successor entity to DBP was to maintain all services previously offered by DBP.

⁽¹²⁾ Annex 5 to the German authorities' letter of 16 September 1999.

⁽¹³⁾ German authorities' letter of 25 April 2000, Annex 11a.

⁽¹⁴⁾ Article 4(1) of the Postal Organisation Act sets forth the obligation to maintain the requisite infrastructure in order to provide monopoly services and "mandatory services" (*Infrastrukturdienste*).

(*) Business secret.

⁽¹⁵⁾ Annex 5 to the German authorities' letter of 16 September 1999, pp. 5 and 6, and letter of 31 January 2002, p. 4.

⁽¹⁶⁾ Annex 5 to the German authorities' letter of 16 September 1999, p. 5. Confirmed by the German authorities' letter of 31 January 2002, pp. 4 and 5.

two distinct entities is attributable to the State since it was mandated by virtue of Article 37(3) of the Postal Organisation Act. However, the German authorities submit that the transfer payments mandated by Article 37(3) of the Postal Organisation Act were indispensable to allow DPAG to provide services of general economic interest in conditions of economic equilibrium.

F. The infrastructure costs attributable to door-to-door parcel services

- (21) In line with the complaints lodged by UPS and BIEK⁽¹⁷⁾, this Decision is concerned with the coverage of costs in providing door-to-door parcel services open to competition. In consequence, the investigation conducted by the Commission focused on DPAG's cost coverage in the two major door-to-door parcel services open to competition: the delivery service for parcels sent between business customers (business-to-business or 'B-to-B' service) and a door-to-door delivery service for mail-order companies for goods ordered by catalogue or electronic commerce (business-to-consumer or 'B-to-C' service)⁽¹⁸⁾.
- (22) DPAG currently provides door-to-door parcel services on a common 'freight branch' infrastructure comprising 33 outward and inward freight centres and 476 delivery points. This infrastructure is also used for the provision of the 'over-the-counter' services which DPAG is obliged to supply, as part of its public service mission, to anyone who presents himself at a postal counter⁽¹⁹⁾. DPAG is thus using the infrastructure originally built up and maintained with resources intended to facilitate the provision of services of general interest in part at least also for the provision of door-to-door parcel services that are open to competition.
- (23) Within the DPAG parcel freight network, door-to-door parcel services are treated in six stages: (1) collection at the customers premises; (2) sorting in the outward freight centre; (3) long-distance transport between the outward and the inward freight centre; (4) sorting at the inward freight centre; (5) regional transport between a freight centre and local delivery points; and (6) delivery to the addressee.
- (24) By letter dated 25 April 2002, the German authorities supplied data on the cost of the different steps that are necessary to provide door-to-door parcel services on the current DPAG infrastructure. The data supplied refer to the period 1994 to 1999. The data supplied on 25 April 2002 complement and, in part, correct an earlier study on the minimum cost of operating a parcel freight infrastructure for door-to-door services supplied on 12 March 2002⁽²⁰⁾. The Commission had questioned this model, as it was based on assumptions which had never been put to the test of practical implementation.
- (25) The supply of new empirical data on the costs of a door-to-door infrastructure was deemed necessary because the initial study submitted on 12 March 2002 was based on a theoretical model, founded on working hypotheses, such as the complete subcontracting of all operational activities to a multitude of third-party service providers, that had never been tested or implemented in practice. Such working hypotheses do not therefore allow an accurate appraisal of the real costs of actually operating a door-to-door parcel infrastructure. A reliable appraisal of the minimum costs of a door-to-door parcel infrastructure presupposes data on an infrastructure that has been empirically tried out and actually applied. The initial study was not based on such actual data. The author confined himself to showing that, under certain conditions and if certain working hypotheses were met, a company could operate a door-to-door parcel service at a certain very low level of cost.

⁽¹⁷⁾ See section I, describing the allegations of UPS and BIEK.

⁽¹⁸⁾ While the over-the-counter service is not reserved, its provision requires a nationwide network of postal counters. DPAG currently operates approximately 14 000 post offices throughout Germany. No private undertaking can match this network and, in consequence, there are no private undertakings which supply a nationwide over-the-counter parcel service.

⁽¹⁹⁾ DPAG's reserved letter-mail services, on the other hand, operate largely through a separate dedicated infrastructure.

⁽²⁰⁾ The cost data supplied on 12 March 2002 were based on a series of assumptions, such as the integration of B-to-B collection and mail-order delivery rounds or the total outsourcing of all sorting activities, measures which were never implemented in practice. The Commission therefore requested the German authorities to submit data on the organisation of the parcel freight infrastructure as organised in practice and actually feasible.

1. Collection

- (26) *B-to-B*: For business customers whose daily parcel volume exceeds 20 units, dedicated bulk collection rounds are organised (*Großmengenabholung*)⁽²¹⁾. A dedicated B-to-B round covers, on average, [...] kilometres⁽²²⁾. Dedicated B-to-B collection rounds are conducted five days a week (= 250 collection days per year)⁽²³⁾. Contrary to the initial data submitted on 12 March 2002⁽²⁴⁾, the German authorities have stated that bulk collection rounds are entirely dedicated to collecting parcels from the business customers' premises. Contrary to what was stated in the initial study, these B-to-B rounds are neither integrated with dedicated B-to-B delivery nor with mail-order return collection rounds. These rounds and the cost they generate⁽²⁵⁾ are fully attributable to the B-to-B service. The cost attributable to B-to-B collection rounds can thus be calculated as the cost per round × rounds driven per day × 250 collection days = attributable cost per year. For the period 1994 to 1999 this yields the following results:

1994: DEM [...] per round⁽²⁶⁾ × [...] attributable collection rounds⁽²⁷⁾ × 250 collection days = DEM [...] million + DEM [...] per round⁽²⁸⁾ × [...] attributable collection rounds × 250 collection days = DEM [...] million,

1995: DEM [...] per round × [...] attributable collection rounds × 250 collection days = DEM [...] million + DEM [...] per round × [...] attributable collection rounds × 250 collection days = DEM [...] million,

1996: DEM [...] per round × [...] attributable collection rounds × 250 collection day = DEM [...] million + DEM [...] per round × [...] attributable collection rounds × 250 collection days = DEM [...] million,

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1999: DEM [...] per round × [...] attributable collection rounds × 250 collection days = DEM [...] million + DEM [...] per round × [...] attributable collection rounds × 250 collection days = DEM [...] million.

⁽²¹⁾ German authorities' letter of 25 April 2002, p. 2; see also German authorities' letter of 12 March 2002, p. 12.

⁽²²⁾ German authorities' letter of 25 April 2002, p. 1.

⁽²³⁾ German authorities' letter of 12 March 2002, p. 54. It should be noted that, due to holidays, there are not five delivery days in all 52 weeks of the year. The experts thus agree that parcels are collected on 250 days per year.

⁽²⁴⁾ German authorities' letter of 12 March 2002, p. 12: collection of B-to-B and mail-order return parcels is conducted via *joint* collection rounds (emphasis added).

⁽²⁵⁾ The cost of a B-to-B collection is based on the following premises: a dedicated B-to-B collection round involves two containers, which is equivalent to a lorry plus trailer (German authorities' letter of 25 April 2002, p. 1).

⁽²⁶⁾ Cost per B-to-B collection round as indicated by German authorities' letter of 25 April 2002, p. 2.

⁽²⁷⁾ German authorities' letter of 25 April 2002, p. 1 specifying that all rounds previously indicated as integrated B-to-B collection and delivery rounds are in reality pure collection rounds on the one hand and pure delivery rounds on the other. This corrects the earlier submissions of 12 March 2002, according to which a part of the B-to-B collection rounds were integrated with B-to-B delivery rounds. The rounds that were previously identified as combined B-to-B collection and delivery rounds thus have to be separated and added to the pure B-to-B collection rounds, which for 1994 yields the following result: [...] pure B-to-B collection rounds + [...] former integrated collection and delivery rounds = [...] pure collection rounds. On the other hand, the pure collection rounds that were formerly identified as integrated collection and delivery rounds cover only [...] km and thus generate half the cost of the pure B-to-B collection rounds.

⁽²⁸⁾ The B-to-B collection and delivery rounds that were previously presented as combined rounds only comprise, when presented individually, [...] km per round and generate half the cost of a B-to-B collection round; DPAG, 24 May 2002.

- (27) *Mail-order*: All mail-order parcels and mail-order returns are picked up at the customer's business premises and transported to the outbound sorting centre. An average mail-order collection round covers [...] kilometres⁽²⁹⁾. Mail order collection takes place five days a week (= 250 collection days per year⁽³⁰⁾). As only mail-order and mail-order return parcels are collected via dedicated rounds at the customer's premises, all costs associated with collecting parcels at the customer's premises are fully attributable to these services⁽³¹⁾. Again, the cost attributable to mail-order collection rounds can thus be calculated as the cost per round × rounds driven per day × 250 collection days = attributable cost per year. For the period 1994 to 1999 this yields the following results:

1994: DEM [...] per round⁽³²⁾ × [...] attributable collection rounds⁽³³⁾ × 250 collection days = DEM [...] million,

1995: DEM [...] per round × [...] attributable collection rounds × 250 collection days = DEM [...] million,

1996: DEM [...] per round × [...] attributable collection rounds × 250 collection days = DEM [...] million,

1997: DEM [...] per round × [...] attributable collection rounds × 250 collection days = DEM [...] million,

1998: DEM [...] per round × [...] attributable collection rounds × 250 collection days = DEM [...] million,

1999: DEM [...] per round × [...] attributable collection rounds × 250 collection days = DEM [...] million.

2. Outward and inward sorting

- (28) At the outward freight centre the sorting stage comprises the coding and sorting of parcels for transport to the inward freight centre⁽³⁴⁾. B-to-B parcels are not pre-sorted and thus all require sorting in the outward freight centre⁽³⁵⁾. As mentioned above, about [...] % of all mail-order parcels are pre-sorted and directly transported to the inward freight centre. Thus, they do not require outward sorting. Also catalogues do not require the outward sorting stage as they are pre-sorted according to inward parcel freight centre by the customer. At the inward freight centre parcels and catalogues are sorted electronically according to the delivery district of destination. They are then loaded onto movable containers (*Rollbehälter*) and transported to the different regional delivery points. As approximately [...] % of parcels remain for delivery within the districts covered by the outward freight centre⁽³⁶⁾, these parcels do not require inbound sorting.

⁽²⁹⁾ German authorities' letter of 25 April 2002, page 2. This corrects an earlier submission according to which the average B-to-C collection round covers [...] kilometres; see German authorities' letter of 12 March 2002, Annex 1, p. 18.

⁽³⁰⁾ German authorities' letter of 12 March 2002, pp. 18 and 44.

⁽³¹⁾ Three major mail-order customers have traditionally pre-sorted their parcels and catalogues according to delivery district. These parcels, about [...] % of all mail-order parcels and catalogues (estimate given in the German authorities' letter of 12 March 2002, Annex 1, p. 23), were picked up and transported directly to the inbound parcel freight centre. This so-called direct transport, which is part of the long-distance transport activity, is discussed below.

⁽³²⁾ Cost per B-to-C collection round as submitted in the German authorities' letter of 25 April 2002, p. 2. The cost data submitted on 25 April 2002 correct earlier data submitted on 12 March 2002. The earlier data, based on a price of DEM [...] to be paid per kilometre to a subcontractor, would have yielded a price of DEM [...] per B-to-C collection round. However, as no undertaking has ever achieved the successful provision of a mail-order parcel service involving several hundred million parcels annually on a 100 % sub-contracting basis, round costs calculated on this basis as a hypothesis of the cost situation with 100 % sub-contracting are not sufficiently reliable.

⁽³³⁾ Contrary to what was stated in the initial study of 12 March, parcels are in reality collected from [...] premises, not [...] premises. Therefore, the amount of B-to-C collection rounds attributable to the mail-order segment as indicated in the study of 12 March has to be multiplied by [...].

⁽³⁴⁾ Less than [...] % of mail-order parcels, on account of their bulky format, require manual sorting.

⁽³⁵⁾ Less than [...] % of B-to-B parcels, on account of their bulky shape, require manual sorting. This percentage of bulky parcels that require manual sorting is significantly below the percentage of bulky B-to-B parcels transported by private competitors. According to information supplied by the German authorities, this lower percentage is due to the fact that DPAG offers B-to-B parcels up to 31,5 kg, see German authorities' letter of 16 September 1999, p.7. On the other hand, private competitors offer B-to-B parcels either themselves or in cooperation with freight logistics providers with a weight up to 75 kg. It is mostly the parcels exceeding the threshold offered by DPAG (31,5 kg) that require manual sorting as they cannot be processed on the sorting machines.

⁽³⁶⁾ German authorities' letter of 12 March 2002, Annex 1, p. 13.

- (29) According to the German authorities, an infrastructure of 33 freight centres is essential in order to provide a 24-hour nationwide door-to-door service⁽³⁷⁾. The capital cost of setting up 33 freight centres must therefore be attributed to the time-critical 24-hour delivery service. However, as door-to-door parcels constitute somewhat less than the total volume processed at the parcel freight centres, the German authorities submit that only a scaled-down version of current freight centres should be attributed to door-to-door parcel services⁽³⁸⁾. The same is true for the cost of running the 33 freight centres and the process equipment capital cost (depreciation and interest). The cost of process equipment capital, maintenance and supplies for a scaled-down version of the current parcel freight centres, between 1994 and 1999, amounted to DEM [...] million annually⁽³⁹⁾. The operation of 33 scaled-down-version freight centres thus generated annual attributable expenditure of DEM [...] million⁽⁴⁰⁾.
- (30) On the other hand, according to estimates submitted by the German authorities, delivery points may be adapted to volume or the amount of delivery rounds necessary to process a certain volume⁽⁴¹⁾. Therefore, on account of their volume⁽⁴²⁾, out of a total of 476 delivery points that were operated by DPAG throughout 1994 to 1999, the following delivery points and corresponding expenditures were necessary to maintain door-to-door parcel services:

1994: [...] delivery points⁽⁴³⁾ generating aggregate expenditure of DEM [...] million⁽⁴⁴⁾ plus freight centre costs of DEM [...] million = DEM [...] million,

1995: [...] delivery points; costs: DEM [...] million plus freight centre costs of DEM [...] million = DEM [...] million,

1996: [...] delivery points; costs: DEM [...] million plus freight centre costs of DEM [...] million = DEM [...] million,

1997: [...] delivery points; costs: DEM [...] million plus freight centre costs of DEM [...] million = DEM [...] million,

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1999: [...] delivery points; costs: DEM [...] million plus freight centre costs of DEM [...] million = DEM [...] million.

⁽³⁷⁾ German authorities' letter of 12 March 2002, Annex 1, p. 10.

⁽³⁸⁾ German authorities' letter of 12 March 2002, Annex 1, p. 20. The capital, operating and materials cost of a parcel freight centre dedicated to door-to-door activities has been calculated on the basis of a maximum of [...] million units a year, of which [...] % must meet a deadline of E + 1 (24 hours). The actual current parcel freight centre network of DPAG has a peak capacity of around [...] million units a year. Mail-order returns and mail-order catalogues are excluded from the E + 1 deadline, as these are not timesensitive and are therefore processed in the parcel centres outside the usual processing schedules (German authorities' letter of 12 March 2002, Annex 1, pp. 8 and 10).

⁽³⁹⁾ German authorities' letter of 12 March 2002, Annex 1, p. 45.

⁽⁴⁰⁾ German authorities' letter of 12 March 2002, Annex 1, p. 45.

⁽⁴¹⁾ German authorities' letter of 12 March 2002, Annex 1, p. 10.

⁽⁴²⁾ Total 'door-to-door' volume from 1994 to 1999 as calculated by Ctcon, *Segmentserfolgsrechnung nach Vollkosten*, 15.1.2000 (submitted by the German authorities on 31 January 2002) developed as follows: 1994: [...] million units; 1995: [...] million; 1996: [...] million; 1997: [...] million; 1998: [...] million; 1999: [...] million. For all years the total volume includes the 'mail-order return' parcels, that are considered as an annex to the 'door-to-door' mail-order business as they are an integral part of DPAG's offer to the mail-order companies. Their consideration at the sorting stage is justified as there is no operational difference in treatment between a mail-order parcel and a mail-order return parcel at this stage.

⁽⁴³⁾ The number of attributable delivery points is based on the information supplied in the German authorities' letter of 12 March 2002, Annex 1, p. 17.

⁽⁴⁴⁾ DEM [...] per delivery base × [...] delivery bases = DEM [...] for [...] delivery bases; see German authorities' letter of 12 March 2002, Annex 1, p. 49.

- (31) The staffing costs incurred at the outbound and inbound sorting stages are, according to the German authorities, attributable to the actual volume of parcels to be sorted. The staffing resources necessary for the inbound and outbound sorting activities can thus be attributed in direct proportion to the volume of door-to-door activities. The same holds true for the man-hours necessary for handling of parcels at the delivery points. The following table is based on annual man-hours necessary to process the annual quantities of door-to-door parcels, both as indicated by DPAG⁽⁴⁵⁾. The hourly wages are calculated on the basis of information submitted by the German authorities⁽⁴⁶⁾. Total staffing costs at the different sorting stages were calculated as follows: man-hours for outbound sorting x hourly wage, man-hours for inbound sorting x hourly wage + man-hours for handling at delivery points x hourly wage. For the years 1994 to 1999 this yields the following results:

1994: [...] h (outbound sorting)⁽⁴⁷⁾ + [...] h (inbound sorting)⁽⁴⁸⁾ + [...] h (handling at delivery points)⁽⁴⁹⁾ × DEM [...] (hourly wage)⁽⁵⁰⁾ = DEM [...] million + [...] million + [...] million = DEM [...] million,

1995: [...] h + [...] h + [...] h × DEM [...] (hourly wage) = DEM [...] million + [...] million + [...] million = DEM [...] million,

1996: [...] h + [...] h + [...] h × DEM [...] (hourly wage) = DEM [...] million + [...] million + [...] million = DEM [...] million,

1997: [...] h + [...] h + [...] h × DEM [...] (hourly wage) = DEM [...] million + [...] million + [...] million = DEM [...] million;

1998: [...] h + [...] h + [...] h × DEM [...] (hourly wage) = DEM [...] million + DEM [...] million + DEM [...] million = DEM [...] million,

1999: [...] h + [...] h + [...] h × DEM [...] (hourly wage) = DEM [...] million + DEM [...] million + DEM [...] million = DEM [...] million.

3. Long-distance transport

- (32) Long-distance transport comprises the daily transport rounds between the 33 inward and outward freight centres⁽⁵¹⁾. On average, the distance between the 33 inward and outward sorting centres amounts to [...] km⁽⁵²⁾. As of 1994, all long-distance delivery rounds were provided through outsourcing⁽⁵³⁾ and always involved two containers⁽⁵⁴⁾ (i.e., one lorry with trailer). In order to provide a countrywide service meeting the 24-hour delivery target, at least one trip per night

⁽⁴⁵⁾ German authorities' letter of 12 March 2002, pp. 45, 47, and 49.

⁽⁴⁶⁾ German authorities' letter of 25 April 2002, p. 3.

⁽⁴⁷⁾ [...] h per year × 33 freight centres = [...] h; see German authorities' letter of 12 March 2002, Annex 1, p. 45.

⁽⁴⁸⁾ [...] h for 33 freight centres per day × 250 working days = [...] h; see German authorities' letter of 12 March 2002, Annex 1, p. 47.

⁽⁴⁹⁾ German authorities' letter of 12 March 2002, Annex 1, p. 49.

⁽⁵⁰⁾ German authorities' letter of 25 April 2002, p. 3. This corrects the hourly labour cost submitted on 12 March 2002, Annex 1, p. 49 which reflected wages that are presumed to have to be paid to subcontractors for taking over the entire sorting activity. However, as sorting activities have never been subcontracted — no undertaking was named as actually having had a volume comparable to DPAG's ([...] million parcels a year) sorted and transported solely through subcontractors — there is no practical example of the feasibility of a subcontracting model on this scale. The German authorities accordingly submitted new figures on 25 April 2002 based on DPAG's real labour costs.

⁽⁵¹⁾ All 33 freight centres are built and equipped to the same design. They all have a dual function, serving as inbound and outbound freight centres concurrently.

⁽⁵²⁾ German authorities' letter of 25 April 2002, p. 3.

⁽⁵³⁾ German authorities' letter of 16 September 1999, Annex 95/1, p. 12 and German authorities' letter of 25 April 2002, p. 3.

⁽⁵⁴⁾ German authorities' letter of 25 April 2002, p. 3.

between each centre is necessary, that is to say 32 trips from each outbound centre to the other inbound centres, or at least $32 \times 33 = 1\,056$ trips per day⁽⁵⁵⁾. Long-distance transport is provided five nights a week (= 250 nights per year)⁽⁵⁶⁾. Therefore, an annual amount of 264 000 long-distance rounds ($1\,056 \times 250$), in terms of staffing, equipment and capital, can be attributed to the door-to-door services⁽⁵⁷⁾. The annual cost attributable to B-to-B long-distance rounds can thus be calculated as the price per round \times 264 000 annual long-distance rounds. For the period 1994 to 1999 this yields the following results:

1994: DEM [...] per round⁽⁵⁸⁾ \times 264 000 annual long-distance rounds = DEM [...] million/year,

1995: DEM [...] per round \times 264 000 annual long-distance rounds = DEM [...] million/year,

1996: DEM [...] per round \times 264 000 annual long-distance rounds = DEM [...] million/year,

1997: DEM [...] per round \times 264 000 annual long-distance rounds = DEM [...] million/year,

1998: DEM [...] per round \times 264 000 annual long-distance rounds = DEM [...] million/year,

1999: DEM [...] per round \times 264 000 annual long-distance rounds = DEM [...] million/year.

- (33) In addition to these nightly long-distance rounds, there are daily direct long-distance transport rounds on behalf of the three major mail-order companies. According to estimates submitted by DPAG, between [...] % (1990) and [...] % (1999) of mail-order parcels were collected at the customer's premises and transported directly to the inbound freight centre⁽⁵⁹⁾. In addition, [...] % of mail-order return parcels are delivered by means of direct transports⁽⁶⁰⁾. As with the B-to-B direct deliveries, all direct transports for mail-order customers involved a lorry with a trailer (two containers). Thus, the outsourcing cost for direct mail-order transport was identical to the cost for B-to-B long-distance transport⁽⁶¹⁾. Direct transport was conducted on five days per week. According to the German authorities, the following direct transport rounds and expenditure were attributable to mail-order services between 1994 and 1999:

1994: DEM [...] per round⁽⁶²⁾ \times [...] attributable rounds/year⁽⁶³⁾ = DEM [...] million,

1995: DEM [...] per round \times [...] attributable rounds/year = DEM [...] million,

1996: DEM [...] per round \times [...] attributable rounds/year = DEM [...] million,

1997: DEM [...] per round \times [...] attributable rounds/year = DEM [...] million,

1998: DEM [...] per round \times [...] attributable rounds/year = DEM [...] million,

1999: DEM [...] per round \times [...] attributable rounds/year = DEM [...] million.

⁽⁵⁵⁾ German authorities' letter of 12 March 2002, Annex 1, p. 14 and 23.

⁽⁵⁶⁾ German authorities' letter of 12 March 2002, Annex 1, p. 46.

⁽⁵⁷⁾ German authorities' letter of 12 March 2002, Annex 1, p. 46.

⁽⁵⁸⁾ Cost per round as submitted by German authorities' letter of 25 April 2002, pp. 3 and 4. This later estimate deviates from the earlier submission of 12 March 2002, Annex 1, pp. 24 and 46, according to which a subcontractor, from 1994 to 1998, would have earned DEM [...] per kilometre \times [...] km = DEM [...] per round.

⁽⁵⁹⁾ German authorities' letter of 12 March 2002, Annex 1, p. 23.

⁽⁶⁰⁾ German authorities' letter of 12 March 2002, Annex 1, p. 15.

⁽⁶¹⁾ German authorities' letter of 25 April 2002, p. 4.

⁽⁶²⁾ Cost per round as submitted by German authorities' letter of 25 April 2002, pp. 3 and 4.

⁽⁶³⁾ Data on attributable rounds as submitted by German authorities' letter of 12 March 2002, Annex 1, p. 46.

4. Regional transport

- (34) Regional transport comprises short-haul transport rounds of, on average, [...] km⁽⁶⁴⁾ between the freight centres and the delivery points. Regional transport rounds are conducted six days a week (= 303 working days)⁽⁶⁵⁾. There are, on average, about five daily rounds between a delivery point and a freight centre. As mentioned in recital 30, the German authorities estimate that a certain number of delivery points out of a total of 476 delivery points operated by DPAG may be attributed to door-to-door services⁽⁶⁶⁾. Therefore, by indirect linkage with another cost category (delivery points), a corresponding amount of delivery rounds can be attributed to door-to-door services. The cost attributable to competitive door-to-door parcel activities can thus be calculated as the cost per round × rounds attributable to door-to-door services per delivery point per day × 303 working days × delivery points attributable to door-to-door activities = attributable cost per year. For the relevant period 1994 to 1999 this yields the following results:

1994: [...] daily rounds⁽⁶⁷⁾ × 303 working days = [...] yearly rounds/delivery point × [...] attributable delivery points⁽⁶⁸⁾ = [...] attributable rounds/year × DEM [...] ⁽⁶⁹⁾ per round = DEM [...]million,

1995: [...] daily rounds × 303 working days = [...] yearly rounds/delivery point × [...] attributable delivery points = [...] attributable rounds/year × DEM [...] per round = DEM [...]million,

1996: [...] daily rounds × 303 working days = [...] yearly rounds/delivery point × [...] attributable delivery points = [...] attributable rounds/year × DEM [...] per round = DEM [...]million,

1997: [...] daily rounds × 303 working days = [...] yearly rounds/delivery point × [...] attributable delivery points = [...] attributable rounds/year × DEM [...] per round = DEM [...]million,

1998: [...] daily rounds × 303 working days = [...] yearly rounds/delivery point × [...] attributable delivery points = [...] attributable rounds/year × DEM [...] per round = DEM [...]million,

1999: [...] daily rounds × 303 working days = [...] yearly rounds/delivery point × [...] attributable delivery points = [...] attributable rounds/year × DEM [...] per round = DEM [...]million.

5. Delivery

- (35) Within the relevant door-to-door activities DPAG distinguishes between three distinct forms of delivery: (1) dedicated business parcel delivery rounds (*Firmenzustellung*) for customers whose daily delivery volume fills one DPAG movable container (*Rollbehälter*)⁽⁷⁰⁾; (2) dedicated mail-order return rounds (*Reroundenzustellung*); and (3) standard delivery rounds (*Regelzustellung*) for the joint delivery of mail-order and those B-to-B parcels that are not delivered by dedicated business parcel delivery rounds.
- (36) *Dedicated business-to-business deliveries:* a dedicated business bulk delivery entails the delivery of parcels that are separated into individual movable containers (*Rollbehälter*). One container only contains parcels for one particular addressee⁽⁷¹⁾. Approximately [...] % of B-to-B parcels are delivered by means of dedicated B-to-B delivery rounds. The remaining [...] % of B-to-B parcels are delivered jointly with the B-to-C parcels in standard delivery rounds⁽⁷²⁾. The cost attributable to dedicated business-to-business deliveries can thus be calculated as follows: cost per round × attributable daily rounds × 250 delivery days per year. For the period 1994 to 1999 this yields the following result:

⁽⁶⁴⁾ German authorities' letter of 25 April 2002, p. 4.

⁽⁶⁵⁾ The German authorities corrected their earlier assumption that regional transport rounds were only conducted five days a week; cf. German authorities' letter of 12 March 2002, Annex 1, p. 48.

⁽⁶⁶⁾ German authorities' letter of 12 March 2002, Annex 1, p. 17.

⁽⁶⁷⁾ German authorities' letter of 12 March 2002, Annex 1, p. 48.

⁽⁶⁸⁾ German authorities' letter of 12 March 2002, Annex 1, p. 48.

⁽⁶⁹⁾ Cost per round as submitted by German authorities' letter of 25 April 2002, p. 4.

⁽⁷⁰⁾ German authorities' letter of 12 March 2002, Annex 1, pp. 15, 36 and 48.

⁽⁷¹⁾ German authorities' letter of 12 March 2002, Annex 1, p. 15.

⁽⁷²⁾ German authorities' letter of 12 March 2002, Annex 1, p. 15.

1994: DEM [...] per round ⁽⁷³⁾ × [...] attributable rounds ⁽⁷⁴⁾ × 250 delivery days = DEM [...] million,

1995: DEM [...] per round × [...] attributable rounds × 250 delivery days = DEM [...] million,

1996: DEM [...] per round × [...] attributable rounds × 250 delivery days = DEM [...] million,

1997: DEM [...] per round × [...] attributable rounds × 250 delivery days = DEM [...] million,

1998: DEM [...] per round × [...] attributable rounds × 250 delivery days = DEM [...] million,

1999: DEM [...] per round × [...] attributable rounds × 250 delivery days = DEM [...] million.

- (37) *Dedicated mail-order return deliveries:* mail-order return parcels contain goods sent by mail-order companies that are returned by the customer. Mail-order return parcels are collected at specified agencies and returned on five working days per week (= 250 working days per year) in bulk to the mail-order company. ⁽⁷⁵⁾ [...] % of mail-order return parcels are delivered by means of dedicated delivery rounds, ⁽⁷⁶⁾ the rest is delivered, as mentioned above, by direct transport. An average mail-order return delivery round covers about [...] kilometres ⁽⁷⁷⁾ and thus generates [...] % of the costs of a [...] km dedicated mail-order collection round. ⁽⁷⁸⁾ The cost attributable to mail-order collection rounds can thus be calculated as the cost per round x rounds attributable to mail-order return deliveries x 250 working days = attributable cost per year. For the period from 1994 to 1999 this yields the following results:

1994: DEM [...] per round ⁽⁷⁹⁾ × [...] attributable daily rounds ⁽⁸⁰⁾ × 250 delivery days ⁽⁸¹⁾ = DEM [...] million,

1995: DEM [...] per round × [...] attributable daily rounds × 250 delivery days = DEM [...] million,

1996: DEM [...] per round × [...] attributable daily rounds × 250 delivery days = DEM [...] million,

1997: DEM [...] per round × [...] attributable daily rounds × 250 delivery days = DEM [...] million,

1998: DEM [...] per round × [...] attributable daily rounds × 250 delivery days = DEM [...] million,

1999: DEM [...] per round × [...] attributable daily rounds × 250 delivery days = DEM [...] million.

⁽⁷³⁾ A dedicated B-to-B delivery round covers, according to DPAG, a distance of [...] km and thus generates half of the cost of a pure B-to-B collection round; DPAG, 24 May 2002.

⁽⁷⁴⁾ As mentioned above, the German authorities' letter of 25 April 2002, p. 1, specified that all rounds previously indicated as integrated B-to-B collection and delivery rounds are in reality pure collection rounds. This corrects the earlier submissions of 12 March 2002, according to which there were pure B-to-B and mail-order return collection rounds on the one hand and integrated B-to-B collection and delivery rounds on the other hand. As mentioned above, the rounds indicated as integrated B-to-B collection and delivery rounds must thus be attributed solely to the B-to-B collection rounds on the one hand and dedicated business parcel delivery rounds on the other.

⁽⁷⁵⁾ German authorities' letter of 12 March 2002, Annex 1, p. 15.

⁽⁷⁶⁾ German authorities' letter of 12 March 2002, Annex 1, p. 15.

⁽⁷⁷⁾ German authorities' letter of 25 April 2002, p. 2.

⁽⁷⁸⁾ As discussed under the heading 'long-distance transport' above, the remaining [...] % of mail-order return parcels are delivered by means of direct transport, German authorities' letter of 12 March 2002, Annex 1, p. 15.

⁽⁷⁹⁾ Cost per round as submitted by the German authorities' letter of 25 April 2002, p. 2.

⁽⁸⁰⁾ German authorities' letter of 12 March 2002, Annex 1, p. 67.

⁽⁸¹⁾ German authorities' letter of 12 March 2002, Annex 1, p. 67.

- (38) *Standard delivery*: according to estimates submitted by the German authorities, DPAG delivers, on average, [...] parcels per standard delivery round (Monday: [...] parcels; Tuesday: [...] parcels; Wednesday: [...] parcels; Thursday: [...] parcels; Friday: [...] parcels; and Saturday: [...] parcels) ⁽⁸²⁾. The average of [...] parcels per round is based on the DPAG schedule of six weekly delivery days which corresponds to 303 delivery days per year ⁽⁸³⁾. According to data supplied by the German authorities, an average delivery round takes [...] hours (Monday to Friday, [...] hours on Saturday) ⁽⁸⁴⁾. On the basis of the above premises, an attribution of delivery rounds to the B-to-B service can be made according to the following formula: yearly B-to-B volume subject to standard delivery ⁽⁸⁵⁾ divided by 303 yearly delivery days divided by [...] parcels/round = attributable daily B-to-B rounds. For the period 1994 to 1999, this yields the following results:

1994: [...] million minus [...] million (dedicated delivery) = [...] million divided by 303 yearly delivery days divided by [...] parcels/round = [...] attributable rounds × DEM [...] ⁽⁸⁶⁾ per round × 303 delivery days = DEM [...] million,

1995: [...] million minus [...] million (dedicated delivery) = [...] million divided by 303 yearly delivery days divided by [...] parcels/round = [...] attributable rounds × DEM [...] per round × 303 delivery days = DEM [...] million,

1996: [...] million minus [...] million (dedicated delivery) = [...] million divided by 303 yearly delivery days divided by [...] parcels/round = [...] attributable rounds × DEM [...] ⁽⁸⁷⁾ per round × 303 delivery days = DEM [...] million,

1997: [...] million minus [...] million (dedicated delivery) = [...] million divided by 303 yearly delivery days divided by [...] parcels/round = [...] attributable rounds × DEM [...] per round × 303 delivery days = DEM [...] million,

1998: [...] million minus [...] million (dedicated delivery) = [...] million divided by 303 yearly delivery days divided by [...] parcels/round = [...] attributable rounds × DEM [...] per round × 303 delivery days = DEM [...] million,

⁽⁸²⁾ German authorities' letter of 16 September 1999, Annex 93/2, p. 5.

⁽⁸³⁾ German authorities' letter of 25 April 2002, p. 5. This corrects the earlier assumption that standard delivery only takes place during five days a week and that [...] parcels may be delivered in an urban standard delivery round and [...] parcels in a rural standard delivery round (see German authorities' letter of 12 March 2002, pp. 27, 28 and 49). In the 25 April 2002 letter, at p. 5, the German authorities correct these earlier assumptions and indicate that, in reality, urban and rural rounds cannot be distinguished with the requisite level of clarity. Thus, an average of [...] parcels per standard delivery round was chosen. The later assumption of [...] parcels is also in line with BIEK's assumption that around [...] parcels are delivered in one standard delivery round; BIEK, 23 May 2002, p. 2.

⁽⁸⁴⁾ German authorities' letter of 16 September 1999, Annex 93/2, p. 5.

⁽⁸⁵⁾ The volume of B-to-B parcels that are delivered on dedicated business customer delivery rounds have to be subtracted from the amount of parcels delivered via standard delivery rounds.

⁽⁸⁶⁾ Cost per round as submitted by the German authorities' letter of 25 April 2002, p. 5. These data differ from the round costs of an 'efficient logistical network' for the operation of a door-to-door parcel delivery infrastructure submitted on 12 March 2002, Annex 1, p. 59. According to these earlier assumptions, 100 % of standard delivery rounds could be subcontracted to third-party undertakings. These subcontractors could be remunerated at rates of between DEM [...] per hour (1994) and DEM [...] (1999). On the assumption that up to [...] parcels could be delivered per urban round by these third parties, a round would last approximately [...] h. Thus, the cost per urban round would amount to between DEM [...] (1994) and DEM [...] (1999). However, the German authorities have not submitted any empirical evidence that a volume of [...] parcels per round could really be delivered under a 100 % sub-contracting arrangement. Nor is there any empirical example of a door-to-door delivery infrastructure that could deliver several million parcels a year (in 1999, DPAG transported some [...] million door-to-door parcel deliveries, see footnote (41) if all delivery rounds were subcontracted across the national territory. The figures presented by the German Government in the letter of 25 April 2002 are more in line with the conclusions of a study conducted by Dornier in October 1990 for Deutsche Bundespost Postdienst. In this study, Dornier assumes, for the years 1989/1990 that a standard delivery round generates cost of DEM [...] plus [...] per kilometre driven between the delivery point and the actual delivery district (Dornier, p. 16). According to Dornier, driving time between delivery points and delivery districts does not exceed [...] hours per round at an average speed of [...] km per hour (Dornier, p. 20). Average cost per round is thus [...] hour × [...] km per hour = [...] km per day. [...] km per day × DEM [...] per kilometre = DEM [...] per round. Average cost of a delivery round in 1990 is thus DEM [...] + [...] = DEM [...].

⁽⁸⁷⁾ According to the estimates submitted by the German authorities, DPAG, contrary to the trend in other stages of the process chain, managed to decrease the cost of a standard delivery round. The German authorities attribute these cost savings to three factors: (1) lowering the labour costs at the delivery stage; (2) reduction in the number of delivery staff and delivery vehicles by better planning of delivery rounds through use of information technology; with resulting savings in delivery staff and vehicles, (3) use of cheaper delivery vehicles.

1999: [...] million minus [...] million (dedicated delivery) = [...] million divided by 303 yearly delivery days divided by [...] parcels/round = [...] attributable rounds × DEM [...] per round × 303 delivery days = DEM [...] million.

- (39) The same formula is used to attribute delivery rounds to the mail-order service. In calculating the volume attributable to the mail-order service, it is noted that, according to an estimate of DPAG, approximately [...] % of all mail order parcels cannot be delivered upon the first delivery attempt, due to the absence of the private household recipient⁽⁸⁸⁾. A second delivery will thus have to be undertaken. Application of the abovementioned formula for B-to-B deliveries to the mail-order segment yields the following result:

1994: [...] million⁽⁸⁹⁾ plus [...] million second delivery attempt = [...] million divided by 303 yearly delivery days divided by [...] parcels/round = [...] attributable rounds × DEM [...] per round × 303 delivery days = DEM [...] million,

1995: [...] million plus [...] million second delivery attempt = [...] million divided by 303 yearly delivery days divided by [...] parcels/round = [...] attributable rounds × DEM [...] per round × 303 delivery days = DEM [...] million,

1996: [...] million plus [...] million second delivery attempt = [...] million divided by 303 yearly delivery days divided by [...] parcels/round = [...] attributable rounds × DEM [...] per round × 303 delivery days = DEM [...] million,

1997: [...] million plus [...] million second delivery attempt = [...] million divided by 303 yearly delivery days divided by [...] parcels/round = [...] attributable rounds × DEM [...] per round × 303 delivery days = DEM [...] million,

1998: [...] million plus [...] million second delivery attempt = [...] million divided by 303 yearly delivery days divided by [...] parcels/round = [...] attributable rounds × DEM [...] per round × 303 delivery days = DEM [...] million,

1999: [...] million plus [...] million second delivery attempt = [...] million divided by 303 yearly delivery days divided by [...] parcels/round = [...] attributable rounds × DEM [...] per round × 303 delivery days = DEM [...] million.

G. The scope of the public service mission entrusted to DPAG in the parcels sector

- (40) Finally, the German authorities submitted general comments on: (1) the scope of the public service mission entrusted to DPAG in the parcels sector; and (2) the 'historical burden' of DPAG as a former state-owned enterprise.
- (41) According to the German authorities, the public service mission of DPAG included the collection, sorting, transport and delivery of all postal parcels up to 20 kilograms. This service had to be provided throughout Germany in accordance with the principle of nationwide tariff uniformity. While it is true that Article 2(2) No 3 of the 1994 Postdienst Mandatory Services Ordinance⁽⁹⁰⁾ grants DPAG the freedom, notwithstanding the uniform tariff laid down by law, to give rebates to certain customers who pre-code and/or pre-sort themselves or have a certain minimum quantity of parcels delivered, this freedom does not mean that DPAG is released from its obligation to transport all parcels deposited at the postal counter at a uniform tariff, independently of whether the customer uses the service for private or business purposes. According to the German authorities, all customers who are granted rebates because of their pre-sorting activities or on account of the parcel volume delivered through DPAG still have the right to use the universal service that is provided at the postal counter at a uniform tariff across the national territory⁽⁹¹⁾. It is therefore not correct to state that business users, in a way contrary to the goals of 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⁽⁹²⁾, are excluded from the universal service⁽⁹³⁾.

⁽⁸⁸⁾ German authorities' letter of 12 March 2002, Annex 1, p. 27.

⁽⁸⁹⁾ German authorities' letter of 31 January 2002, Annex 5 *Segmenterfolgsrechnung 1990-2000*. Mail-order parcel volume is counted without the mail-order return deliveries which, as mentioned above, are not delivered as part of the standard delivery rounds.

⁽⁹⁰⁾ *Postdienst-Pflichtleistungsverordnung* of 12 January 1994, BGBl. 1994, part II, p. 86.

⁽⁹¹⁾ German authorities' letter of 16 September 1999, p. 10.

⁽⁹²⁾ OJ L 15, 21.1.1998, p. 14.

⁽⁹³⁾ German authorities' letter of 16 September 1999, p. 13.

H. The 'historical burden' of DPAG as a former state-owned enterprise

- (42) The German authorities argue that DPAG's fully allocated costs for the operation of its parcel freight branch as identified in the decision to initiate the procedure are inflated by a series of 'burdens of the past' all of which are linked to the fact that DPAG has an obligation to provide services of general economic interest. On account of past and present obligations, DPAG's costs are higher than the cost of providing equivalent services under normal market conditions. According to the German authorities, the cost coverage of DPAG with respect to its domestic parcel delivery operations should be assessed, not on the basis of a comparison between its fully allocated costs and the revenue achieved in providing these services, but on the basis of a calculation comparing DPAG's revenue with the hypothetical 'burden-free' cost that DPAG would have incurred in providing parcel services under normal market conditions⁽⁹⁴⁾. According to the German authorities, the 'burdens of the past' thus reflect the difference between the cost of providing parcel services under normal market conditions and the special cost of providing these services that only DPAG incurs⁽⁹⁵⁾.
- (43) DPAG, if allowed to operate its parcel service under normal market conditions, would not have encountered a series of atypical cost elements, such as (1) basic wages above the normal market level; (2) housing loans to staff at interest rates below the normal market level; (3) redundancy payments; (4) the cost of overstaffing (payment of staff for whom no work is provided); (5) missed investment aid for projects in the new *Länder*; (6) non-deductible value-added tax (because DPAG services are exempt from VAT); (7) cost of civil protection and security; (8) atypical cost of capital; (9) cost of a non-standard form of accelerated depreciation; (10) cost of operating postal counters as opposed to remuneration of agencies; (11) low parcel volume per stop of the delivery vehicle⁽⁹⁶⁾; (12) Saturday deliveries; (13) unification costs; (14) inefficient parcel freight system in the new *Länder*; and (15) cost of operating two parcel freight systems in parallel during the transitional period lasting from 1994 to 1995.
- (44) According to the German authorities, all of these burdens of the past are linked to political choices by a Member State on how to fulfil a public service mission. According to the German authorities, in the absence of Community rules on the matter, the Commission is not entitled to rule on the level of costs linked to services of general interest or the expediency of the political choices made in this regard by the national authorities⁽⁹⁷⁾. The German authorities conclude that, if DPAG had been operated without these atypical burdens under normal market conditions, its parcel freight network would have been profitable.
- (45) Finally, according to the German authorities, even if the Commission were not to deem all parcel services provided on this infrastructure as still being provided in the public interest, the 'burdens of the past' must be considered 'stranded costs' of providing parcel services that were undeniably deemed to be in the public interest when the current infrastructure was planned in 1990⁽⁹⁸⁾.

III. COMMENTS FROM INTERESTED PARTIES

- (46) Following the invitation to submit comments under Article 88(2) of the EC Treaty, the Commission received comments from the complainants and 12 interested third parties.

⁽⁹⁴⁾ According to the German authorities (letter of 16 September 1999, page 18), the term 'burdens of the past' is supposed to designate the atypical costs of DPAG as compared with the costs of an undertaking operating under normal market conditions. According to the German authorities, it is precisely these 'burdens of the past' which produce the deficit in the parcel freight operations that has been identified in the decision to initiate proceedings.

⁽⁹⁵⁾ German authorities' letter of 1 February 2000, page 20; see also the German authorities' letter of 16 September 1999, p. 18.

⁽⁹⁶⁾ DPAG only delivers, on average, [...] parcels per stop, while it alleges that competitors deliver at least 1,8 to 1,9 and up to 2,1 parcels per stop; document *Ergebnisbelastungen* DPAG, 1995, p. 7, submitted by the German authorities by letter of 19 November 1997.

⁽⁹⁷⁾ German authorities' letter of 16 September 1999, p. 13.

⁽⁹⁸⁾ German authorities' letter of 21 June 2000, Annex 1.

- (47) According to UPS, the services of general economic interest provided by DPAG are profitable. The undercoverage of cost established in the decision to initiate the procedure is due to the provision of door-to-door parcel services not dealt with at the postal counter. State aid to cover losses from these activities cannot be justified under Article 86(2) of the Treaty. Furthermore, UPS submits that the 'burdens of the past' as presented by the German authorities are exaggerated. It doubts whether the wages paid by DPAG really exceed those normally paid by competitors. Redundancy payments should in any case not be considered an atypical 'burden of the past' but a normal cost any undertaking has to face. In addition, UPS also delivers parcels on Saturdays. In any event, the alleged 'burdens of the past' should be balanced against the benefits received by DPAG to cover those burdens, such as the considerable real estate and capital endowments granted to DPAG by the State when it was transformed into a limited company in 1995.
- (48) According to BIEK, an association of private providers of express delivery and courier services in Germany, the losses incurred by Postdienst and DPAG are attributable exclusively to the door-to-door parcel service. These losses were cross-subsidised by revenue from Deutsche Telekom's telephone monopoly. BIEK also alleges that Article 7 of the Postal Reorganisation Act obliged DTAG to waive a claim of approximately DEM 5,4 billion against DPAG.
- (49) According to BIEK, the cost and revenue accounts submitted by the German authorities do not reflect the actual cost of supplying parcel delivery services under normal market conditions. According to it, the German authorities' data are based on a 'top-down' analysis of the costs of the whole business which fails to allocate costs precisely according to the actual use of resources at the origin of those costs. BIEK therefore submits a costs and revenues assessment of DPAG's parcel delivery service which, in order to determine the actual cost of supplying parcel services, undertakes a 'bottom-up' analysis of the individual procedural steps that are necessary to provide a parcel delivery service of the size of DPAG's. The study calculates the use of human and material resources based on standard processing times combined with standard labour and material costs. This method determines the actual market cost exclusive of inherited burdens such as overstaffing or other 'burdens of the past' ⁽⁹⁹⁾.
- (50) The costs and revenues assessment submitted by BIEK concludes that the revenue achieved by DPAG in parcel deliveries to business customers is much lower than the actual market cost of providing such parcel services. While the door-to-door segment is making losses, the over-the-counter service is actually earning a profit. The losses incurred by the parcel freight sector are thus exclusively attributable to the door-to-door parcel services segment. The BIEK study also concludes that the losses in the door-to-door parcel services segment are due to the structure of DPAG's parcel freight business ⁽¹⁰⁰⁾ because, regardless of the alleged 'burdens of the past', losses would occur if the current business structure and prices were to be maintained. On the basis of its assessment, BIEK concludes that the losses in the door-to-door parcel services segment are the result, not of the 'burdens of the past' or of political choices, but of DPAG's aggressive pricing strategy in this segment ⁽¹⁰¹⁾.
- (51) In an additional study submitted on 7 February 2002, BIEK made an assessment of the cost of providing B-to-B and mail-order parcel services under normal market conditions. In this respect, it identified the different procedural steps that make up door-to-door parcel services in the B-to-B segment and conducted a survey among the companies German Parcel, DPD and UPS on the costs that a private undertaking operating under normal market conditions would incur in the provision of these procedural steps in the value chain. A survey was conducted among the firms DPD, Hermes Versandservice and UPS on the costs incurred under normal market conditions in the operation of a door-to-door infrastructure for the mail-order trade. On the basis of given quantities and industry working time and wage standards, costs were assigned to the individual procedural stages on the basis of the resources (labour, capital or materials) that they actually consume.

⁽⁹⁹⁾ BIEK, letter of 22 November 1999, p. 2.

⁽¹⁰⁰⁾ According to BIEK, the losses are structural because if private competitors were to operate the DPAG parcel freight infrastructure comprising 33 sorting centres and 476 delivery bases, they would incur comparable losses.

⁽¹⁰¹⁾ BIEK, letter of 22 November 1999, p. 3 at paragraph 3.

- (52) In addition, BIEK contests the existence of individual 'burdens of the past' as described by the German authorities. A comparison of basic wages shows that DPAG's are no higher than those paid to comparable employees working for competitors. In particular, according to BIEK, the basic wages for parcel delivery workers paid by DPAG in certain areas are even lower than the hourly rate paid in the transport industry. According to BIEK, parcel deliveries on Saturdays are not a handicap but a necessity to remain competitive in the mail-order segment.
- (53) BIEK submits that the transfer of real-estate assets to DPAG in 1995 should have served, *inter alia*, to cover 'burdens of the past', and not to compensate for operating costs. The use of revenue from the sale of non-essential land, buildings or dwellings for purposes other than the coverage of these historical burdens, such as the extension of the parcel delivery service or the acquisition of other companies, amounts to State aid to DPAG. Finally, BIEK is of the opinion that a distortion of competition can be remedied only by a structural and legal separation between the parcel freight service and the letter mail service.
- (54) The German association Bundesverband Spedition und Logistik eV ('BSL') submits that DPAG's parcel freight service is over-dimensioned compared with the potential demand. DPAG has consequently tried to generate additional volume by charging prices which cannot be matched by private companies operating under normal market conditions. According to BSL, at the price level offered by DPAG, neither DPAG nor any company operating under normal market conditions can cover from revenue the costs of the individual parcel services.
- (55) The Dutch association Transport en Logistiek Nederland ('TLN') submits that no private operator of parcel services can survive in a market in which State-owned enterprises use aid to subsidise parcel services that are open to competition. According to TLN, activities open to competition should be structurally and legally separate from the subsidised services of general economic interest.
- (56) The European Express Organisation ('EEO') submits that maintaining a loss-making parcel freight activity for more than 15 years is inconsistent with the business practices of an undertaking subject to normal market conditions. In the absence of a credible restructuring plan, the maintenance of those parcel activities would distort competition. In addition, according to the EEO, DPAG should have used revenue from the sale of real-estate assets to finance the restructuring of its parcel freight operations instead of financing new acquisitions in the international logistics and freight forwarding business.
- (57) Federal Express submits that the Commission should clearly identify the cost standard to be used to determine the absence or presence of State aid with respect to parcel services open to competition. According to Federal Express, the State did not, at the time the investments to modernise DPAG's parcel freight infrastructure were made, have a reasonable expectation of a return on investment commensurate with the risks of that investment. Federal Express also voices doubts as to the existence and true scale of the 'burdens of the past' as submitted by the German authorities.
- (58) Another interested party, which does not want its identity to be revealed, submits that DPAG receives, through State resources, compensation in excess of the costs associated with fulfilment of its public service mission. This 'overcompensation' gives DPAG the financial means with which to aggressively price its services in parcel delivery markets open to competition in a way which is not possible for any of its private competitors operating under normal market conditions. This overcompensation negatively affects trade between Member States in view of the increasingly cross-border nature of the relevant postal services.
- (59) German Parcel submits that DPAG has almost unlimited resources, which it has used and is using to expand its parcel freight network. Unlike its competitors, DPAG can go ahead and expand without regard to the cost. Nor would it be true to say that competitors are not interested in the private-customer market. Numerous service providers, including German Parcel, offer parcel services to private consumers. In this respect, German Parcel describes its 'parcel shop' infrastructure which comprises over 1 000 parcel counters across the country tailored to the needs of individual consumers. However, German Parcel has encountered difficulties in entering the mail-order parcel delivery segment due to long-term contracts and quantity and fidelity rebates that DPAG has offered to most major customers in this segment.

- (60) German Parcel also contests the existence and scale of the 'burdens of the past' as submitted by the German authorities. The low stop factor (volume of parcels delivered per stop of the delivery vehicle) is not a consequence of DPAG's public service obligations, as fewer than 9 % of parcels are handed in at a postal counter. A lower stop factor compared with competitors is, according to German Parcel, due to DPAG's decision to serve the entire mail-order trade. On the other hand, the stop density (number of stops per street) is, owing to the higher volume, more favourable in the case of DPAG than in that of its private competitors. In addition, DPAG enjoys the unique ability to deliver parcels jointly with general letter mail covered by the statutory monopoly, an option not available to any of its competitors. According to German Parcel, Saturday deliveries are offered not only by DPAG but notably also by Hermes Versand AG. Saturday deliveries, if organised with the requisite diligence, do not give rise to extra costs.
- (61) According to the Association of German Transport Companies (Vereinigung Deutscher Kraftwagenspediteure eG — 'VDK'), DPAG has not submitted a transparent system of cost accounting which would permit clarification of the actual costs and revenues generated by given business segments.
- (62) The German postal users association, Deutscher Verband für Post und Telekommunikation eV ('DVPT'), is of the opinion that DPAG must have achieved a profit of at least DEM 1,7 billion in the reserved letter market. As DPAG overall merely breaks even or makes a slight profit, the extent of cross-subsidisation between reserved letter mail services and competitive services is significant. The DVPT doubts whether the amount of compensation that DPAG receives from the State in order to provide services in the general interest is in proportion to the additional costs actually incurred, especially since the volume achieved in the provision of over-the-counter parcels does not amount to the 23 % indicated in the decision to initiate the procedure. In reality, the additional costs in the over-the-counter segment are much smaller as they represent a much smaller proportion of the total volume than indicated by the German authorities. Thus, the amount of compensation received from the State should be substantially reduced.
- (63) According to the British Post Office (the 'Post Office'), the transfer of real property or other property by the State to a public postal operator constitutes State aid. According to the Post Office, this is also true of any assets transferred between two State entities, if such assets were not required to provide services of general economic interest. Also, the assumption of pension liabilities that DPAG incurred as a consequence of the early retirement of 25 % of its staff is State aid. According to the Post Office, the pensions shortfall should have been financed by the sale of business assets. According to the Post Office, a transfer of real estate is too remote and indirect a means to qualify as compensation for the additional costs of providing services of general economic interest under Article 86(2) of the Treaty. In any case, the funding of 'burdens of the past' should have been undertaken on a case-by-case basis with proceeds from the sale of real estate.

IV. LEGAL ASSESSMENT

- (64) Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the common market. The abovementioned State measures in support of DPAG constitute State aid within the meaning of Article 87(1) of the EC Treaty if: (1) DPAG received an economic advantage as a result; (2) the funds mobilised in order to grant the advantage were state resources; (3) the advantage distorts competition and trade; and (4) trade between Member States is affected.
- (65) As a preliminary point, this legal assessment will address the allegation made with respect to the acquisition of Postbank AG. In the course of the procedure, the German authorities produced documents which indeed demonstrate that, contrary to the assertions made by the complainants, the sales price was not set off against a non-existent claim but was actually paid by DPAG to the German authorities. The German authorities submitted a purchase contract and proof of actual payment of the agreed-upon purchase price by DPAG. Furthermore, the German authorities submitted documents which prove that the agreed-upon purchase price reflected the economic value that Postbank represented to DPAG. Under these circumstances, the acquisition of Postbank involved no grant of State aid.

A. Economic advantage

- (66) According to the judgment of the Court of Justice of the European Communities in Case C-53/00 (ACOSS) ⁽¹⁰²⁾, State financing of the provision of services of general economic interest may confer an economic advantage on an undertaking within the meaning of Article 87(1) of the EC Treaty. However, if it does not exceed the additional costs ⁽¹⁰³⁾ actually incurred in providing services in the general interest, State financing ceases to be a real advantage within the meaning of Article 87(1) of the Treaty and may be regarded as reasonable compensation for the discharge of public service obligations ⁽¹⁰⁴⁾.
- (67) The German authorities are therefore free to grant compensation for the net additional costs actually associated with the discharging of public service obligations through State resources, such as, in this case, financial contributions to a postal pension fund, State guarantees or the transfer of capital and real estate. However, in granting such compensation the German authorities need to ensure that the value of the different state resources does not exceed the net additional costs actually resulting from the discharge of public service obligations. Should net additional costs arising for other, unrelated reasons be compensated for through State resources, this would confer an economic advantage on the beneficiary.
- (68) Responding to a request by the Commission of 10 March 2000 concerning any profits DPAG may have earned between 1990 and 1998 in the area of non-reserved services, the German authorities, by letter of 24 March 2000 (p. 10), submitted data showing that competitive services yielded aggregate profits of DEM [...] million in 1998. On the other hand, the German authorities submitted data according to which, in the period 1990 to 1998, the deficit in the provision of parcel services as a whole amounted to DEM [...] million ⁽¹⁰⁵⁾ and the deficit in newspaper and press products amounted to a further DEM [...] million ⁽¹⁰⁶⁾. This amounts to a total deficit for these two segments of DEM [...] million. Revenue from competitive services was therefore insufficient to cover the deficit in the provision of parcel services ⁽¹⁰⁷⁾.
- (69) The German authorities claim that the entire deficit of DEM [...] million incurred by DPAG in the provision of parcel services is inseparably linked to political choices as to the scope and discharge of public service obligations in this sector ⁽¹⁰⁸⁾. The German authorities are of the view that, on account of the affordable uniform tariff set in the general interest, parcel services between 1990 and 1998 generated revenue insufficient to achieve economic equilibrium and caused net additional costs. In addition, the German authorities refer to 15 'burdens of the past' ⁽¹⁰⁹⁾ which made clear why DPAG cannot function as an undertaking operating under normal market conditions. As already indicated, according to the German authorities the specific burden associated with the discharging of public service obligations should be defined and calculated as the difference between the cost of providing parcel services under normal market conditions and the special cost of providing these services that only DPAG incurs on account of its status as a former State administrative body ⁽¹¹⁰⁾.
- (70) In the light of the abovementioned judgment of the Court of Justice in Case C-53/00, the deficit due to the discharging of public service obligations is, however, to be calculated as the net additional costs of providing services in the general interest. The scope of these services provided in the general interest and the net additional costs to which they give rise must first of all be precisely defined.

⁽¹⁰²⁾ [2001] ECR I-9067, at paragraphs 20 and 22.

⁽¹⁰³⁾ I.e. the net additional costs incurred in discharging a public service obligation; see the opinion of Advocate-General Tizzano in Case C-53/00, paragraph 60.

⁽¹⁰⁴⁾ Case C-53/00, paragraph 27.

⁽¹⁰⁵⁾ Corrected version submitted by letter of 2 June 2000.

⁽¹⁰⁶⁾ Corrected version submitted by letter of 2 June 2000.

⁽¹⁰⁷⁾ According to the data supplied by the German authorities by letter of 2 June 2000 (corrected version submitted by letter of 12 January 2001), the reserved area, from 1990 to 1998, generated an aggregate profit of DEM [...] million. In the same period, competitive services contributed net revenue of DEM [...] million. This necessarily implies that an amount of at least DEM [...] million of the abovementioned total deficit of DEM [...] million was not covered either by revenue from the statutory monopoly or by revenue from competitive services.

⁽¹⁰⁸⁾ German authorities' letter of 16 September 1999, p. 18.

⁽¹⁰⁹⁾ For a list of these burdens, see II.(G) above.

⁽¹¹⁰⁾ German authorities' letter of 16 September 1999, p. 18.

- (71) With respect to parcel services, the abovementioned Postdienst Mandatory Services Ordinance of 12 January 1994 contains precise specifications as to the services to be provided, i.e. the type of parcels that are to be conveyed in the general interest, and the tariffs applicable to these services. According to these specifications the former DB-Postdienst and, from 1995 onwards, DPAG had to fulfil two essential requirements: (1) the conveyance of 'parcels and packets' within the meaning of the Ordinance had to be effected as an infrastructure service in the general interest⁽¹¹¹⁾; and (2) Article 1(1) of the Ordinance requires DB-Postdienst to convey parcels and packets within the meaning of Article 2 throughout Germany at uniform prices in accordance with the principle of tariff uniformity. The tariff considered affordable was set by ministerial order⁽¹¹²⁾.
- (72) In the light of the considerable deficit of DEM [...] million in the parcel sector, it needs to be assessed, as a next step, whether all the net additional costs that have been compensated for by the State are directly linked to the precisely defined statutory mandate of DPAG. Should the flow of State resources enable the parcel sector to cover also those net additional costs that have no causal link with the discharge of public service obligations, DPAG would derive an advantage within the meaning of Article 87(1) of the Treaty. For in these circumstances, the equivalence required by the case-law between the State-financed compensation and the net additional costs of the public service mission is lacking⁽¹¹³⁾. This is because, in these circumstances, the financial compensation paid by the State does not correspond to any special charges borne specifically in discharging public service obligations⁽¹¹⁴⁾.
- (73) An examination of the infrastructure costs that are attributable specifically to door-to-door parcel services which are open to competition (hereinafter called 'door-to-door infrastructure costs')⁽¹¹⁵⁾ has revealed that DPAG, in providing door-to-door parcel services open to competition, has incurred net additional costs which do not have any causal link with the discharge of public service obligations, namely the obligation to convey parcels at an affordable uniform tariff⁽¹¹⁶⁾. The amount of these net additional costs not connected with the obligation to convey parcels at an affordable uniform tariff can be clearly quantified. There is therefore a minimum amount of DPAG's net additional costs which is in no way linked to the discharge of public service obligations.
- (74) The Commission's investigation of DPAG's pricing policy has revealed that DPAG incurred considerable losses in the provision of door-to-door parcel services due, not to its adherence to the uniform tariff, but to an aggressive rebate policy leading to prices below the uniform tariff for door-to-door parcel customers⁽¹¹⁷⁾. Owing to this rebate policy, DPAG's revenue in door-to-door parcel services is considerably lower than the door-to-door infrastructure costs. There is, however, no causal link between these net additional costs and DPAG's public service obligations because: (1) there was no

⁽¹¹¹⁾ Article 2(1) of the Ordinance defines parcels and packets as containers whose weight does not exceed 20 kg and whose dimensions do not exceed 120 cm in length, 60 cm in width and 60 cm in height.

⁽¹¹²⁾ According to the German authorities, the applicable tariffs as set by the competent minister are reflected by the tariff schedules published by DPAG. According to these schedules, the affordable tariff for the lowest parcel weight category (up to five kilograms) for over-the-counter parcels available to the general public in the period 1994 to 1995 was DEM 7,60. In 1996, the lowest weight category was limited to parcels up to two kilograms. The affordable price from 1996 to 1998 was DEM 9,00.

⁽¹¹³⁾ Case C-53/00, paragraph 27.

⁽¹¹⁴⁾ On the contrary, a reimbursement, be it partial, through State resources of costs indispensable to the maintenance of door-to-door infrastructure confers on DPAG an advantage over competitors who are obliged to cover those costs entirely out of their own revenue.

⁽¹¹⁵⁾ See II. (F).

⁽¹¹⁶⁾ The Commission has limited its investigation to door-to-door parcel services open to competition because the complaints by UPS and BIEK focus on these services.

⁽¹¹⁷⁾ This differentiates the present case from the recent decision in Case C 47/98 *Poste Italiane*, in which the investigation did not reveal the existence of an aggressive rebate strategy in a postal market open to competition. Furthermore, as opposed to the complaint against *Poste Italiane*, which was lodged by another State-owned postal operator and which limited itself to alleging that *Poste Italiane* received more State resources than strictly necessary for the discharge of its public interest tasks, the complaints lodged by UPS and BIEK in the present case specifically allege that DPAG received funds from the State which enabled it to hinder the competitive opportunities of private providers of door-to-door parcel services. This has rendered necessary an analysis of the infrastructure costs dedicated to door-to-door services and of whether revenue from these services covered the costs attributable to this infrastructure. In contrast to the present case, *Poste Italiane* was present neither in the door-to-door parcels sector nor in any other postal markets open to competition, nor were there any competitors that alleged that their competitive opportunities were hindered by a particular pricing policy pursued by *Poste Italiane*. When confronted with specific complaints alleging the hindering of the competitive opportunities of other undertakings, the Commission must therefore assess: (1) whether these strategies aimed at hindering competition were financed by State resources; and (2) whether such hindrance can exceptionally be inseparably linked to the discharge of public service obligations.

legal obligation to provide door-to-door parcel services to customers at prices below the statutory uniform tariff; (2) the rebate policy was entirely attributable to DPAG's goal of achieving or maintaining market share in competitive door-to-door parcel activities; and (3) the rebate policy caused clearly identifiable net additional costs which cannot be attributed to public service obligations.

1. *The absence of a legal obligation to provide aggressive rebates for door-to-door parcel services*

- (75) In the light of the increased competition in door-to-door parcel services, as of 1 February 1994 DB-Postdienst was given the opportunity — but was not placed under the obligation — to grant rebates to customers who either pre-sorted their parcels themselves or delivered certain minimum quantities to DPAG ⁽¹¹⁸⁾. Pursuant to Article 2(2)(3) of the Postdienst Mandatory Services Ordinance of 12 January 1994, DB-Postdienst and later DPAG could grant rebates which resulted in prices below the uniform tariff laid down in Article 1(1) of the Ordinance to customers who either carried out certain pre-sorting operations or delivered certain minimum quantities ⁽¹¹⁹⁾. If the customer did not fulfil the criteria set forth in Article 2(2)(3), the uniform tariff as stipulated in Article 1(1) applied.
- (76) According to the official explanatory memorandum to the Postdienst Mandatory Services Ordinance, Article 2(2)(3) effectively excludes from the universal acceptance obligation parcels in respect of which special rules are adopted under separate contracts with specific customers, e.g. 'self-labellers' or customers with cooperation contracts ⁽¹²⁰⁾. According to the explanatory memorandum, such business customers may be excluded from the acceptance obligation because there is effective competition in this sector which renders the acceptance obligation superfluous ⁽¹²¹⁾.
- (77) Self-labellers are customers who do not hand in parcels individually at postal counters. In order to participate in the self-labelling arrangements, a self-labeller needs to pre-code at least 10 000 parcels annually ⁽¹²²⁾. DPAG collects these pre-sorted and coded parcels at the customer's premises on dedicated B-to-B collection rounds. The product offered by DPAG at special prices to these customers is the 'self-labelled parcel'.
- (78) The cooperation with senders affords certain large door-to-door customers, known as 'cooperation partners', the opportunity of cooperating with DPAG in a way which goes beyond mere self labelling. DPAG entrusts to a sender, under a cooperation contract, the tasks of sorting, coding and loading and agrees for these pre-processing operations an amount of financial compensation ⁽¹²³⁾. For mail-order companies, DPAG offers special discounts for the distribution of non-time-sensitive catalogues (heavy *Infopost*) ⁽¹²⁴⁾.
- (79) However, there was no legal obligation to grant self-labellers and cooperation partners — groups which, according to the Federal Government's official explanatory memorandum to the Postdienst Mandatory Services Ordinance, are to be classed as business customers — rebates resulting in the prices paid by these customers being significantly below the uniform tariff deemed affordable for all other postal users ⁽¹²⁵⁾. In the opinion of the German authorities, the public service mission draws no distinction according to category of favoured customer.

⁽¹¹⁸⁾ German authorities' letter of 16 September 1999, p. 10 and Annex 1 p. 5.

⁽¹¹⁹⁾ This renders the principle of tariff uniformity inapplicable to the designated customer groups.

⁽¹²⁰⁾ *Entwurf einer Verordnung zur Regelung der Pflichtleistungen der Deutschen Bundespost Postdienst, Stand 9.12.1992*, German authorities' letter of 27 March 2000, Annex to question 3.

⁽¹²¹⁾ Annex 3 to the German authorities' letter of 27 March 2000.

⁽¹²²⁾ *Allgemeine Geschäftsbedingungen Frachtdienst Inland*, point 3.3.2 *Pauschalentgelt für selbstgebuchte Paketsendungen*, submitted at Annex 1 to the German authorities' letter of 18 March 1997.

⁽¹²³⁾ *Allgemeine Geschäftsbedingungen Frachtdienst Inland*, point 3.3.4 *Zusammenarbeit mit Versendern (Kooperation)*, submitted at Annex 1 to the German authorities' letter of 18 March 1997.

⁽¹²⁴⁾ The procedure of cooperation in respect of heavy *Infopost* is described in the new point 3.3.4.2 of the General Terms of Business for Inland Freight Services, which was announced in August 1995 by measure (*Verfügung*) P 777/1993: 'Senders of large volumes of heavy *Infopost* may in respect of such consignments by contract agree to take over from the postal service certain sorting functions going beyond the requirements of section 4.2, or the loading of dedicated transport units, or both. In return, the postal service will reduce the basic charge for heavy *Infopost*'.

⁽¹²⁵⁾ As mentioned above, the provision granting DPAG, for the first time in its history, the freedom to grant rebates is Article 2(2)(3) of the Postdienst Mandatory Services Ordinance. According to this provision, DPAG may grant rebates to certain customers who pre-sort and ship certain minimum quantities; see German authorities' letter of 16 September 1999, p. 10. In these circumstances, the uniform tariff functions as a maximum tariff, see explanatory memorandum to Article 6 of the Postal Universal Service Ordinance (*Postuniversaldienstverordnung*) of 30 September 1999, p. 11.

- (80) Under applicable German law, DPAG's freedom to grant rebates was subject to statutory limits. Pursuant to Article 37(4) of the 1989 Postal Organisation Act, the competitive opportunities of other undertakings on a market should not, without objective justification, be impaired by an appreciable long-term undercoverage of cost in competitive services. Pursuant to Article 20(2) of the Postal Act, DPAG's prices may not contain any rebates which impair abusively the competitive opportunities of other undertakings on a market for postal services ⁽¹²⁶⁾. These provisions make clear that rebates granted by DPAG in markets open to competition may not impair the competitive opportunities of other undertakings ⁽¹²⁷⁾.
- (81) In these circumstances, DPAG was under no legal obligation not to cover the costs of providing parcel services to self-labellers or cooperation partners, something which for a private undertaking operating under normal market conditions would have been out of the question.

2. The reasons for the rebate strategy

- (82) In a submission to its supervisory board of 21 February 1991 ⁽¹²⁸⁾, DB-Postdienst, as it then was, noted that, with respect to door-to-door parcel services, it was active in a competitive market. This market was characterised by strong growth and increasing customer demand. Competitors that had been entering this market in increasing numbers since the mid-1970s had succeeded in providing products that met this demand with respect to delivery times, safety and price ⁽¹²⁹⁾. Competitors were achieving a high level of customer satisfaction and their prospects of further growth were good. When it came to meeting customer demands, the products of the incumbent operator were of significantly inferior quality. This could be seen above all from a comparison of delivery times ⁽¹³⁰⁾.
- (83) According to the submission, as a result of this trend the former Bundespost was constantly losing market share while private service providers were gaining market share ⁽¹³¹⁾. If the competition grew more intense, the former Bundespost's market position would be increasingly threatened. In the 24-hour door-to-door parcel services sector, two leading competitors in particular — DPD and UPS — were steadily increasing their market share. If the trend continued, the time when the former Bundespost would lose its market leadership in parcel services was imminent. A further erosion of market share against this background of increased competition was precluded only by competitors' capacity limits and the particularly favourable prices of the former Bundespost in the lower weight categories ⁽¹³²⁾. In this respect, the former Bundespost acknowledged that its parcel freight service was making heavy losses, whereas its competitors were achieving profits with more efficient products. Average revenue per unit was DEM [...], while unit costs were DEM [...]. In the words of the submission, 'With each unit transported, Deutsche Bundespost is making an average loss of DEM [...]' ⁽¹³³⁾.

⁽¹²⁶⁾ The prices for parcels and all consignments comprising at least 50 items per operation are determined by the market price corresponding to the criteria of Article 20(2) of the Postal Act; see explanatory memorandum to Article 6 of the Postal Universal Service Ordinance of 30 September 1999, p. 11.

⁽¹²⁷⁾ As stated above, business customers benefited from special agreements authorised under Article 2(2)(3) of the Postdienst Mandatory Services Ordinance. These 'self-labellers' or 'cooperation partners' as a rule did not hand in parcels at the postal counter owing to the volumes involved, but had the technical means to pre-sort and code parcels and stack them on pallets before loading them onto vehicles provided by DPAG. In order to take part in the self-labelling procedure, a customer had to ship at least 10 000 items a year. The stringent requirements as regards sorting, coding and loading capacity and the annual minimum quantities shipped show that these services are for business customers. It is precisely the serving of these business customers that has been opened up to competition since the 1970s.

⁽¹²⁸⁾ German authorities' letter of 16 September 1999, Annex 91/3, p. 3.

⁽¹²⁹⁾ According to Annex 91/3, p. 17, in the door-to-door segment business customers require services to have the following features: (1) 24-hour delivery time; (2) collection at the customer's premises; (3) computerised tracking and tracing; and (4) specific door-to-door price.

⁽¹³⁰⁾ DPAG acknowledges that its competitors are able to deliver approximately 56 % of all items within 24 hours. This covers a large proportion of consignments in Germany. The former Bundespost, however, was capable of delivering only [...] % of items within 24 hours. This success rate was, moreover, limited essentially to local services; see Annex 91/3, p. 15.

⁽¹³¹⁾ Annex 91/3, pp. 3 and 13.

⁽¹³²⁾ Annex 91/3, p. 17.

⁽¹³³⁾ Annex 91/3, p. 5.

- (84) The chief concern was therefore one of stagnating traffic volumes and loss of market share. The former Bundespost felt that its market position and/or market leadership were being threatened⁽¹³⁴⁾. By proposing products which satisfied customers' demands, competitors were constantly increasing their market shares at the former Bundespost's expense.
- (85) The various supervisory and managing board documents submitted by the German authorities reveal the real impetus behind the aggressive rebate policy pursued in 24-hour door-to-door parcel services following the modernisation of these services. Far from being dictated by the general interest or the maintenance of affordable prices, this policy sought to preserve DPAG's market position in the area of door-to-door parcel services. In these circumstances, the net additional costs which are to be attributed to this rebate policy are in no way causally linked to the provision of services of general economic interest.

3. Calculation of the net additional costs due to the rebate policy with respect to door-to-door parcel services

- (86) The net additional costs which can be attributed to DPAG's rebate policy in the provision of door-to-door parcel services and which therefore are not causally linked with the legislation governing DP-Postdienst and DPAG can be identified by comparing the revenue that an undertaking operating under normal market conditions would have considered essential in the medium term for it to be able to continue providing these services with the revenue actually achieved by DPAG in providing these services. An undertaking operating under normal market conditions would, in the absence of a legal obligation to do so, have no economic interest of its own in continuing to provide door-to-door parcel services which, in the medium term, fail to yield revenue which at least covers the costs of the specific door-to-door infrastructure. An undertaking operating under normal market conditions would be compelled in the medium term to achieve revenue which at least covers the specific costs of the door-to-door infrastructure.
- (87) If an undertaking offering door-to-door parcel services achieves revenues below the specific costs of the door-to-door infrastructure, every sale entails a loss which includes the other operating costs and at least part of the infrastructure costs necessary to operating door-to-door parcel services. This means that, in these circumstances, every additional sale not only entails the loss of at least part of the costs of the infrastructure directly devoted to door-to-door parcel services, but makes no contribution towards covering the undertaking's other operating costs. As indicated, in the medium term⁽¹³⁵⁾ such a pricing policy is in no undertaking's own economic interest. No private undertaking subject to market forces would continue to offer door-to-door parcel services under such conditions because the rebate policy pursued accumulates annual deficits and leads in the medium term, in the absence of financial compensation, to over-indebtedness. An undertaking subject to market forces would therefore seek to charge prices that at least cover the costs attributable specifically to the door-to-door infrastructure.
- (88) The detailed analysis that was compiled by the Commission on the basis of the cost information supplied by the German authorities⁽¹³⁶⁾ revealed that the revenue achieved in the provision of door-to-door parcel services was at all times insufficient to cover the costs of the infrastructure elements that were devoted solely to providing these services⁽¹³⁷⁾. This finding holds true for the period from 1994 until 1998. It was not until 1999 that this persistent undercoverage came to an end and revenue was achieved that at least covered the costs of the door-to-door infrastructure. The Commissions findings are summarised in the table below:

⁽¹³⁴⁾ Annex 91/3, pp. 3 and 13.

⁽¹³⁵⁾ To verify whether DPAG achieves revenue in door-to-door parcel services that exceeds the additional costs attributable to the provision of these services, consideration must be given to the appropriate time frame over which the costs and revenue situation should be analysed. In the present case, a very short period would not allow any meaningful conclusions to be drawn about medium-term trends in the coverage of the additional costs associated with door-to-door parcel services. A more representative period of 1994 to 1999 has therefore been chosen. This assessment of the costs and revenue situation over a medium-term period also reflects the approach taken by Article 37(3) of the Postal Organisation Act, according to which a long-term undercoverage of costs is likely to adversely affect the competitive opportunities of other undertakings.

⁽¹³⁶⁾ German authorities' letter of 25 April 2002.

⁽¹³⁷⁾ See, in particular, J. Gregory Sidak and Daniel F. Spulber, *Protecting competition from the postal monopoly* (AEI Press, 1996), p. 107.

Table 1

Door-to-door infrastructure costs

Year/Process stage	(DEM million)					
	1994	1995	1996	1997	1998	1999
<i>Collection</i> ⁽¹³⁸⁾ :						
B-to-B	[...]	[...]	[...]	[...]	[...]	[...]
Rounds that were previously identified as combined B-to-B collection and delivery rounds	[...]	[...]	[...]	[...]	[...]	[...]
Dedicated mail order	[...]	[...]	[...]	[...]	[...]	[...]
<i>Sorting</i> ⁽¹³⁹⁾ :						
capital, maintenance	[...]	[...]	[...]	[...]	[...]	[...]
staff	[...]	[...]	[...]	[...]	[...]	[...]
<i>Transport</i> :						
long-distance transport	[...]	[...]	[...]	[...]	[...]	[...]
direct transport (mail order)	[...]	[...]	[...]	[...]	[...]	[...]
Regional transport	[...]	[...]	[...]	[...]	[...]	[...]
<i>Delivery</i> :						
mail-order return delivery	[...]	[...]	[...]	[...]	[...]	[...]
standard delivery (mail order)	[...]	[...]	[...]	[...]	[...]	[...]
dedicated B-to-B delivery	[...]	[...]	[...]	[...]	[...]	[...]
standard delivery (B-to-B)	[...]	[...]	[...]	[...]	[...]	[...]
Operational cost of door-to-door infrastructure	[...]	[...]	[...]	[...]	[...]	[...]
+ 13 % overheads ⁽¹⁴⁰⁾	[...]	[...]	[...]	[...]	[...]	[...]
Revenue door-to-door services ⁽¹⁴¹⁾	[...]	[...]	[...]	[...]	[...]	[...]
Annual undercoverage of door-to-door infrastructure costs	[...]	[...]	[...]	[...]	[...]	[...]
Volume of door-to-door parcels (million items) ⁽¹⁴²⁾	[...]	[...]	[...]	[...]	[...]	[...]
Attributable cost per unit door-to-door (DEM)	[...]	[...]	[...]	[...]	[...]	[...]

Aggregate net additional costs of the rebate policy 1994 to 1999 = 1 118,7 million

- (¹³⁸) As indicated above, the cost for collection rounds can be attributed either to dedicated B-to-B collection or to dedicated mail-order collection rounds.
- (¹³⁹) The capital, staff and maintenance costs cannot be attributed individually to either the B-to-B or the mail-order service. However, this cost can be attributed to the two door-to-door services in combination. This is equally true for the cost of long-distance and regional transport infrastructure, which cannot be attributed to either B-to-B or mail-order services, but must be maintained to provide the two services in combination.
- (¹⁴⁰) Overheads comprise the general cost of coordination necessary to maintain a door-to-door infrastructure. According to the German authorities' letter of 12 March 2002, p. 9, the 'cost of coordination' in turn comprises personnel administration, marketing, sales, IT and supervision of parcel freight centres. According to the German authorities, the cost of overheads is equivalent to [...] % of the cost of the value-added chain. This estimate is in line with that submitted by BIEK, according to which overheads amount to [...] % of the cost of the value-added chain; see the above-mentioned BIEK study of 7 February 2002, p. 3.
- (¹⁴¹) Revenue figures for mail order (including return deliveries) and B-to-B as indicated in Annex 5 to the German authorities' letter of 31 January 2002.
- (¹⁴²) Volume figures for mail order (including return deliveries) and B-to-B as indicated in Annex 5 to the German authorities' letter of 31 January 2002.

- (89) In these circumstances, the competitive opportunities of private undertakings in door-to-door parcel services were impaired during the period 1994 to 1998 (¹⁴³). Unlike DPAG, these undertakings, which operate under normal market conditions, were obliged during the relevant period to cover at least the costs of the infrastructure that is essential to door-to-door parcel services with revenue earned in this sector.
- (90) Nor can DPAG's rebate policy be justified on the basis of Article 12 of Directive 97/67/EC, which provides that an affordable tariff must be fixed for all users in the parcel services field. The requirement of an affordable uniform tariff provided for in Directive 97/67/EC does not oblige DPAG to grant certain customers in the B-to-B and mail-order parcel segments rebates which result in prices significantly below the uniform tariff fixed by law (¹⁴⁴). This is especially true if the prices based on the rebates policy are not geared to the actual costs of door-to-door parcel services (¹⁴⁵).
- (91) It can be seen from DPAG's cost and revenue data for 1994 to 1998 that in the provision of mail-order parcel services DPAG achieved revenue per unit of between DEM [...] (1994) and DEM [...] (1998) (¹⁴⁶). The unit revenue achieved in the provision of B-to-B services was between DEM [...] (1994) and DEM [...] (1998) (¹⁴⁷). Thus, the prices charged for the provision of the two major door-to-door parcel services are well below the affordable uniform tariff for the cheapest over-the-counter parcel in the lowest weight category (¹⁴⁸). Table 1 reveals that the specific average cost of maintaining a door-to-door infrastructure, calculated on a per unit basis, amounted to between DEM [...] (1994) and DEM [...] (1998). Coverage of the specific costs linked to the maintenance of a door-to-door infrastructure would therefore not have excluded a rebate policy resulting in prices below the uniform tariff that was geared to cost. Even a slightly less radical rebate policy with respect to the provision of mail-order parcel services (it being precisely in this service that revenue was consistently below specific average costs calculated on a per unit basis (¹⁴⁹)) would easily have permitted DPAG to: (1) cover the specific door-to-door infrastructure costs; and (2) offer mail-order parcel services at prices well below the affordable uniform tariff.

(¹⁴³) This is confirmed by the conclusions reached by the German Federal Cartel Office in two reports submitted under Article 37(3) of the Postal Organisation Act and Article 7 of the Act concerning the Regulation of Telecommunications and Posts; see Federal Cartel Office, 11 January 1995 and 28 August 1996, submitted by the German authorities by letter of 18 March 1997.

(¹⁴⁴) Article 12, first indent (OJ L 15, 21.1.1998, p. 14). Under German law, the uniform tariff in the parcel services sector is identical to the affordable price; see Article 1(1) of the Postdienst Mandatory Services Ordinance.

(¹⁴⁵) Article 12, second indent.

(¹⁴⁶) 1994: DEM [...]; 1995: DEM [...]; 1996: DEM [...]; 1997: DEM [...]; 1998: DEM [...]. These average unit revenue figures were compiled on the basis of the German authorities' letter of 31 January 2002, Annex to question 5.

(¹⁴⁷) 1994: DEM [...]; 1995: DEM [...]; 1996: DEM [...]; 1997: DEM [...]; 1998: DEM [...]. These average unit revenue figures were compiled on the basis of the German authorities' letter of 31 January 2002, Annex to question 5.

(¹⁴⁸) It should be noted that a substantial proportion of the parcels conveyed from door to door for business customers exceed the 2 kg threshold.

(¹⁴⁹) The revenue per unit achieved in B-to-B parcel services was below the unit cost of providing a door-to-door infrastructure only in 1995, while revenue per unit in mail-order parcel services was consistently below this threshold.

B. State resources

- (92) It follows from the case-law of the Court of Justice that financial resources are to be regarded as State resources within the meaning of Article 87(1) of the EC Treaty where those resources fell within the control of the State prior to their being transferred to the recipient⁽¹⁵⁰⁾. It also follows from the Court's case-law that Article 87(1) covers all the financial means by which authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the State⁽¹⁵¹⁾. The budgetary resources employed to make a contribution towards the postal pension fund fall within the control of the State. The State likewise exercises direct control over the debt instruments issued by Deutsche Bundespost; and the special asset DB-Postdienst transferred to DPAG was also directly controlled by the State.
- (93) In addition, the amounts which DB-Telekom had to raise by reason of the financial transfers provided for in Article 37(3) of the Postal Organisation Act fell within the direct control of the State inasmuch as, pursuant to the statutory rules on the provision of financial support to DB-Postdienst and subsequently to DPAG, the resources earmarked for transfer were at the disposal of the competent national authorities. Furthermore, between 1991 and 1995, DB-Telekom was not listed on the stock exchange, and during that period the State bore in full the financial disadvantage associated with the payment of grants to DB-Postdienst. In the Commission's opinion, the transfer payments were outright grants because the financial situation of Deutsche Bundespost Postdienst was such that the State could not expect a normal return in the form of dividends or an appreciation in value. Witness the fact that the grants served in their entirety to offset the losses first of Deutsche Bundespost Postdienst then, from 1995 onwards, of DPAG.
- (94) The transfer payments are attributable to the State as they were required by law under Article 37(3) of the Postal Organisation Act.
- (95) Finally, it must be pointed out that, according to the case-law of the Court of Justice, Community law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid⁽¹⁵²⁾. Without the provisions of Article 37(3) of the Postal Organisation Act, the State would have had to have recourse to general budget resources in order to support Deutsche Bundespost Postdienst and DPAG.

C. Distortion of competition

- (96) Since 1976, undertakings have supplied a variety of commercial parcel services in Germany, mainly focusing on a rapid 24-hour delivery service of parcels collected at the customer's premises, the door-to-door parcel services. In response to the competitive threat posed by the emergence of high-performance 'door-to-door' parcel services, DPAG, in 1990, started to plan a major modernisation of its parcel freight operations. In this connection, the German authorities have submitted a number of submissions to the supervisory board, proposals for decisions by the supervisory board and project documents that explain the aims, goals and main impetus behind this modernisation⁽¹⁵³⁾. These documents all come to the conclusion that DPAG, like its competitors in the parcel freight market, will have to direct its efforts towards a time-critical 24-hour service including collection⁽¹⁵⁴⁾.
- (97) However, in spite of the modernisation of DPAG's parcel freight infrastructure, private service providers, in particular Deutscher Paket Dienst (DPD), UPS and German Parcel, in the period from 1990 to 1999 inclusive, increased their market shares in time-critical 24-hour door-to-door parcel services in the B-to-B segment from 16 % to 20 % (UPS), from 17 % to 30 % (DPD) and from 4 % to 13 % (German Parcel). In the same period, DPAG's market share declined from [...] % to [...] %⁽¹⁵⁵⁾.

⁽¹⁵⁰⁾ Case C-482/99 *France v Commission*, judgment of 16 May 2002, not yet reported, paragraph 38.

⁽¹⁵¹⁾ Case C-482/99 *France v Commission*, judgment of 16 May 2002, not yet reported, paragraph 38. See also the judgment in Case C-83/98 P *France v Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 50.

⁽¹⁵²⁾ Case C-482/99 *France v Commission*, judgment of 16 May 2002, not yet reported, paragraph 24.

⁽¹⁵³⁾ German authorities' letter of 16 September 1999, Annex 91/3, p. 3.

⁽¹⁵⁴⁾ Annex 91/3, p. 11.

⁽¹⁵⁵⁾ Parcels branch of Deutsche Post AG, *Darstellung und Bewertung der Entscheidungssituation der Sparte Frachtpost 1996*, Ctcon, April 1997, Annex 1: FiT-Team; Turnover: *Marktanteilsentwicklung im Business-to-Business Segment*. These market share data do not include business customer parcels handed in at the postal counter. These are estimated to account for around [...] % of DPAG's overall business-to-business volume.

- (98) On the other hand, throughout the period in question DPAG remained the only significant provider in Germany of a nationwide parcel and catalogue delivery service which met the specific requirements of the mail-order trade ⁽¹⁵⁶⁾. Neither UPS nor the other competitors providing B-to-B services, that is to say DPD and German Parcel, were able to establish themselves as suppliers of mail-order parcel services to any appreciable extent. The only alternative infrastructure that was available to any appreciable extent for the mail-order trade was operated by Hermes Versand Service ('Hermes'), a subsidiary of the biggest German mail-order company, Otto Versand AG. DPAG's volume-based share of the German mail-order parcel services market was stable throughout the period for which figures are available (1990 to 1999), at over 85 % ⁽¹⁵⁷⁾.
- (99) The development of the market for the delivery of parcels and catalogues for the mail-order trade demonstrates that, as a result of DPAG's persistently selling at prices well below cost in this area, the competitive opportunities of other undertakings that had been able to successfully establish themselves in door-to-door parcel services in the B-to-B segment had been lastingly impaired. In contrast to DPAG, competitors operating under normal market conditions have to cover in the medium term all the costs of a corresponding door-to-door infrastructure out of corresponding revenue. But also in the area of commercial B-to-B services, the growth rates of private competitors would probably have been much greater had DPAG pursued a rebate policy geared to the actual costs of the door-to-door infrastructure ⁽¹⁵⁸⁾.

D. Effect on trade between Member States

- (100) The effect of the gradual liberalisation at least of those postal services which are open to competition has been to stimulate competition between postal services in the Community. Already the postal markets open to competition are characterised by the presence of a number of multinational undertakings such as UPS, Federal Express and the Dutch transport and logistics provider TNT which offer their services in several Member States. Where an advantage granted by Germany to DPAG strengthens the latter's position in postal markets open to competition, intra-Community trade must be regarded as affected by that advantage ⁽¹⁵⁹⁾. This is apparent in the present case simply from the fact that the strengthening of DPAG in the area of competitive door-to-door parcel services is likely to act as a permanent brake on further penetration of the Germany market. The provision of State resources strengthens DPAG's position on a market in which it is in competition with service providers from outside Germany. Since, however, postal operators from other Member States would also like to establish a foothold in Germany, this strengthening of DPAG makes access to the German door-to-door parcel market more difficult. It is clear, therefore, that the State support for DPAG distorts competition and affects trade between Member States.

E. Compatibility with the common market

- (101) State aid is in principle incompatible with the common market in so far as it is not covered by the derogations in Article 87(2) and (3) of the EC Treaty.
- (102) The aid granted in the present case to DPAG does not fall under any of the derogations in Article 87(2) of the Treaty, being neither aid having a social character, granted to individual consumers, nor aid to make good the damage caused by natural disasters or exceptional occurrences, nor aid granted to the economy of certain areas of the Federal Republic of Germany.

⁽¹⁵⁶⁾ See Commission Decision of 20 March 2001, *Deutsche Post AG*, OJ L 125, 5 May 2001, p. 27, at paragraph 31.

⁽¹⁵⁷⁾ Federal Association of German Mail-order Companies' information brochure *Versandhandel in Deutschland*, according to which DPAG carries 92 % of mail-order parcels in Germany, p. 17.

⁽¹⁵⁸⁾ See conclusions by the German Federal Cartel Office in two reports on the monitoring of competition submitted under Article 37(4) of the Postal Organisation Act, Federal Cartel Office, 11 January 1995, p. 7 and 28 August 1996, p. 6, submitted by the German authorities by letter of 18 March 1997.

⁽¹⁵⁹⁾ Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 11.

- (103) Nor can this aid benefit from any of the derogations in Article 87(3) of the Treaty. The aid in question is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State within the meaning of Article 87(3)(b), nor is it aimed at promoting culture and heritage conservation within the meaning of Article 87(3)(d). Nor can the aid in question be interpreted as regional aid within the meaning of Article 87(3)(a) or (c) because it does not serve to facilitate the development of certain economic activities and is not part of a multisectoral aid scheme which is open in a given region to all the undertakings of the sectors concerned (see the Community guidelines on national regional aid ⁽¹⁶⁰⁾). Nor can this aid be regarded as aid to facilitate the development of certain activities as referred to in the abovementioned subparagraph (c) since it is intended to cover the operating costs of door-to-door parcel services open to competition and is not part of a general plan to render the beneficiary undertaking economically and financially efficient without recourse to further aid.
- (104) Article 86(2) of the EC Treaty states that 'undertakings entrusted with the operation of services of general economic interest [...] shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.'
- (105) As DPAG incurred in the provision of door-to-door parcel services open to competition net additional costs of DEM 1 118,7 million which are in no way related to the legal requirements imposed on it, this amount cannot be considered a burden actually resulting from its public service obligations. According to the case-law of the Court of Justice, a financial advantage, to the extent that it exceeds the net additional costs inherent in the discharge of public service obligations, cannot be regarded as necessary to enable the operation of services of general economic interest ⁽¹⁶¹⁾.
- (106) Furthermore, it is clear that the net additional costs were incurred, not in the interests of users of postal services in general, but in the interests of self labellers and cooperation partners — a business customer segment. It is also established that DPAG's rebate policy in favour of this segment did not correspond, under German law, to the general interest. In these circumstances, the net additional costs of DEM 1 118,7 million were not linked to the discharge of a public service obligation.

V. CONCLUSIONS

- (107) To the extent that it has the effect of reducing the costs normally inherent in the provision of competitive door-to-door parcel services, State compensation for the net additional costs of a rebate policy constitutes an advantage within the meaning of Article 87(1) of the EC Treaty. An amount of DEM 1 118,7 million of net additional costs that accrued in the provision of door-to-door parcel services open to competition cannot be attributed to the discharge of a public service obligation. The provision of State resources to compensate for this part of the cost undercoverage in services open to competition constitutes a competitive advantage for DPAG. Unlike its competitors, DPAG was thereby freed from the need to cover all the infrastructure costs specifically linked to the provision of door-to-door services from out of its revenue. This advantage and the aid incompatible with the common market amounts to DEM 1 118,7 million,

HAS ADOPTED THIS DECISION:

Article 1

The State aid totalling EUR 572 million (DEM 1 118,7 million) which Germany has granted to Deutsche Post AG is incompatible with the common market.

⁽¹⁶⁰⁾ OJ C 74, 10.3.1998, p.9.

⁽¹⁶¹⁾ Case 53/00, paragraph 32.

Article 2

1. Germany shall take the necessary steps to recover from the beneficiary the aid referred to in Article 1, which was granted unlawfully.
2. Recovery shall be effected in accordance with the procedures of national law. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 3

Germany shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 19 June 2002.

For the Commission
Mario MONTI
Member of the Commission
