



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 16 October 2014¹

Case C-340/13

bpost SA

v

Institut belge des services postaux et des télécommunications (IBPT)(Request for a preliminary ruling from the

cour d'appel de Bruxelles (Belgium))

(Postal services — Directive 97/67/EC — Relations between the universal service provider and consolidators of mail items — Special tariffs — Prohibition of discrimination — Quantity discounts)

1. bpost is a universal service provider (USP)² active in the postal sector in Belgium. Alongside standard tariffs applicable to the service for letter post, bpost applies two types of price reduction. 'Operational discounts' are granted where a client prepares mail prior to its handling by bpost (for instance, sorting according to format, packaging and weight or delivering pre-sorted mail to bpost's sorting offices). 'Quantity discounts' are calculated purely according to the income generated for bpost by a client during a reference period. Before 2010, consolidators (enterprises that group together mail from various senders) could aggregate the volume of mail they handled in order to obtain greater quantity discounts. That possibility disappeared in 2010, when bpost decided that quantity discounts would be calculated according to the volumes of mail which each sender decides to post.

2. The national regulatory authority for postal services in Belgium (*Institut belge des services postaux et des télécommunications*; 'the IBPT') decided in July 2011 that bpost's new calculation method was inconsistent with the provisions of Belgian law transposing the non-discrimination principle enshrined in the fifth indent of Article 12 of the Postal Services Directive.³ That ruling was based, in essence, on the finding that there was a difference of treatment as between consolidators and individual bulk senders since, for a given volume of mail delivered to bpost, an individual bulk sender was entitled to a higher quantity discount than a consolidator. bpost appealed against that decision to the cour d'appel de Bruxelles (Court of Appeal, Brussels; 'the referring court'), which seeks guidance on, first, the scope of the fifth indent of Article 12 of the Postal Services Directive and, secondly, whether consolidators

1 — Original language: English.

2 — See point 4 below.

3 — Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14). I shall refer to the original version of that directive as 'the 1997 Directive'. That directive was amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (OJ 2002 L 176, p. 21) ('the 2002 Directive') and by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ 2008 L 52, p. 3) ('the 2008 Directive'). I shall refer to the 1997 Directive as amended by the 2002 Directive and the 2008 Directive as 'the Postal Services Directive'. Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty (OJ 2003 L 284, p. 1) has also amended the Postal Services Directive, but only with regard to comitology.

and individual bulk senders are in a comparable situation with regard to quantity discounts. In that context, the Court is invited to clarify the scope of its reasoning in *Deutsche Post and Others*,⁴ where it held that if a USP grants operational discounts to individual senders, consolidators should also enjoy such discounts under the same conditions.

Legislation

3. The 1997 Directive initiated the process of gradual liberalisation of the market in postal services. That directive established common rules concerning in particular the provision of a universal postal service within the Community and tariff principles for universal service provision.⁵

4. According to the Postal Services Directive, a ‘postal network’ is a system of organisation and resources of all kinds used by the USP(s) for, in particular, the clearance of postal items covered by a universal service obligation from access points throughout the territory, the routing and handling of those items from the postal network access point to the distribution centre, and the distribution of items to the addressees.⁶ The term ‘USP’ refers to the public or private postal service provider providing a universal postal service or parts thereof within a Member State, the identity of which has been notified to the European Commission.⁷ The ‘sender’ is any natural or legal person responsible for originating postal items.⁸

5. Recital 26 in the preamble to the Postal Services Directive indicates that the tariffs applied to the universal postal service should be objective, transparent, non-discriminatory and geared to costs, in order to ensure sound management of the universal service and to avoid distortions of competition. Those principles are reflected in Article 12 of the Postal Services Directive. In the original version introduced by the 1997 Directive, that provision read as follows:

‘Member States shall take steps to ensure that the tariffs for each of the services forming part of the provision of the universal service comply with the following principles:

- prices must be affordable and must be such that all users have access to the services provided,
- prices must be geared to costs; Member States may decide that a uniform tariff should be applied throughout their national territory,
- the application of a uniform tariff does not exclude the right of the universal service provider(s) to conclude individual agreements on prices with customers,
- tariffs must be transparent and non-discriminatory.’

6. In its proposal which led to the adoption of the 2002 Directive, the Commission indicated that the proposed amendments to the 1997 Directive were intended to ‘set a clear course and timetable towards the further opening of the Community postal sector, but in an orderly manner that will allow sufficient time for the market as a whole, and the universal service providers in particular, to complete the modernisation process and adapt to the conditions of greater competition in a stable and predictable regulatory environment’.⁹

4 — Judgment in *Deutsche Post and Others*, C-287/06 to C-292/06, EU:C:2008:141.

5 — Article 1 of the 1997 Directive.

6 — Article 2(2) of the Postal Services Directive.

7 — Article 2(13).

8 — Article 2(16).

9 — Explanatory memorandum to the Proposal for a European Parliament and Council Directive amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, COM(2000) 319 final (‘the 2000 Commission proposal’), section 2.1 (OJ 2000 C 337 E, p. 220).

7. The Commission observed in that context that, while special tariffs were offered ‘to many bulk or business customers and intermediaries related to avoided costs by the [USP]’, certain complaints had arisen in this area against a number of incumbent operators and that, accordingly, it was necessary to make clear ‘that the principles of transparency and non-discrimination must always be respected with regard to the application of these special tariffs and all associated conditions’.¹⁰ The Commission thus proposed to insert a new indent in Article 9 of the 1997 Directive (which is part of Chapter 4 dealing with the ‘Conditions governing the provision of non-reserved services and access to network’), emphasising the application of the non-discrimination principle in the context of special tariffs.

8. The proposed indent was adopted without modification, although it was ultimately inserted not in Article 9 but in Article 12 (which is in Chapter 5 on ‘Tariff principles and transparency of accounts’). Recital 29 in the preamble to the 2002 Directive adopts the phraseology of the 2000 Commission proposal where it states that ‘[t]he [USPs] normally provide services, for example to business customers, consolidators of mail for different customers and bulk mailers, enabling them to enter the mail stream at different points and under different conditions by comparison with the standard letters service’, and that ‘[i]n doing this, [they] should comply with the principles of transparency and non-discrimination, both as between different third parties and as between third parties and [USPs] supplying equivalent services ...’.

9. In the version resulting from amendment by the 2002 Directive, the new fifth indent of Article 12 of the Postal Services Directive thus stated:

‘[W]henever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different customers, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions. The tariffs shall take account of the avoided costs, as compared to the standard service covering the complete range of features offered for the clearance, transport, sorting and delivery of individual postal items and, together with the associated conditions, shall apply equally both as between different third parties and as between third parties and universal service providers supplying equivalent services. Any such tariffs shall also be available to private customers who post under similar conditions.’

10. The 2008 Directive was intended to complete the liberalisation process initiated by the 1997 Directive and to confirm the final date for the accomplishment of the internal market for postal services.¹¹

11. In its proposal which led to the adoption of the 2008 Directive, the Commission pointed out in particular that a larger pricing flexibility for USPs was vital to enable them to react to their increased exposure to competition — especially in the most profitable segments of the market such as business mail — resulting from the full liberalisation of postal markets and, in turn, to limit any risks to the financial equilibrium of the universal service in the new environment.¹² Such flexibility was thus regarded as an essential tool to guarantee the financing of the universal service, a central issue throughout the legislative process which led to the adoption of the 2008 Directive. Consequently, the second sentence of Article 12, second indent, was reformulated in order to limit State-imposed tariff uniformity mainly to items subject to single piece tariffs (for example stamps).¹³

10 — Explanatory memorandum to the 2000 Commission proposal, cited in footnote 9, section 2.9.4.

11 — See recitals 12, 13 and 16.

12 — Proposal for a Directive of the European Parliament and of the Council amending Directive 97/67/EC concerning the full accomplishment of the internal market of Community postal services, COM(2006) 594 final (the ‘2006 Commission proposal’), section 3.2.2, p. 5.

13 — That indent now reads as follows: ‘[w]henever necessary for reasons relating to the public interest, Member States may decide that a uniform tariff shall be applied, throughout their national territory and/or cross-border, to services provided at single piece tariff and to other postal items’.

12. The need for greater pricing flexibility is also reflected in the first sentence of recital 39 in the preamble to the 2008 Directive, which states that '(f)or the provision of services for all users, including businesses, bulk mailers and consolidators of mail from different users, universal service providers may enjoy more pricing flexibility in line with the cost-orientation principle'.

13. Moreover, a reference to the obligation for USPs to 'take account of the avoided costs' in the context of special tariffs was deleted from the fifth indent of Article 12, which now reads as follows:

'[W]henever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different users, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions. The tariffs, together with the associated conditions, shall apply equally both as between different third parties and as between third parties and universal service providers supplying equivalent services. Any such tariffs shall also be available to users, in particular individual users and small and medium-sized enterprises, who post under similar conditions.'

Facts, procedure and questions referred

14. As indicated earlier, there are two categories of price reduction granted by USPs in the postal sector.

15. 'Operational discounts' reward the deposit of pre-sorted mail (above a specified minimum volume) with the USP. They are intended to take into account the cost savings from which the USP benefits as a result of the clearance and sorting of such mail according to, for instance, format, packaging and weight and the delivery of this mail to the sorting offices of the USP. Operational discounts usually require 'downstream access' to the postal network of the USP, particularly its sorting and/or delivery facilities.

16. 'Quantity discounts' reward the sending of large volumes of mail in the course of a given reference period, irrespective of whether that mail is pre-sorted or not when delivered to the USP. They are purely commercial in nature. Their objective is to increase demand for postal services.

17. bpost applies three categories of tariffs for postal services: (i) the standard tariff, which represents a price per item; (ii) reduced or preferential tariffs granted to customers who deposit minimum quantities of pre-sorted mail, which can be therefore regarded as operational discounts; and (iii) 'contractual tariffs' which are intended for very large volumes of mail ('bulk mail') and which are negotiated between bpost and its customers.

18. bpost's contractual tariffs, which mainly concern 'direct mail' and 'administrative mail',¹⁴ can in turn be based on three types of contracts: (i) 'Client Direct' contracts concluded directly with business senders; (ii) 'Proxy' contracts concluded with consolidators entrusted by senders with the exclusive management of their mail; and (iii) 'Intermediary' contracts concluded with consolidators who deliver to bpost bulk mail originating from various senders unspecified at the time of the conclusion of the contract. The Commission has defined the 'intermediary' (a synonym for consolidator) in the postal sector as 'any [economic] operator who acts between the sender and the [USP], by clearing, routing and/or pre-sorting postal items, before channelling them into the public postal network of the same or of another country'.¹⁵

14 — In postal terminology, 'direct mail' refers to addressed advertising while 'administrative mail' refers to bulk mail containing individual information, such as statements of account delivered by banks to their clients.

15 — See Notice on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (OJ 1998 C 39, p. 2).

19. In 2010, bpost's quantity discounts for items weighing less than 50 grams ranged from 10.4% (class 1 discount) to 39.7% (class 11 discount), while quantity discounts for items weighing more than 50 grams ranged from 9.7% (class 1 discount) to 50.4% (class 12 discount).¹⁶ The discounts applied depended on the income generated for bpost by the volume of mail delivered to it in the course of a reference period,¹⁷ and were irrespective of the type of tariff contract.¹⁸

20. Until 2010, bpost allowed 'aggregation' in the context of quantity discounts. Thus, a consolidator could aggregate the volumes of mail handled for various customers in order to receive higher rates of quantity discounts.

21. In 2010, bpost replaced this system by a 'per sender' model, under which a consolidator is entitled to quantity discounts calculated on the basis of the respective volumes of mail of each of its customers taken separately. bpost indicates that this change was meant to address the practice of a limited number of consolidators who aggregated mail originating from various senders on a purely administrative basis (i.e. without carrying out any preparatory tasks), in order to benefit 'artificially' from the highest levels of quantity discounts.

22. To illustrate the difference between the two models, suppose that a consolidator grouped together mail from three different senders. Under the pre-2010 system, he might have obtained a discount of, say, 20% in respect of their combined mail during a particular reference period, even though the volume of mail from each sender would have qualified for a discount of only 10% if sent separately. Under the 2010 system, the same consolidator would qualify only for the 10% discount in respect of each sender's mail.

23. On 20 July 2011, the IBPT held that the 'per sender' model resulted in a difference of treatment as between individual bulk senders and consolidators for the calculation of quantity discounts, although the two categories were in a comparable situation with regard to the postal services delivered by bpost. It therefore imposed a fine of EUR 2 250 000 on bpost for violating the Belgian legislation transposing the non-discrimination rule contained in the fifth indent of Article 12 of the Postal Services Directive.

24. bpost appealed against that decision to the cour d'appel de Bruxelles, which stayed the proceedings and requested a preliminary ruling on the following questions:

- (1) Is the fifth indent of Article 12 of [the Postal Services Directive] to be interpreted as imposing an obligation of non-discrimination, particularly in relations between the [USP] and consolidators, with regard to operational discounts granted by that provider, the pure quantity discounts remaining subject to the application of the fourth indent of Article 12?
- (2) If the reply to the first question is in the affirmative, is the [system of] pure quantity discount[s] [applied by bpost in 2010] consistent with the obligation of non-discrimination set out in the fourth indent of Article 12 where the differentiation in price which it creates is based on an objective factor having regard to the relevant geographical and services market and it does not create an effect of exclusion or of inducing loyalty?

16 — bpost confirmed at the hearing that bulk senders or consolidators could benefit from quantity discounts and operational discounts cumulatively in the context of tariff contracts.

17 — In 2010, the reference period was one year for items of less than 50 grams and three months for items of more than 50 grams.

18 — With the exception of the 'Indirect Channel Rebate' granted in the context of 'Intermediary' contracts. However, that rebate is intended to reflect the avoidance of costs by bpost due to the fact that the consolidator (rather than bpost) manages commercial relationships with individual senders. It should therefore be regarded as an operational discount rather than a quantity discount.

- (3) If the reply to the first question is in the negative, does the quantity discount granted to the consolidator breach the principle of non-discrimination under the fifth indent of Article 12 where its level does not equal the discount granted to a sender who posts an equivalent number of items, but equals all the discounts granted to all the senders on the basis of the number of items of each sender which this consolidator has consolidated?’

25. Written observations were submitted by bpost, Belgium, Italy, Sweden and by the Commission. At the hearing on 11 June 2014, bpost, Belgium, France and the Commission made oral submissions.

Assessment

26. I shall begin by discussing which is the relevant version of the Postal Services Directive for the purposes of the present reference. I shall then examine whether the fifth indent of Article 12 of the Postal Services Directive governs quantity discounts before turning to the central issue of whether the ‘per sender’ model is consistent with the principle that tariffs for the universal postal service have to be non-discriminatory.

The relevant version of the Postal Services Directive

27. Whilst the referring court asks for guidance on Article 12 of the Postal Services Directive as amended by both the 2002 Directive and the 2008 Directive, bpost argues that the version resulting from the 2002 Directive (which still contained a reference to ‘avoided costs’) applies in the main proceedings.

28. The deadline for transposing the 2008 Directive was 31 December 2010, and it was duly transposed into national law in Belgium on that date. Considering that the main proceedings focus on quantity discounts granted by bpost in 2010, it seems to me that formally the present dispute is governed by the version of Article 12 resulting from the 2002 Directive.

29. However, the 2008 Directive entered into force on 27 February 2008. As the IBPT has correctly suggested in the decision challenged in the main proceedings, that circumstance cannot be ignored when assessing which version of the Postal Services Directive should be taken into account by the Court in the present proceedings. It is indeed settled case-law that, during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive.¹⁹ It follows that, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive.²⁰

30. Since the 2008 Directive had already entered into force at the time of the facts giving rise to the main proceedings, the interpretation sought by the cour d’appel de Bruxelles, which relates to the version of Article 12 resulting from that directive, must be regarded as being useful to that court for the purpose of enabling it to decide the case before it in compliance with the obligation which I have just recalled.²¹

19 — Judgments in *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628, paragraph 45; *ATRAL*, C-14/02, EU:C:2003:265, paragraph 58; and *Nomarchiaki Aftodioikisi Aitolokarnanias and Others*, C-43/10, EU:C:2012:560, paragraph 57.

20 — See, in particular, judgment in *Adeneler and Others*, C-212/04, EU:C:2006:443, paragraphs 122 and 123.

21 — See, by analogy, judgment in *VTB-VAB and Galatea*, C-261/07 and C-299/07, EU:C:2009:244, paragraph 40.

31. I therefore consider that the Court should answer the questions referred on the basis of that version.

Question 1: the scope of the fifth indent of Article 12 of the Postal Services Directive

32. By its first question, the referring court seeks guidance on the scope of the fifth indent of Article 12 of the Postal Services Directive and how it relates to the general principle, laid down in the fourth indent, that tariffs for universal postal services must be non-discriminatory.

33. I should indicate at the outset that, as I see it, the answer to the first question has no bearing on the issue of discrimination raised by the referring court in its second and third questions. That is because the fourth indent of Article 12 makes it clear that all tariffs for the universal service applied by USPs have to be non-discriminatory in any event.

34. Whilst the original version of the Postal Services Directive already contained the general principle that tariffs for universal postal services have to be non-discriminatory, it was not until the amendment introduced by the 2002 Directive that a fifth indent on ‘special tariffs’ was added to Article 12. That indent requires USPs to observe the principles of transparency and non-discrimination when they apply such ‘special tariffs’. The Postal Services Directive mentions, by way of illustrations, services for businesses, bulk mailers or consolidators of mail from different users.

35. In *Deutsche Post and Others*,²² the Court held that the fifth indent of Article 12 is specifically intended to regulate a situation where a USP grants some of its customers, ‘in an even more liberal way than required by the [Postal Services Directive], access to its postal network at points other than the traditional access points and agrees special tariffs for them on that basis’. Consequently, operational discounts granted to customers carrying out preparatory work with mail and therefore seeking access to the postal chain under conditions and at points different from those which apply to the traditional service for letter post are covered by that provision.

36. However, *Deutsche Post and Others* was concerned exclusively with *operational discounts*. What is at issue here is whether the fifth indent of Article 12 applies equally to *quantity discounts*. Are they included within the concept of ‘special tariffs’?

37. That question arises in particular because under the version of Article 12 which resulted from the 2002 Directive, such special tariffs had to ‘take account of the avoided costs, as compared to the standard service covering the complete range of features offered for the clearance, transport, sorting and delivery of individual postal items’. Moreover, although the 2008 Directive deleted that sentence from Article 12, recital 39 of the preamble to that directive still stated that ‘[t]ariffs should take account of the avoided costs, as compared to the standard service covering the complete range of features offered for the clearance, sorting, transport and distribution of individual postal items’.

38. bpost and the French Government argue in substance that the reference to the ‘avoided costs’ in both the 2002 version of the fifth indent of Article 12 and in the preamble to the 2008 Directive indicates that that indent should be read as applying exclusively to operational discounts, which are granted to reward the preparation of mail prior to its deposit and the ensuing cost savings for the USP. By contrast, the Belgian, Italian and Swedish Governments and the Commission submit that quantity discounts similarly imply the granting of ‘special tariffs’ by the USP: both operational and quantity discounts depart from ‘normal’ tariffs applicable to the traditional service for letter post. For the Belgian Government, the reference to ‘avoided costs’ in Article 12 itself and/or in the preamble to the 2008 Directive is merely intended to reflect the cost-orientation principle in the context of operational rebates. It cannot be interpreted as limiting the concept of ‘special tariffs’.

22 — C-287/06 to C-292/06, EU:C:2008:141, paragraphs 42 and 43.

39. The Postal Services Directive does not define ‘special tariffs’. The three illustrations given in the fifth indent of Article 12 are not particularly illuminating. It is true that the reference to ‘businesses, bulk mailers or consolidators of mail from different users’ suggests that special tariffs concern users who send larger volumes of mail than usual. However, as I have explained earlier, the quantity of mail delivered to the USP is a factor which — even if in a very different way — comes into play when calculating both operational discounts and quantity discounts.²³

40. Nor does the rule contained in the 2002 version of the fifth indent that special tariffs ‘shall take account of the avoided costs, as compared to the standard service covering the complete range of features offered for the clearance, transport, sorting and delivery of individual postal items’ provide a decisive clue. That sentence can be read either as encapsulating the concept of ‘special tariffs’ itself — in which case special tariffs concern operational discounts only — or merely as emphasising the principle of cost orientation in the field of operational discounts, without prejudice to the application of the fifth indent to quantity discounts. The same is true of the reference to ‘avoided costs’ in the preamble to the 2008 Directive.

41. However, the legislative history of the 2002 Directive²⁴ tends to indicate that ‘special tariffs’ only concern the situation where a USP avoids costs by enabling its clients who have carried out part of the postal handling themselves to access the postal chain at points other than those where postal items are usually deposited with the public postal network, such as sorting offices. It is apparent from the 2000 Commission proposal that adding a fifth indent to Article 12 was deemed necessary in order to address the practice of a number of USPs who treated various categories of customers differently with regard to *operational discounts*. The objective of the amendment was therefore to make it clear that, when they grant such discounts, USPs have to do so on a non-discriminatory basis, particularly as between senders and consolidators. Similarly, the fifth indent requires that conditions associated with operational discounts — for example, the minimum or maximum quantities of pre-sorted mail giving rise to a discount or their packaging — apply regardless of the identity of the customer.²⁵

42. The fact that the new indent was not inserted in Chapter 4 (‘Conditions governing the provision of non-reserved services and access to network’), as the Commission had proposed, but in Chapter 5 (‘Tariff principles and transparency of accounts’) does not, in my view, affect that conclusion. As the Court made clear in *Deutsche Post and Others*, the new provision was not intended to govern access to the postal network as such, by obliging USPs to grant access to the postal chain under conditions and at points different from those which apply to the traditional service for letter post.²⁶ Rather, the purpose was to avoid tariff discrimination where a USP decides to grant such access. As I see it, that may also have been why the French and Portuguese members of the Council’s Working Party on Postal Services took the view that the new indent ‘might be better placed’ in Article 12 of the Postal Services Directive than in Article 9.²⁷

43. I consider therefore that, in the version of the Postal Services Directive resulting from the 2002 Directive, the fifth indent of Article 12 exclusively governed operational discounts.

44. That conclusion, which is further confirmed by recital 29 in the preamble to the 2002 Directive, is not undermined by the argument of the Belgian and Italian Governments, supported by the Commission, that quantity discounts are covered by that provision anyway because the handling of larger volumes of mail entails cost savings for USPs in the form of economies of scale.

23 — See points 15 and 16 above.

24 — See points 6 to 9.

25 — Pursuant to the last sentence of the 2002 version of the fifth indent, ‘[special] tariffs shall also be available to private customers who post under the same conditions’.

26 — EU:C:2008:141, paragraph 41.

27 — Report of the meeting of 8 September 2000, Council document 11249/00, 15 September 2000, p. 3.

45. It is common ground that the handling and distribution of larger volumes of mail, which are stimulated by quantity discounts, enable USPs to benefit from economies of scale by spreading fixed costs over a greater number of mail items. I am not convinced however that such quasi-automatic economies of scale fall within the concept of ‘avoided costs’ in the Postal Services Directive.

46. As I have said, the reference to ‘avoided costs’ in the 2002 version of the fifth indent related to the carrying out of part of the postal handling chain by third parties. Economies of scale result from increases in the total volumes of mail handled by the USP rather than from a modification of the traditional service for letter post delivered by that USP. Furthermore, it is not easy to anticipate precisely how demand for postal services may evolve as a result of quantity discounts. Actual economies of scale can only be measured by reference to the total volume of mail handled by the USP. It therefore seems to me difficult if not impossible to calculate in advance (when fixing ‘special tariffs’) which part of such economies (and thus avoided costs) might be specifically related to increases in the demand for postal services resulting from quantity discounts. In contrast, it is easier to measure the costs avoided by the USP where a third party carries out part of the postal handling chain.

47. Did the removal of the reference to ‘avoided costs’ in the fifth indent of Article 12 by the 2008 Directive alter the scope of that provision?

48. Here, I note that the Commission’s original proposal for what was to become the 2008 Directive did not suggest such a modification. In that context, the Commission observed that, as regards the ‘sorting and delivery part of the network ..., Member States must continue to comply with Article 12, fifth indent, and may, in the light of national conditions, introduce other measures to ensure access to the public postal network under conditions which are transparent and non-discriminatory’.²⁸ In my view, that confirms (albeit implicitly) that the Commission was not intending to redefine the concept of ‘special tariffs’ in the fifth indent so as to cover quantity discounts.

49. I see no reason to consider that the ultimate removal of the reference to ‘avoided costs’ in Article 12 entailed such redefinition.

50. First, as bpost and the French Government correctly point out, recital 39 in the preamble to the 2008 Directive continues to refer to the ‘avoided costs’ in relation to services provided by the USP, as compared to the standard service covering the complete range of features offered for the clearance, sorting, transport and distribution of individual postal items.

51. Secondly, the drafting history of the 2008 Directive²⁹ contains no indication that the reference to ‘avoided costs’ was removed from the fifth indent of Article 12 so as to make sure that the latter provision would in future cover both operational and quantity discounts.

52. As I see it, the drafting history tends rather to support the submission made by the French Government at the hearing, that the new drafting of the fifth indent reflects a compromise concerning the flexibility which USPs should enjoy in fixing their tariffs.

53. That government explained that, in the context of further liberalisation of postal markets, a number of USPs had emphasised the need for more tariff flexibility (i.e. less constraints imposed by public authorities) in order to be able to adapt to growing competition.

28 — 2006 Commission proposal, cited in footnote 12, section 3.3.2, p. 7.

29 — See points 10 to 13 above.

54. While echoing that concern, the 2006 Commission proposal did not suggest abandoning the rule that special tariffs should take account of the costs avoided by the USP if the client carries out part of the postal handling chain. In these circumstances, a number of USPs may have feared that they would not be permitted to adjust their special tariffs to changing conditions of competition, including where necessary through the granting of higher operational discounts than those which would result mechanically from reflecting avoided costs.³⁰ It is in that context that the European Parliament suggested the insertion of an additional recital in the preamble to the 2008 Directive, stressing that *'[i]t is necessary for the provision, by [USPs] of services for businesses, bulk mailers and consolidators of mail from different customers, to be subject to more flexible tariff conditions'*.³¹

55. The solution which prevailed in the Council — despite opposition from the Commission and a few Member States — was to delete the reference to 'avoided costs' in the fifth indent of Article 12, in line with the increased pricing flexibility enjoyed by USPs.³² However, the ultimate wording of recital 39 in the preamble to the 2008 Directive, compared to the Parliament's proposal, suggests that this deletion was part of a compromise: on the one hand, that recital makes clear that USPs should enjoy more pricing flexibility albeit 'in line with the cost-orientation principle'; on the other, the second sentence of that recital reproduces (with only minor modifications) the reference to avoided costs previously contained in the fifth indent of Article 12.³³

56. I therefore conclude that the removal of the reference to 'avoided costs' in the fifth indent of Article 12 as a result of the 2008 Directive did not modify the material scope of application of that provision, which concerns operational discounts only.

57. The drafting history recalled above also reinforces my view that the substantive issue of discrimination raised by the referring court does not turn on whether the fourth or (some version of the) fifth indent of Article 12 of the Postal Services Directive applies. The intention of the EU legislator when adding a fifth indent to that provision was plainly not to alter the general ban on tariff discrimination already contained in the original version of the Postal Services Directive. As can be inferred from the 2000 Commission proposal, the objective was rather to address subsisting discriminatory practices by a number of incumbent USPs in respect of operational discounts.

58. It follows that, should the Court disagree with my view and conclude that the fifth indent applies to quantity discounts as well as to operational discounts, the answer I propose to Question 2 below can be applied by analogy to answer Question 3.

30 — If USPs are to be increasingly exposed to competition all along the postal handling chain (including for instance for the distribution of mail items), they may wish to offer part of that handling at a competitive price as compared to the price charged by competitors for an equivalent service.

31 — Position of the European Parliament adopted at first reading on 11 July 2007 with a view to the adoption of a directive amending Directive 97/67/EC concerning the full accomplishment of the internal market of Community postal services, OJ 2008 C 175 E, p. 355 (see recital 34 in the modified version proposed by the Parliament).

32 — Working Party on Postal Services, preparation of the Transport/Telecommunications and Energy Council of 1/2 October 2007, Proposal for a Directive of the European Parliament and of the Council amending Directive 97/67/EC concerning the full accomplishment of the internal market of Community postal services — Political agreement, Council document 12864/07, 14 September 2007, p. 32 (see especially footnote 40).

33 — Council document 12864/07, cited in footnote 32, p. 16 (footnote 25). The Commission successfully opposed the proposal by a number of Member States to replace 'should take account of the avoided costs' with 'may take account of the avoided costs'.

Question 2: the compatibility of the ‘per sender’ model with the non-discrimination principle

59. I begin by observing that the present reference for a preliminary ruling focuses solely on the system of quantity discounts granted by bpost in 2010.³⁴ By its second question, the referring court seeks to ascertain in substance whether the ‘per sender’ model is consistent with the principle of equal treatment set out in the fourth indent of Article 12 of the Postal Services Directive. As bpost submits, the answer to that question is likely to be of direct relevance not only in Belgium but also in a number of other Member States where USPs calculate quantity discounts on the basis of the volumes of mail which each individual sender decides to post.

60. It is settled case-law that the principle of equal treatment, which is one of the fundamental principles of EU law, means that comparable situations should not be treated differently unless such different treatment is objectively justified, and that situations which are not comparable should not be treated the same way.³⁵ In assessing the comparability of situations, all the elements which characterise them must be taken into account, including the principles and objectives of the field to which the Union act concerned relates.³⁶

61. It seems to me first that, contrary to the submission made by bpost, the system of quantity discounts in issue in the main proceedings does effectively entail a difference of treatment as between consolidators of mail and individual bulk senders. Using the illustration which I gave earlier,³⁷ under the ‘per sender’ model, the consolidator would qualify only for a 10% discount in respect of the mail from each of the three senders, whereas an individual bulk sender delivering to the USP exactly the same volume of mail — and therefore generating in principle the same income for that USP — would qualify for a discount of 20%.

62. The central issue here is whether (bulk) senders and consolidators are in a comparable situation with regard to quantity discounts, so that such a difference of treatment is unlawful.

63. bpost and the French Government emphasise in that regard that only senders actually generate demand for postal services. Quantity discounts are intended to stimulate that demand. It is therefore justified to calculate those discounts in such a way that only the sender’s decision to send more mail is rewarded, rather than the consolidator’s ability to collect large volumes of mail from various senders. By contrast, the Belgian, Italian and Swedish Governments and the Commission argue that senders and consolidators are in a comparable situation since the service supplied to each by bpost is the same.

64. I should make clear at the outset that I am not convinced by the argument of the Belgian, Italian and Swedish Governments and the Commission that the reasoning of the Court in *Deutsche Post and Others*³⁸ can simply be transposed here.

65. In that case, the Court had to ascertain whether the Postal Services Directive precluded Deutsche Post (the USP in Germany) from refusing to apply to businesses which consolidated, on a commercial basis and in their own name, postal items from various senders the special tariffs which that USP granted to business customers for the deposit of minimum quantities of pre-sorted mail at its sorting

34 — Thus, the present reference does not concern other issues raised in the main proceedings, such as the alleged violation by bpost of its obligation to apply non-discriminatory tariffs by requiring consolidators to identify their individual customers in order to benefit from quantity discounts, or by calculating the operational discounts granted to consolidators on the basis of the quantities of pre-sorted mail originating from their customers taken separately.

35 — Judgments in *Ruckdeschel and Others*, 117/76 and 16/77, EU:C:1977:160, paragraph 7; *Edeka Zentrale*, 245/81, EU:C:1982:277, paragraph 11; and *Schaible*, C-101/12, EU:C:2013:661, paragraph 76.

36 — See, by analogy, judgment in *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraphs 25 and 26 and the case-law cited.

37 — See point 22 above.

38 — EU:C:2008:141.

offices. *Deutsche Post and Others* therefore concerned downstream access to the postal handling chain under conditions and at points which differed from those which apply to the traditional service for letter post. The Court held in substance that, while it is true that the fifth indent of Article 12 of the Postal Services Directive is not intended to determine the question of principle whether a USP is or is not obliged to grant such access, the refusal by Deutsche Post to extend to consolidators the regime of operational discounts available to (business) senders was inconsistent with the rule of equal treatment contained in that provision.³⁹ The Court thus implicitly but necessarily recognised that individual senders and consolidators are in a comparable situation with regard to *operational discounts*.

66. In my opinion, transposing that reasoning in the present case would amount to denying that individual senders and consolidators are in a different position with regard to *quantity discounts*, due to the fact that only individual senders generate autonomous demand for letter post. To illustrate that difference, it is useful to explore the likely effects of the ‘per sender’ model on the market and to compare them with the effects which the ‘aggregation’ model can be expected to produce.

67. Suppose that individual bulk sender A (for instance a bank sending large amounts of administrative mail) is entitled to a quantity discount of 10%. Let us imagine that A decides to entrust exactly the same volume of mail to consolidator X for further delivery to the USP. Under the ‘per sender’ model, that decision has no impact whatsoever on the quantity discount to which the volume of mail originating from A gives rise. X will thus receive a discount of 10% for that mail. By contrast, under the ‘aggregation’ model, X will be entitled to a quantity discount for the mail originating from A corresponding to the aggregate volumes of mail from all its clients that it delivers in the course of the reference period (for instance 20%).

68. Let us assume now that A concludes a contract for the handling and delivery of exactly the same volume of mail to the USP with consolidator Y, which is larger than X. Under the ‘per sender’ model, Y will again be entitled to a discount of 10% for the volumes originating from A. Under the ‘aggregation’ model, the quantity discount Y receives for the volume of mail originating from A will be calculated by reference to the total gross income generated for the USP by Y (for instance 30%).

69. Lastly, let us envisage the situation of individual sender B, which does not send enough mail to qualify for a quantity discount. Under the ‘per sender’ model, there will be no discount regardless of whether B decides itself to deliver its mail to the USP or to entrust a consolidator with that task. However, the situation is very different under the ‘aggregation’ model: the volumes of mail generated by B would then give rise to a quantity discount of 20% if it decides to deal with consolidator X and a quantity discount of 30% if it decides to deal with consolidator Y.

70. I draw two lessons from these examples.

71. The first lesson is that only the ‘per sender’ model is likely to stimulate senders to send more mail and hence serve the commercial objective of quantity discounts. Only senders are ultimately responsible for generating mail. Consolidators presumably generate such autonomous demand only to the limited extent that they are themselves senders.⁴⁰ The situation of individual sender B illustrates this point: under the ‘per sender’ model, all other things being equal, B can only obtain a quantity discount by increasing the volume of mail it sends.⁴¹

39 — EU:C:2008:141, paragraphs 41 and 44.

40 — For example, correspondence with the consolidator’s employees and clients, with sub-contractors or with public authorities.

41 — That may not of course happen if, for example, the evolution of B’s activities leads to a reduction in its correspondence, or if it switches to using other, possibly more cost-efficient, means of communication such as electronic messaging.

72. As I see it, the incentive to send more post practically vanishes under the ‘aggregation’ model: what matters then is not the volume of mail which the sender decides to post but rather the decision to deal with a consolidator as well as the choice between various consolidators. Indeed, for an unchanged volume of mail, B has an incentive to deal with the consolidator offering the best unit price. In my example, that consolidator would probably be Y, which qualifies for a higher level of quantity discount than X and which will be able to price its service so as to undercut X.⁴²

73. Because the positions of senders and consolidators with regard to quantity discounts are different, the USP’s objective to increase demand for postal services might be jeopardised by the ‘aggregation’ model. There may, in particular, be a risk that ‘purely administrative’ consolidators emerge on the market, handling the largest possible volumes of mail — including items originating from small senders — in order to benefit from the highest levels of quantity discounts.⁴³

74. As bpost correctly submits, the result might be a classic ‘no-win’ situation. If the USP is required to apply the ‘aggregation model’, it might be forced to abandon its system of quantity discounts in order to protect its financial equilibrium. However, the abolition of quantity discounts would presumably reduce the demand for postal services to the benefit of alternative methods of communication, such as fax, email, broadcasting and the Internet.⁴⁴ In turn, this might affect the financing of the universal service, to the detriment of the USP.

75. I cannot therefore agree with the Belgian Government’s submission that the Court’s reasoning at paragraphs 37 and 38 of *Deutsche Post and Others* applies to the present case. The Court there rejected the argument of Deutsche Post and the German Government that extending the system of *operational discounts* to consolidators would threaten the financial stability of the USP (Deutsche Post). The Court held that Deutsche Post could reduce its operational discounts for all recipients ‘if it were to turn out that the grant to the [consolidators] of the discounts ... agreed only for the business customers ... are excessive compared with the avoided costs’.⁴⁵ As it is clear from that wording, the Court’s reasoning was closely related to the nature of operational discounts: since the latter are granted to reflect costs avoided by the USP, as compared to the costs of the standard service for letter post, their extension to consolidators does not on the face of it risk affecting the financial stability of the USP. As I have just explained, that reasoning cannot be applied to quantity discounts because reducing or abolishing them is liable to have a negative impact on the demand for letter post and hence on the financial equilibrium of the USP.

76. I add that imposing the ‘aggregation’ model in the context of quantity discounts is difficult to reconcile with the pricing flexibility which the EU legislature deliberately granted to USPs in compensation for their increased exposure to competition, subject to the limits laid down in Article 12 of the Postal Services Directive and those resulting more generally from the Treaties (for example the prohibition of abuse of a dominant position under Article 102 TFEU).⁴⁶

77. The second lesson concerns the neutrality of the ‘per sender’ model in terms of its effect on the competitive position of the various participants in the postal market.

42 — See also point 85 below.

43 — Indeed, bpost submits that it was precisely in order to address this phenomenon that it decided to introduce the ‘per sender’ model in 2010. See point 21 above.

44 — An independent report prepared at the request of the United Kingdom Secretary of State for Business, Enterprise and Regulatory Reform sheds light on the increasing price elasticity of postal services as a result from (in particular) cheaper alternatives to mail. See Hooper, R., Hutton, D., Smith, I.R., ‘The challenges and opportunities facing UK postal services. An initial response to evidence’, May 2008, p. 26 (<https://www.berr.gov.uk/files/file46075.pdf>). See also the Explanatory memorandum to the 2000 Commission proposal, cited in footnote 9, sections 1.2.5 and 1.3.

45 — Judgment in *Deutsche Post and Others*, EU:C:2008:141, paragraph 38.

46 — See points 11 and 12 and 52 to 56 above. The Commission emphasised that there is in principle no contradiction between maintaining and improving the universal service and gradually introducing competition, ‘provided the [USP] has the necessary commercial and pricing flexibility to respond within the bounds of competition law’. See Explanatory memorandum to the 2000 Commission proposal, cited in footnote 9, section 1.3.

78. When assessing whether a system of quantity discounts such as that in issue in the main proceedings is discriminatory or not, the Court should be guided in my view by the objective of opening postal markets to competition. As recital 26 in the preamble to the Postal Services Directive confirms, the principles that tariffs for the universal service should be non-discriminatory and that distortions of competition should be avoided are closely connected. It is thus necessary, in an increasingly competitive environment, both to ‘provid[e] sufficient freedom to [USPs] to adapt to competition and at the same time, ensure adequate monitoring of the behaviour of the likely dominant operator in order to safeguard effective competition’.⁴⁷

79. Against this background, it seems to me that the ‘per sender’ model is not liable to distort competition. Under that model, the level of quantity discount granted depends exclusively on the income generated for the USP by each individual sender during a reference period. As a result, the ‘per sender’ model neither encourages nor deters bulk senders from entrusting their mail to a consolidator.

80. Contrary to the submissions of the Belgian Government at the hearing, I see no reason to believe that the ‘per sender’ model generally threatens the viability of consolidators. Although that model prevents the emergence of purely administrative consolidators, it does not affect the potential interest which a bulk sender may have in using an ‘operational’ consolidator. This is typically the case when, for the same ‘stamping tariff’, the sender could only prepare, pre-sort and/or send mail himself at higher average cost. Several factors come into play in deciding whether or not to outsource these tasks, such as the (un)availability of in-house infrastructure and human resources, the costs of these resources, the periodic variations in the volumes of mail to be sent or the pure convenience of using a consolidator. The fact that under the ‘per sender’ model a consolidator cannot benefit from higher levels of quantity discounts (which he may or may not pass on to the customer) than those which are available to each sender individually does not deprive outsourcing of its potential economic interest.

81. The neutrality of the ‘per sender’ model’s effects on the competitiveness of consolidators sharply contrasts with the distortive effects of the practice in issue in *Deutsche Post and Others*.⁴⁸ There, the fact that consolidators could not benefit from the operational discounts which Deutsche Post granted to individual senders for the deposit of minimum quantities of pre-sorted mail at its sorting offices clearly impeded the development of competition in the market for mail consolidation. The Court’s decision in that case promoted the objective of liberalisation of postal markets pursued by the Postal Services Directive.⁴⁹

82. The ‘per sender’ model is equally neutral with respect to the competitiveness of different consolidators in so far as it is applied consistently to all of them.⁵⁰ If quantity discounts are based solely on mail generated by individual senders, a sender’s choice of consolidator will depend (all other things being equal) on the quality of the service being offered. That quality will presumably in turn reflect such factors as the reliability of the consolidator, the convenience of the method it uses to clear mail, how rapidly it handles and delivers mail to the USP and how able or willing it is to deal, at a reasonable price for the sender, with sudden increases or decreases in the volumes of mail to be handled.

83. By contrast, competitive distortions are likely to arise under the ‘aggregation’ model.

47 — 2006 Commission proposal, cited in footnote 12, section 3.3.3, p. 7.

48 — EU:C:2008:141.

49 — See, in particular, recital 8 in the preamble to the Postal Services Directive; recitals 2 and 12 to 15 in the preamble to the 2002 Directive; recitals 12, 16 and 38 in the preamble to the 2008 Directive.

50 — So far as I can tell, that seems to be the case here: bpost indicates in particular that its quantity discounts for 2010 were applied under the same conditions to its own mail consolidation subsidiary (Speos).

84. First, that model creates incentives for most senders to entrust their mail to a consolidator.⁵¹ That conclusion is not called into question by the fact that there is no guarantee that the (full) discount obtained by a consolidator will be passed on to the clients. Even using a purely administrative consolidator may be economically advantageous for a sender provided that the consolidator's offer enables the sender to post mail at an (even slightly) lower average price than the price which would otherwise be charged by the USP. For instance, assuming that consolidator Y (which thanks to the 'aggregation' model qualifies for an overall discount of 30%) merely offers a discount of 12% to bulk mailer A, the latter will still have an incentive to deal with Y since A would only benefit from a quantity discount of 10% if it delivered its mail directly to the USP.

85. Second, the 'aggregation' model operates to the advantage of consolidators who aggregate the largest volumes of mail and therefore benefit from the highest levels of discounts.⁵² That becomes particularly clear when comparing the competitive situation of consolidators X and Y.⁵³ In the example that I gave earlier, under the aggregation model, X qualified for quantity discounts of 20%, whereas Y qualified for quantity discounts of 30%. All other things being equal, this means that, for the same service, Y enjoys a significant competitive advantage over X to attract senders. Y also enjoys greater operational flexibility than X. Y can (for example) offer a less elaborate service but a much better discount; or the same service with a slightly better discount and retain more profit.

86. Furthermore, if the USP cannot use the 'per sender' model, it may ultimately have no choice but to abolish its system of quantity discounts altogether in order to ensure its financial viability.⁵⁴ That would be likely to have negative consequences for users of postal services in general.

87. Such distortions of competition and their side-effects are self-evidently not consistent with the stated objectives of the Postal Services Directive.

88. Encouraging competition with incumbent operators was considered by the EU legislator to be critical to achieving the internal market for postal services.⁵⁵ *Deutsche Post and Others*⁵⁶ shows the role played by the non-discrimination principle enshrined in Article 12 of the Postal Services Directive in pursuing that objective. However, I share the French Government's view that the directive does *not* require an USP to set tariffs in a way that favours large consolidators over smaller consolidators and/or the USP itself.⁵⁷ On the contrary, positive discrimination in favour of large consolidators might well fall foul of the fourth indent of Article 12, which requires Member States to ensure that tariffs for postal services do not favour certain (categories of) customers.

89. As I see it moreover, avoiding calculating quantity discounts in a way which creates a competitive advantage for the largest consolidators is likely to contribute to the emergence and successful development of consolidators which — regardless of their size — offer the best service to end-users. In that sense, the 'per sender' model appears to be accord with the objectives of the Postal Services Directive to improve the quality of postal service in the EU and promote the completion of a functioning internal market for postal services.⁵⁸

51 — See point 72 above. However, that incentive does not exist for those bulk senders who are entitled to the highest level of discount anyway.

52 — See in that sense, Avis n° 07-A-17 du Conseil de la concurrence (France) relatif à une demande d'avis de l'Autorité de régulation des communications électroniques et des postes (ARCEP) sur le dispositif de remises commerciales de La Poste, 20 December 2007, *Bulletin officiel de la concurrence, de la consommation et de la répression des fraudes*, 23 April 2008, p. 313.

53 — See points 67 and 68 above.

54 — See point 74 above.

55 — See, to that extent, for instance, the Explanatory memorandum to the 2000 Commission proposal, cited in footnote 9, section 2.7.

56 — EU:C:2008:141.

57 — More generally, even following the 2002 and 2008 amendments, the Postal Services Directive does not require Member States to reach some specified minimum level of effective competition in the postal sector.

58 — See, in particular, recitals 1, 19, 30, 31, 32 and 35 in the preamble to the Postal Services Directive.

90. I therefore conclude that, since senders and consolidators are objectively in different situations with regard to quantity discounts, the principle of non-discrimination laid down in the fourth indent of Article 12 of the Postal Services Directive must be interpreted as not precluding a USP from calculating the quantity discounts granted to a consolidator on the basis of the volumes of mail of each of the consolidator's clients taken separately during a reference period, rather than on the basis of the aggregated volumes of mail delivered by that consolidator to the USP during that period.

91. For the reasons which I have already given,⁵⁹ it is not necessary to give a separate answer to the third question.

Conclusion

92. In the light of all the foregoing considerations, I suggest that the Court should rule to the following effect in answer to the questions referred by the cour d'appel de Bruxelles (Belgium):

- (1) The fifth indent of Article 12 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, as amended, does not apply to quantity discounts granted by a universal service provider according to the volume of items delivered to it by a sender in the course of a reference period and intended to create an incentive for senders to increase their demand for postal services.
- (2) The principle of non-discrimination laid down in the fourth indent of Article 12 of Directive 97/67 does not preclude a universal service provider from calculating quantity discounts granted to a consolidator on the basis of the volumes of mail of each of the consolidator's clients taken separately during a reference period, rather than on the basis of the aggregated volumes of mail delivered by that consolidator to the universal service provider during that period.

⁵⁹ — See points 33, 57 and 58 above.