

## II

*(Acts whose publication is not obligatory)*

## COMMISSION

## COMMISSION DECISION

of 25 July 2001

relating to a proceeding under Article 82 of the EC Treaty

**(COMP/C-1/36.915 — Deutsche Post AG — Interception of cross-border mail)**

*(notified under document number C(2001) 1934)*

**(Only the German text is authentic)**

**(Text with EEA relevance)**

(2001/892/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Having regard to the complaint lodged by the British Post Office on 4 February 1998, alleging infringement of Article 82 of the Treaty by Deutsche Post and requesting the Commission to put an end to this infringement,

Having regard to the Commission decision of 25 May 2000 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission in accordance with Article 19(1) of Regulation No 17 and with Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty <sup>(3)</sup>,

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

Whereas:

## I. FACTS

## A. The complainant

- (1) The British Post Office (BPO) is the public postal operator (PPO) in the UK <sup>(4)</sup>. The BPO is primarily active in domestic and international letter and parcel delivery.

<sup>(1)</sup> OJ L 13, 21.2.1962, p. 204/62.

<sup>(2)</sup> OJ L 148, 15.6.1999, p. 5.

<sup>(3)</sup> OJ L 354, 30.12.1998, p. 18.

<sup>(4)</sup> On 26 March 2001 the BPO changed its name to Consignia plc, which is a public limited company wholly owned by the UK Government. For the purposes of this Decision, however, the name 'British Post Office (BPO)' is retained.

## B. The respondent

- (2) Deutsche Post AG (DPAG) is the PPO of Germany<sup>(5)</sup>. In 1995 the former Deutsche Bundespost Postdienst was transformed into a state-owned limited company — DPAG. In the autumn of 2000 the German State sold 33 % of its DPAG shares through an initial public offering (IPO). In 2000 the total turnover of the DPAG group of companies amounted to EUR 32,7 billion (EUR 22,4 billion in 1999)<sup>(6)</sup>. The mail division of DPAG is highly profitable<sup>(7)</sup>. In 2000 the operating profit of the mail division amounted to approximately EUR 2 billion (compared with EUR 1 billion in 1999)<sup>(8)</sup>. The total turnover of the mail division remained stable: EUR 11,73 billion in 2000, as against EUR 11,67 billion in 1999<sup>(9)</sup>. The operating profit of the entire DPAG group of companies was approximately EUR 2,38 billion in 2000<sup>(10)</sup>.

## C. The complaint

- (3) On 4 February 1998 the BPO filed a complaint against DPAG pursuant to Article 3 of Regulation No 17. In the complaint it was alleged that, since 1996, the BPO had faced an increasing number of refusals from DPAG to distribute cross-border bulk mailings coming from the UK, unless the BPO paid a surcharge corresponding to the German domestic tariff minus terminal dues. The BPO maintains that the contested mailings constitute ordinary cross-border mail, whereas DPAG states that these mailings are so-called A-B-A remail (see section D below).
- (4) The BPO alleged that DPAG had repeatedly delayed the release of contested mailings even though the BPO had — in order to get the mail released — agreed to pay the difference between the terminal dues (see section D below) payable for delivering cross-border mail and the full domestic tariff. Since mailings of the contested type are often time-sensitive, additional delays harm the BPO and its customers commercially as well as financially. The BPO stated that DPAG's repeated refusal to deliver cross-border mailings unless a surcharge is paid, on the incorrect basis that these mailings are A-B-A remail, constitutes an abuse of a dominant position contrary to Article 82 of the EC Treaty. Moreover, the delayed release of intercepted mailings — despite the agreement of the BPO to meet DPAG's claims — allegedly constitutes another abuse of a dominant position.

## D. Factual and regulatory background

### *The postal monopoly in Germany*

- (5) The core activity of DPAG is the domestic collection, sorting and delivery of letter mail. DPAG is obliged by law to provide basic, uniform postal services at affordable prices all over Germany, the so-called universal service obligation (USO)<sup>(11)</sup>. Certain postal services in Germany are subject to a statutory monopoly which has been granted to DPAG, whereas other services are performed by DPAG in competition with private operators<sup>(12)</sup>. In addition, DPAG provides international mail services through bilateral or multilateral arrangements with other PPOs. The domestic tariffs in Germany are the highest in the Community<sup>(13)</sup>.

<sup>(5)</sup> The Deutsche Post group of companies now markets itself under the name Deutsche Post World Net. For the purposes of this Decision, the name Deutsche Post AG (DPAG) is used.

<sup>(6)</sup> DPAG Annual Report 2000, published on 2 May 2001. For the purposes of this Decision, the Commission consistently uses the irrevocable conversion rate adopted by the Council on 31 December 1998 when converting German marks into euro even in cases where the particular amount concerned a period of time prior to that date.

<sup>(7)</sup> The Mail Division of DPAG comprises the business divisions Mail Communication (letters, packages and parcels except express), Direct Marketing and Press Distribution. DPAG Annual Report 2000.

<sup>(8)</sup> Profit from operative activities before amortisation and goodwill (EBITA). DPAG Annual Report 2000.

<sup>(9)</sup> DPAG Annual Report 2000.

<sup>(10)</sup> Profit from operative activities before amortisation and goodwill (EBITA). DPAG Annual Report 2000.

<sup>(11)</sup> Postal Act (*Postgesetz*) of 22 December 1997, *Bundesgesetzblatt* 1997, Part I, No 88, 30 December 1997.

<sup>(12)</sup> Section 51 of the Postal Act.

<sup>(13)</sup> See *Tarifvergleich Briefpost — Inlandstarife bis 20 g*, June 1999, Referat 212, Regulierungsbehörde für Telekommunikation und Post (RegTP — the national regulatory authority in Germany). The present domestic tariff for a first class letter in the first weight step is EUR 0,56 (DEM 1,10).

- (6) The postal monopoly granted to DPAG comprises the collection, forwarding and delivery of domestic mail, the forwarding and delivery of incoming cross-border mail and the collection and forwarding of outgoing cross-border mail. All letters and addressed catalogues weighing less than 200 grams whose postage does not exceed five times the corresponding tariff in the lowest weight step are subject to the monopoly. However, the monopoly does not cover bulk mailings (comprising at least 50 items with identical content where each item weighs more than 50 grams) or certain value-added services <sup>(14)</sup>. DPAG's exclusive licence expires on 31 December 2002 <sup>(15)</sup>.
- (7) The total turnover of the overall German market for letter mail (including domestic mail and cross-border mail) has been estimated at EUR 9,7 billion in 1998, of which some EUR 2,6 billion was formally open to competition (i.e. fell outside the reserved area). However, the approximately 250 licensees which, in addition to DPAG, were active on the German letter market in that year accounted for only a fraction of that amount — EUR 55 million, i.e. 2 % of the market segment theoretically open to competition <sup>(16)</sup>. This figure is confirmed by the national regulatory authority (NRA) in Germany, which has estimated the market shares of DPAG on this market at 99,2 % in 1998 and 98,7 % in 1999 <sup>(17)</sup>.

#### *Cross-border letter mail*

- (8) The system by which postal administrations compensate each other for the delivery of cross-border mail on each others behalf is known as the terminal dues system. Under this arrangement, the receiving PPO is remunerated for the delivery of cross-border mail by the sending PPO. These delivery charges are called terminal dues <sup>(18)</sup>.
- (9) The collection and forwarding of outgoing cross-border letter mail has been *de jure* or *de facto* liberalised in most EU Member States. Although competitors have entered this market in a number of Member States, the PPOs still dominate their home markets <sup>(19)</sup>. The liberalisation of outgoing cross-border letter mail has facilitated the provision of remail services. DPAG has — in contrast to most other Community PPOs — taken a tough stance against postal operators providing outgoing cross-border letter mail services in Germany. DPAG has taken these operators to court and has obtained German court rulings stating that companies offering outward cross-border letter mail services infringe the German postal monopoly. Competing operators have been ordered by the courts to cease offering these services <sup>(20)</sup>.
- (10) As regards the market for the forwarding and delivery of incoming cross-border letter mail, the situation is quite different. In all Member States practically all incoming letter mail is handled by the incumbent PPOs <sup>(21)</sup>. Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (the Postal Directive) — which entered into force in 1998 — opened only a fraction of this market to competition <sup>(22)</sup>.

<sup>(14)</sup> DPAG's monopoly was reduced as of 1 January 1998 when the monopoly threshold for identical bulk mailings was reduced from 100 grams to 50 grams. Section 51(4) of the Postal Act exempts certain value-added services from the postal monopoly.

<sup>(15)</sup> Section 47 of the Postal Act provides that RegTP shall, every two years, present a report to the legislative bodies of Germany. *Inter alia*, the report shall include RegTPs observations on the possible necessity of maintaining the exclusive licence under Section 51 beyond the date set forth therein (i.e. 31 December 2002).

<sup>(16)</sup> KEP Nachrichten, No 51/17, December 1999 (document 1146 in the Commission file).

<sup>(17)</sup> Mid-2000 Report of RegTP, p. 62, as published on its website ([www.regtp.de](http://www.regtp.de)).

<sup>(18)</sup> See Commission Decision 1999/695/EC REIMS II, Case COMP/36.748 (OJ L 275, 26.10.1999, p. 17). The REIMS II agreement entered into force on 1 April 1999. The Commission has adopted a decision pursuant to Article 81(3) of the Treaty which exempts the agreement until 31 December 2001. The PPOs of all Member States except TPG of the Netherlands are signatories to this agreement, in which terminal dues are expressed as a percentage of domestic tariffs in the receiving country. Terminal dues were increased annually, provided that the receiving PPO met certain quality of service standards. As of 1 January 2001, the terminal dues were increased to the level of 70 %.

<sup>(19)</sup> *Liberalisation of Incoming and Outgoing Intra-Community Cross-border Mail*, p. 25. In this study, seven Community PPOs were asked to estimate their own market shares in 1996. The estimated shares for outgoing cross-border mail varied between 80 and 100 %.

<sup>(20)</sup> See, for instance, *Deutsche Post AG gegen TNT Mailfast GmbH*, ref. 31 O 796/93, Cologne Regional Court, 14 April 1994; *TNT Mailfast GmbH gegen Deutsche Post AG*, ref. U (Kart) 31/94, Düsseldorf Higher Regional Court, 23 April 1996; *DHL Worldwide Express GmbH gegen Deutsche Post AG*, judgment of the Düsseldorf Higher Regional Court, 23 April 1996.

<sup>(21)</sup> *Liberalisation of Incoming and Outgoing Intra-Community Cross-border Mail*, pp. 22 and 38. Seven Community PPOs estimated that their market shares for incoming cross-border letter mail in 1996 varied between 95 and 100 %.

<sup>(22)</sup> OJ L 15, 21.1.1998, p. 14. The Directive opened some 3 % of PPOs total mail turnover to competition. In practice, PPOs have retained everything but a very small share of the business theoretically open to competition.

*Remail*

- (11) Remailing can be described as the practice of re-routing mail between countries utilising a combination of conventional transport services, express services and other postal services. Specialist remailing firms tender international bulk mailings to postal operators on behalf of clients in other countries (commercial remailing). Although remail services were initially provided by private firms, PPOs themselves have become increasingly involved in remailing activities.
- (12) Remailing becomes economically viable when postal tariffs vary significantly between different countries, as is the case within the Community. The greater the difference between a given country's high domestic tariffs and the low terminal dues which its PPO receives for delivering incoming cross-border mail, the greater becomes the possibility for profitable remailing. In other words, if terminal dues in the receiving country are low compared to the domestic tariffs in that country, the sending PPO is able to charge a cross-border tariff which is significantly lower than the normal domestic tariff in the receiving country. It thus becomes profitable to transport mail emanating from country A to country B and have it posted back to country A or to a third country (country C).
- (13) If German firms re-route their domestic mail via the UK, the turnover of UK postal operators will increase at the cost of DPAG's. It is in the commercial interest of PPOs of countries with high postal tariffs (such as Germany) to impede remailing, whereas PPOs of countries with low cross-border tariffs — thus likely transition countries for remail — have a commercial interest in encouraging remail.
- (14) Two types of remailing are relevant for the assessment of the present case, namely so-called A-B-A and A-B-C remailing. In its judgment in Joined Cases C-147/97 and C-148/97 *Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH and Citicorp Kartenservice GmbH* <sup>(23)</sup> the Court of Justice of the European Communities described these practices in the following manner.

A-B-A remail:

letters come from State A but are posted in State B for delivery in State A,

A-B-C remail:

letters come from State A but are posted in State B for delivery in State C.

*Centralised mail distribution*

- (15) As a consequence of the ongoing integration of Community markets, many transnational companies now demand postal services tailor-made for their own requirements as regards cost, delivery speed and other service elements. In order to minimise production and distribution costs and maximise economies of scale and scope, these companies demand 'one-stop-shop' service solutions to all their mail distribution needs. To an increasing extent, transnational companies are thus centralising their mailing activities to a limited number of mailing centres from which mailings are distributed to customers in a number of countries.
- (16) Most customers still prefer dealing with sellers in their own country and in their own language. Experience shows that the response rate to a commercial mailing is much higher if customers can respond to someone in their country of residence. Transnational firms solve this problem by offering a contact point in each country (e.g. by indicating a local subsidiary or agent as response address).

*International mailing services provided by DPAG*

- (17) DPAG provides centralised mailing services for transnational customers who wish to purchase tailor-made distribution services. DPAG itself has recognised that:

'Customers operating internationally demand high quality and a broad range of service [sic] from a single source (one stop shopping) <sup>(24)</sup>'

<sup>(23)</sup> [2000] ECR I-825, at paragraph 12. Preliminary ruling in response to questions referred to the Court of Justice by the Frankfurt am Main Higher Regional Court pursuant to Article 234 of the EC Treaty.

<sup>(24)</sup> Common position paper concerning the revision of Directive 97/67/EC published by DPAG, TNT Post Group NV and Sweden Post Ltd of 14 February 2000 (document 1146 in the Commission file).

- (18) Deutsche Post Global Mail — a subsidiary of DPAG — provides customised service solutions for international letter mail business customers, including international addressed bulk mail services. An example of a Community-wide mailing service carried out by DPAG is the distribution of mailings on behalf of Oracle Corporation, a company which distributes bulk mail to addressees in 16 European countries via DPAG in Germany. Recipients are given the possibility of replying by telephone or fax using national, free-of-charge telephone numbers <sup>(25)</sup>.

- (19) DPAG markets its centralised, international mailing service in the following way:

'International Mail Service advises you on how to optimize international mail activities. (...)

Suppose for example a software company based in Germany is planning to send a mail shot with reply option to 30 000 recipients in 16 different countries simultaneously. Each mail piece consists of three elements: envelope, letter and brochure. International Mail Service will not only check and update the address file, but also personalize the mail shot in accordance with the conventions of each country — a significant factor for mail shot success <sup>(26)</sup>.

- (20) DPAG estimates its market share in the German market for outgoing cross-border mail at approximately 75 % <sup>(27)</sup>. The main target groups are international business customers sending large volumes of business mail, direct mail, publications and added-value items <sup>(28)</sup>. DPAG competes directly with the BPO and other operators in the UK market for outgoing cross-border mail. One example of such competition is DPAG's tender for the pan-European contract of American Express, a company which — at the time — distributed its mailings to all European customers from its distribution centre in the UK <sup>(29)</sup>.

#### *The Convention of the Universal Postal Union*

- (21) The Universal Postal Union (UPU), a specialised agency of the United Nations, is the international body responsible for postal matters. In general, members of the United Nations are also members of the UPU. The UPU Convention provides a regulatory framework for the international exchange of mail. The UPU holds a congress every five years at which the Convention is reviewed and, if necessary, revised. The UPU Convention has the status of a treaty which the governments of each UPU member state enter into. The last UPU Congress was held in Beijing in August-September 1999. The revised UPU Convention (UPU 1999) entered into force on 1 January 2001 <sup>(30)</sup>. The 1989, 1994 and 1999 versions of the UPU Convention (hereinafter called UPU 1989, UPU 1994 and UPU 1999) are relevant to the present case.

<sup>(25)</sup> Deutsche Post Global Mail was previously called International Mail Services GmbH. DPAG brochure 'Zum Beispiel — Oracle8 ConText Cartridge', annexed to DPAG's response to a Commission request for information of 23 April 1999 (document 1122 in the Commission file).

<sup>(26)</sup> Underlining by the Commission. DPAG promotional brochure "We Deliver", published on 1 January 1999, p. 48 (document 1140 in the Commission file).

<sup>(27)</sup> DPAG 'Unvollständiger Verkaufsprospekt' of 20 October 2000, p. 140.

<sup>(28)</sup> DPAG 'Unvollständiger Verkaufsprospekt' of 20 October 2000, p. 146.

<sup>(29)</sup> Letter from American Express to the Commission of 15 April 1999 (document 975 in the Commission file).

<sup>(30)</sup> Article 65 UPU 1999.

- (22) Article 25 of the UPU Convention provides the administrative powers which PPOs may use in respect of remail <sup>(31)</sup>. Article 25 UPU 1994 prescribes the following.

'Posting abroad of letter-post items:

1. A member country shall not be bound to forward or deliver to the addressee letter-post items which senders residing in its territory post or cause to be posted in a foreign country with the object of profiting by the more favourable rate conditions there.
  2. The provisions set out under 1 shall be applied without distinction both to letter-post items made up in the senders country of residence and then carried across the frontier and to letter items made up in a foreign country.
  3. The administration of destination may claim from the sender and, failing this, from the administration of posting, payment of the internal rates. If neither the sender, nor the administration, nor the administration of posting agrees to pay these rates, within a time limit set by the administration of destination, the latter may return the items to the administration of posting and shall be entitled to claim reimbursement of the redirection costs, or handle them in accordance with its own legislation.
  4. A member country shall not be bound to forward or deliver to the addressees letter-post items which senders post or cause to be posted in large quantities in a country other than the country where they reside, without receiving appropriate remuneration. The administration of destination may claim from the administration of posting payment commensurate with the costs incurred and which may not exceed the higher of the following two amounts: either 80 % of the domestic tariff for equivalent items, or 0,14 SDR per item plus one SDR per kilogramme. If the administration of posting does not agree to pay the amount claimed, within a time limit set by the administration of destination, the administration of destination may either return the items to the administration of posting, and shall be entitled to claim reimbursement of the re-direction cost, or handle them in accordance with its own legislation.'
- (23) DPAG argues that the majority of disputed mailings in the case at hand were sent at a time when — according to DPAG — UPU 1989 was still in force in Germany. Article 25 UPU 1989 was similar to Article 25 UPU 1994. The main material difference was the fact that, in the 1989 version, Article 25(1) contained an additional sentence subsequently deleted in the 1994 version. Article 25(1) UPU 1989 thus read as follows.
- '1. A member country shall not be bound to forward or deliver to the addressee letter-post items which senders resident in its territory post or cause to be posted in a foreign country with the object of profiting by the lower charges in force there. The same applies to such items posted in large quantities, whether or not such postings are made with a view to benefiting from lower charges <sup>(32)</sup>.'
- (24) DPAG maintains that the transposition of UPU 1994 into German law entered into force on 9 December 1998 and argued that this position is supported by German case law. However, the BPO has contested DPAG's view and alleges that UPU 1994 entered into force at an earlier date <sup>(33)</sup>. Under UPU 1989, receiving PPOs could invoke Article 25 for bulk mailings posted abroad by domestic senders regardless of the objective for doing so, whereas under UPU 1994 PPOs have to prove that the mailings were posted abroad in order to benefit from lower tariffs in the foreign country in order to invoke this provision.

<sup>(31)</sup> In UPU 1999, Article 25 has become Article 43.

<sup>(32)</sup> Sentence underlined by the Commission.

<sup>(33)</sup> Referring to a judgment of the German Federal Constitutional Court (BverfGE 63, 343, 354 ff.), the BPO maintains that UPU 1994 entered into force retroactively as of 1 January 1996.

*Definition of sender*

- (25) The dispute between the parties in the present case stems from a fundamental disagreement on what constitutes a sender of a postal item. None of the versions of the UPU Convention mentioned above includes a definition of the term sender. For the purposes of Article 25, PPOs interpret the term sender differently. Consequently, both the BPO and DPAG maintain that their respective interpretations of 'the sender' concur with Article 25 UPU.

*Definition of sender in the Postal Directive*

- (26) The Postal Directive stipulates the following definition of the term sender.
- 'sender: a natural or legal person responsible for originating postal items; <sup>(34)</sup>'
- (27) The definition of the sender in the Postal Directive may be interpreted in widely diverging ways. The BPO as well as DPAG are of the opinion that their respective interpretations are consistent with the definition of sender in the Postal Directive.

*The material definition of sender*

- (28) DPAG has repeatedly stated that its actions concerning incoming cross-border mail are fully in line with German case law. A definition which DPAG terms the material definition of sender ('der materielle Absenderbegriff') has been defined in the case law of German courts <sup>(35)</sup>. Under this definition, a prima facie assumption is made about the identity of the sender. The person who appears to address himself to the addressee — based on the overall appearance of the postal item including its contents — is assumed to be the sender. The relevance of the material definition of sender and DPAG's interpretation of it have recently been questioned by German courts <sup>(36)</sup>. DPAG interprets the material definition of sender very broadly. In practice, the inclusion in the contents of any cross-border mailing of any reference to an entity residing in Germany (e.g. in the form of a German reply address), is interpreted as the mailing having a German sender, irrespective of the physical origin of the mailing.
- (29) In its reply to the Commission's Statement of Objections, DPAG argued that the Commission had misrepresented DPAG's application of the material definition of sender. According to DPAG, the following set of criteria are taken into account when a mailing is examined by DPAG:
- (i) the reference to a domestic (i.e. German) sender;
  - (ii) the use of stationery belonging to a domestic firm;
  - (iii) the indication of a domestic reply address;
  - (iv) the possibility for customers to contact a domestic entity to order goods or to obtain information;
  - (v) the possibility for the customer to pay for goods domestically;
  - (vi) the signature of a representative of a domestic company;
  - (vii) the fact that a domestic company addresses the customer <sup>(37)</sup>.

<sup>(34)</sup> See footnote 22.

<sup>(35)</sup> DPAG refers to the following definition of the 'materielle Absenderbegriff': the sender is 'the person who, according to the overall impression, is to be perceived by a reasonable recipient as he who addresses himself with a direct, personal interest in communication to the addressee.', Frankfurt am Main Higher Regional Court, decision of 25 March 1999, NJW-RR 1997, pp. 162, 165.

<sup>(36)</sup> See judgment of the Berlin Regional Court ref. 97 O 252/98, DPAG/Franklin Mint GmbH of 27 November 2000; in its judgment the court concluded that a strict application of the material definition of sender, which does not take into account the actual origin of the mailing in question, was incorrect. Judgment of the Bonn Regional Court ref. 1 O 487/1999, Center Parcs NV/DPAG of 22 September 2000; the court concluded that DPAG's interpretation of the material sender was incorrect and concluded that Center Parcs NV of the Netherlands was the sender and not the German subsidiary Center Parcs GmbH & Co. KG. Judgment of the Düsseldorf Higher Regional Court ref. U (Kart) 17/1999, DPAG/Comfort Card of 20 September 2000; the court concluded that DPAG's interpretation of the material sender was incorrect and rejected DPAG's claims.

<sup>(37)</sup> DPAG reply to the Statement of Objections, p. 32.

### E. The measures complained of

- (30) In order to substantiate its complaint, the BPO has provided information concerning a large number of cross-border mailings which DPAG has intercepted and claimed surcharges for in order to deliver the mailings to its German addressees. To serve as examples, the BPO provided detailed information on mailings from several companies which were intercepted, delayed and surcharged by DPAG. Three of these examples — Ideas Direct, Fidelity Investments and Gant will be dealt with in detail below. In addition to demanding payments from the BPO, DPAG has — in some cases — claimed surcharges not from the UK senders but from the senders representatives in Germany.
- (31) After the original complaint was filed with the Commission in February 1998, DPAG has made a large number of additional claims for previously uncontested mailings. The BPO has subsequently submitted further evidence of cases where DPAG has delayed the release of intercepted cross-border mailings for lengthy periods of time. The case of Multiple Zones will be addressed below.

#### *Ideas Direct Ltd*

- (32) The UK company Ideas Direct Ltd (Ideas Direct) is a subsidiary of Direct Group International Ltd which is also registered in the UK. The main business of Ideas Direct is selling consumer goods to customers in the UK, France, Belgium, the Netherlands and Germany. In most cases identical mailings, containing promotional material such as catalogues, are sent simultaneously from the UK to these countries <sup>(38)</sup>.

#### The November 1996 mailing

- (33) According to the complainant, a mailing posted by Ideas Direct in the UK, containing 173 338 postal items, was intercepted by DPAG at the latest on 4 November 1996 <sup>(39)</sup>. The BPO claims to have agreed on 8 November 1996 to pay the amount claimed by DPAG <sup>(40)</sup>. According to the BPO, the mailing was not released by DPAG until 14 November 1996, i.e. a total delay of at least ten days <sup>(41)</sup>.
- (34) The mailing of November 1996 contained catalogues and covering letters in German which were produced and printed in the UK. The addressees were requested to respond to the letter by sending a coupon to Ideas Directs agent in Germany <sup>(42)</sup>. The mailing was produced and posted in the UK. The German agent was not at any stage involved in the production or the preparation of the mailing. The main activities of the agent include placing advertisements in magazines and operating a computerised order data system on behalf of its principals. The agents task in the mailing campaign in question was to receive orders from German customers and forward them to the principal in the UK. The ordered products were then despatched by Ideas Direct in the UK to customers in Germany. The agent performs similar tasks on behalf of a number of other clients.
- (35) DPAG has not disclosed the exact date of interception of the November 1996 mailing but does not refute the fact that the mailing was intercepted on 4 November 1996 at the latest. It maintains that the communication from the BPO to DPAG of 8 November 1996 did not include any undertaking on the BPO's part to pay the surcharge. According to DPAG, the BPO only agreed to pay the claimed amount on 12 November and DPAG released the mailings the same day <sup>(43)</sup>. The communication to the BPO of 14 November 1996 was merely a confirmation of the release that had taken place two days earlier <sup>(44)</sup>. DPAG concludes that the mailing was held back for eight and not ten days.

<sup>(38)</sup> Identical apart from language and contact addresses on covering letters.

<sup>(39)</sup> DPAG notified the BPO of the interception by fax on 4 November 1996 but it did not state when the mailing was actually stopped (documents 38-41 in the Commission file).

<sup>(40)</sup> Fax from the BPO to DPAG of 8 November 1996, in which the BPO requests DPAG to 'release the mail' and to 'let [the BPO] know what the costs are' (document 47 in the Commission file).

<sup>(41)</sup> Fax from DPAG to the BPO of 14 November 1996 which states that the mail has been released, without saying when the release took place (document 52 in the Commission file).

<sup>(42)</sup> The agent trades under the name Framar International. However, the registered name of the company is Werbung und Dienstleistungen für Versandhandel GmbH.

<sup>(43)</sup> Fax from the BPO to DPAG of 12 November 1996 including the statement 'Royal Mail International agrees to pay the cost for the release of Ideas Direct, from the Terminal Dues account' (document 49 in the Commission file). In its reply to the Statement of Objections, DPAG submitted a copy of a fax sent to the BPO on 12 December which seems to indicate that the mailings were forwarded that day.

<sup>(44)</sup> It should be noted that DPAG changed its view on this point during the course of the proceedings. In its initial response to the complaint, DPAG confirmed that the mailing was released on 14 November 1996 (DPAG response to the complaint of 20 July 1998, p. 10 — document 176 in the Commission file).



## National court proceedings against Ideas Direct

- (36) On 30 December 1998 Ideas Direct was issued with a summons from DPAG before the Hamburg Regional Court <sup>(45)</sup>. DPAG claimed surcharges amounting to EUR 866 394 for 680 543 items sent by Ideas Direct in 1997. The amount claimed was substantially larger than previous claims addressed to the BPO regarding mailings emanating from Ideas Direct in the UK. On 29 October 1999 the Hamburg Regional Court ordered Ideas Direct of the UK to pay to DPAG the claimed sum (plus interest and DPAG's litigation costs) <sup>(46)</sup>. Ideas Direct has filed an appeal against the judgment of the Hamburg Regional Court. The BPO has indicated its strong concern about the outcome of these proceedings to the Commission and stressed the fact that Ideas Direct is a small company which cannot support a legal battle with DPAG.

## Retroactive claims for mailings sent in 1998

- (37) DPAG has continued to surcharge mailings from Ideas Direct. In a letter sent on 27 November 1998 DPAG requested the BPO to pay surcharges for 19 Ideas Direct mailings (258 067 items in total), which DPAG had received between 1 January and 30 September 1998. The claimed surcharge amounted to EUR 323 900. In the fax DPAG maintained the following.

'To avoid any disturbance of intra community mail services we recorded the circumstances and delivered the letters to the addressees.

After receiving reliable information about the sender and the contents of the mailing,, we are now able to prove a case of Article 25 par. 1-3 UPU convention <sup>(47)</sup>.'

- (38) On 3 February 1999 DPAG sent a fax to the BPO stating that it had received in total 156 435 mail items from Ideas Direct in the UK between 1 October and 31 December 1998 and requested the BPO to pay a total surcharge of EUR 197 272. In this fax the following statement was made by DPAG.

'To avoid any disturbance of intra community mail services we recorded the circumstances and delivered the letters to the addressees.

After receiving reliable information about the contents of the mailing, we are now able to prove a case of Article 25 par. 1-3.[...] In all cases the domestic address of [Ideas Direct] is printed on the covering letter as well as on the reply postcard which is added to the mailing <sup>(48)</sup>.'

- (39) In March 1999 the Commission requested DPAG to provide detailed information about all mailings from *inter alia* Ideas Direct that had been intercepted in 1997 and 1998, including interception dates <sup>(49)</sup>. In its response, DPAG claimed that none of these mailings had been intercepted or delayed at all <sup>(50)</sup>. In its submission to the Commission of 2 May 2001, DPAG reiterated its statement that no mailings from Ideas Direct sent in 1997 and 1998 had been intercepted or delayed by DPAG <sup>(51)</sup>. However, DPAG now gave the following reason for not doing so.

'... Deutsche Post AG had in its possession sample mailings, so there was no longer any need to hold back the mailings in order to establish its claims <sup>(52)</sup>.'

<sup>(45)</sup> The summons was incorrectly directed to Ideas Direct Ltd, Osterbekstrasse 90a, Hamburg, which is the address of Framar International. The summons was received by the Court on 5 January 1999. Despite the fact that no company trading under the name Ideas Direct is domiciled at that address, the summons was accepted by the German Court (documents 611-914 in the Commission file).

<sup>(46)</sup> *Deutsche Post AG gegen Ideas Direct Ltd*, ref. 416 O 2/1999, judgment of Hamburg Regional Court of 29 October 1999.

<sup>(47)</sup> Underlining by the Commission. Letter from DPAG to the BPO of 27 November 1998, including attached records of 19 mailings from Ideas Direct (documents 524-526 in the Commission file).

<sup>(48)</sup> Underlining by the Commission. Fax from DPAG to the BPO of 3 February 1999 (documents 927-928 in the Commission file).

<sup>(49)</sup> Commission request for information of 3 March 1999 (document 606 in the Commission file).

<sup>(50)</sup> DPAG response to request for information of 23 April 1999 (document 991 in the Commission file).

<sup>(51)</sup> DPAG submission to the Commission of 2 May 2001, p. 2.

<sup>(52)</sup> DPAG letter to the Commission of 2 May 2001, p. 2 (... verfügte die Deutsche Post AG über Mustersendungen, so dass es keines Anhaltens zur Prüfung mehr bedurfte.)

- (40) At the Commission's request, the BPO has confirmed the fact that no mailings from Ideas Direct sent to Germany via the BPO in 1998 contained any sample mail items <sup>(53)</sup>. On 18 May 2001 DPAG confirmed — as requested by the Commission — that the Ideas Direct mailings in question were held back while the addressees were contacted. As soon as DPAG had received a sample mailing from one of the addressees, the mailings were forwarded to their recipients without further delay <sup>(54)</sup>.

*Fidelity Investments Ltd*

- (41) Fidelity Investments Services Ltd (Fidelity Investments) is a transnational company active in the financial services sector with its registered office in the Bahamas. The UK holding company is Fidelity Investment Management Ltd. The Fidelity Investments group has offices in Paris, Frankfurt, Amsterdam, Madrid, Stockholm, Luxembourg and Zürich. These offices, which essentially provide customer support, serve customers in all Member States. The Frankfurt office is operated by the groups German subsidiary Fidelity Investments Services GmbH. Although all offices regularly post mail on a smaller scale, the handling of all bulk mailings has been centralised at the groups European Service Centre in the UK. In 1997, Fidelity Investments used the BPO to distribute a number of mailings to addressees in the Community. The mailings contained a prospectus and a covering letter in German. The covering letter stated that German customers should send their replies to Fidelity Investment GmbH in Frankfurt.
- (42) Several mailings sent in March and April 1997 were intercepted by DPAG on entering Germany. On 7 April 1997 DPAG notified the BPO about the interception of one such mailing <sup>(55)</sup>. A copy of a sample letter dated 25 March 1997 was attached to the notification form sent to the BPO <sup>(56)</sup>. The BPO raised the issue again with DPAG on 16 April 1997 after the interception of another mailing from Fidelity Investments <sup>(57)</sup>. DPAG responded the day after, stating that the latest mailing would be released and reiterated its claim for surcharge payments <sup>(58)</sup>. Several mailings from Fidelity Investments were held back by DPAG for several weeks <sup>(59)</sup>. The BPO maintains that these mailings should not have been delayed any further, since the BPO had agreed to pay the surcharges.
- (43) In the second half of 1997 DPAG received 118 mailings — containing in total 275 027 items — from Fidelity Investments in the UK <sup>(60)</sup>. DPAG presented its claims for these mailings for the first time a year later in a fax to the BPO on 11 December 1998 in which DPAG requested the BPO to pay a surcharge of EUR 340 774. In the fax, DPAG stated the following.

'To avoid any disturbance of intra community mail services we recorded the circumstances and delivered the letters to the addressees.

After receiving reliable information about the contents of the mailing, we are now able to prove a case of Article 25 par. 1-3 UPU convention.[...] In all cases it is the address of this firm which is printed on the covering letter of the mailing <sup>(61)</sup>.'

<sup>(53)</sup> Communication from the BPO to the Commission of 10 May 2001.

<sup>(54)</sup> DPAG letter to the Commission of 18 May 2001, p. 1.

<sup>(55)</sup> DPAG Remail Case Control Form, fax from DPAG to the BPO of 7 April 1997 (document 60 in the Commission file).

<sup>(56)</sup> Documents 61-62 in the Commission file.

<sup>(57)</sup> Fax from the BPO to DPAG of 16 April 1997 (document 55 in the Commission file).

<sup>(58)</sup> Fax from DPAG to the BPO of 17 April 1997 (document 56 in the Commission file).

<sup>(59)</sup> Letter from the BPO to DPAG of 17 April 1997 in which the BPO maintains the following: 'I understand from Fidelity UK that you are having a meeting today to decide whether to release the mailings or not. Why? I personally gave authorisation for the release of the mail several weeks ago under the normal process which was agreed by both our administrations' (document 58 in the Commission file).

<sup>(60)</sup> DPAG records of received mailings from Fidelity Investments in the UK as sent to the BPO on 11 December 1998 (documents 506-507 in the Commission file).

<sup>(61)</sup> Underlining by the Commission. Fax from DPAG to the BPO of 11 December 1998 (documents 493-494 in the Commission file). Sample mail items — including contents dated 9 October 1997 — were attached to the letter (documents 495-505 in the Commission file).

- (44) Shortly thereafter, on 28 December 1998, DPAG requested Fidelity Investments German subsidiary to pay the surcharge for the 275 027 mail items mentioned above. The reason for DPAG's decision to contact what it considered to be the sender was the failure of the BPO to reply within the time limit given by DPAG <sup>(62)</sup>.
- (45) DPAG sent a second letter to the BPO on 1 February 1999, in which it stated that it had received 1 035 837 mail items from Fidelity Investments in the UK between 4 January and 30 September 1998. The total sum claimed amounted to EUR 1 325 522 <sup>(63)</sup>. On 3 February 1999 DPAG sent a third letter to the BPO claiming that — between 1 October and 31 December 1998 — DPAG had received in total 224 301 mail items from Fidelity Investments in the UK. DPAG claimed surcharges amounting to EUR 285 704 from the BPO <sup>(64)</sup>. Both letters contained sentences very similar to those quoted above. DPAG itself has submitted to the Commission several samples (including contents) of mailings from Fidelity Investments of the UK <sup>(65)</sup>.
- (46) The BPO has supplied the Commission with a copy of a letter which DPAG sent to addressees of a Fidelity Investments mailing. In this letter, DPAG requested the addressee to waive his rights of secrecy as regards the enclosed communication from Fidelity Investments. The reason given by DPAG for this request was 'the presumption that the sender of these letters applies international rules in an abusive manner.' <sup>(66)</sup> Fidelity Investments reacted strongly to the fact that DPAG had addressed itself directly to customers of Fidelity Investments, implying that Fidelity Investments had abused certain, non-defined international rules. The company subsequently indicated its strong concern to the BPO as well as to DPAG. In a letter to the BPO, Fidelity Investments stated the following:
- 'We are extremely anxious that our reputation be maintained at the highest level in every jurisdiction in which we operate and consider that communications of this nature have an extremely adverse impact on our reputation and image in the marketplace <sup>(67)</sup>.'
- (47) Fidelity Investments has recently decided to stop sending its mail bound for Germany from the UK and is currently in the process of building a new print and production site in Germany from which the company's German customers will be served <sup>(68)</sup>.
- (48) DPAG did confirm — in its original response to the complaint of July 1998 — that DPAG had received several mailings sent by Fidelity Investments via the BPO in March and April 1997 <sup>(69)</sup>. On the basis of the material definition of sender, DPAG argued that the German subsidiary of Fidelity Investment was the sender of the mailings <sup>(70)</sup>.
- (49) In March 1999, the Commission requested DPAG to provide detailed information about all mailings from *inter alia* Fidelity Investment that had been intercepted in 1997 and 1998, including interception dates <sup>(71)</sup>. At the time, DPAG claimed that no such mailings had been intercepted or delayed at all <sup>(72)</sup>.

<sup>(62)</sup> Letter from DPAG to Fidelity Investments Services GmbH of 28 December 1998. Annex 9 of the BPO memorandum of 17 November 2000.

<sup>(63)</sup> Letter from DPAG to the BPO of 1 February 1999 (documents 931 and 932 in the Commission file).

<sup>(64)</sup> Letter from DPAG to the BPO of 3 February 1999 (documents 929 and 930 in the Commission file).

<sup>(65)</sup> Letters from Fidelity Investments to German customers dated 20 March 1997 and 15 June 1998 (documents 203-209 in the Commission file).

<sup>(66)</sup> Letter from DPAG dated 17 August 1998 to an addressee of a Fidelity Investments mailing (document 313 in the Commission file). ('... die Vermutung, dass der Absender dieser Sendungen internationale Regelungen missbräuchlich verwendet.')

<sup>(67)</sup> Letter from Fidelity Investments to the BPO of 12 October 1998 (documents 311-312 in the Commission file).

<sup>(68)</sup> Hearing held on 23 November 2000; BPO memorandum of 17 November 2000, p. 31.

<sup>(69)</sup> DPAG response to the complaint of 20 July 1998, p. 11 (document 177 in the Commission file).

<sup>(70)</sup> DPAG response to the complaint of 20 July 1998, p. 13 (document 179 in the Commission file).

<sup>(71)</sup> Commission request for information of 3 March 1999 (document 606 in the Commission file).

<sup>(72)</sup> DPAG response to request for information of 23 April 1999, p. 8 (document 991 in the Commission file).

- (50) In its reply to the Commission's Statement of Objections, DPAG claimed it could no longer identify which mailings the BPO had referred to. DPAG added that in 1997 it had received 158 mailings from Fidelity Investments which — according to DPAG — fell under Article 25 UPU. In April 1997 alone, DPAG 'recorded' 24 such cases <sup>(73)</sup>. It is evident from documents submitted to the Commission that DPAG keeps detailed records of all mailings coming from Fidelity Investments in the UK <sup>(74)</sup>. Moreover, DPAG pointed out that the correspondence of 16 and 17 April 1997 referred to another Fidelity Investments mailing than the one notified to the BPO on 7 April that year <sup>(75)</sup>. DPAG submitted that the second mailing was intercepted on 16 April 1997 and released the day after <sup>(76)</sup>.
- (51) In its submission to the Commission of 2 May 2001, DPAG stated again that since the second half of 1997 DPAG had not intercepted or delayed any mailings from Fidelity Investments. However, the explanation given by DPAG was the following.

'Since Deutsche Post AG had in its possession the information that was necessary to establish payment claims before German courts, there was no longer any need, from Deutsche Post AG's point of view, to collect further information in order to prove that the criteria of the material definition of sender were met. [...] The mailings were forwarded within a limited period of time, since there was still a need to establish the payment claims <sup>(77)</sup>.'

- (52) At the Commission's request, the BPO has confirmed the fact that no mailings from Fidelity Investments sent to Germany via the BPO during the second half of 1997 or later contained any sample mail items <sup>(78)</sup>. On 18 May 2001 DPAG confirmed — at the Commission's request — that the Fidelity Investments mailings in question were held back while the addressees were contacted. As soon as DPAG had received a sample mailing from one of the addressees, the mailings were forwarded to their recipients without further delay <sup>(79)</sup>.

#### *Gant*

- (53) Gant is an American clothes brand. Gant clothing is marketed in more than 30 countries. A company registered in Sweden, Pyramid Sportswear AB, is the franchisee of the brand for markets outside the USA. In the Community Gant clothes are sold through selected retailers and outlets called 'Gant Stores'. There are Gant Stores in several European countries including Germany. The Düsseldorf-based German store is operated by the company Pyramid Sportswear GmbH, which is a fully owned subsidiary of Pyramid Sportswear AB.
- (54) Gant regularly distributes catalogues to registered customers all over Europe. Catalogues can also be requested by returning a reply card to the local Gant Store. These replies are then forwarded to Sweden. Bulk mailings containing advertising material such as catalogues are posted from the UK to European customers, the main reason being the fact that 60-70 % of all requests for catalogues emanate from the UK. These bulk mailings are produced by Pyramid Sportswear AB in Sweden, whereupon they are transported to the UK for posting through the BPO. The only exception is mailings to Swedish customers which are not routed via the UK.

<sup>(73)</sup> DPAG reply to Statement of Objections, 22 September 2000, p. 21.

<sup>(74)</sup> Documents 506 and 507 in the Commission file — submitted by the BPO — contain copies from a DPAG database which provides detailed information about each intercepted mailing from Fidelity Investments (e.g. case number, date of interception and number of items).

<sup>(75)</sup> Documents 55, 56 and 60 in the Commission file.

<sup>(76)</sup> DPAG reply to the Statement of Objections, 22 September 2000, p. 22. In the fax from DPAG to the BPO of 17 April 1997, DPAG states that the mail 'will be released' (document 56 in the Commission file).

<sup>(77)</sup> DPAG submission to the Commission of 2 May 2001, p. 2. (Da die Informationen, die zur Durchsetzung des Zahlungsanspruches vor deutschen Gerichten benötigt wurden, vorhanden waren, bestand aus Sicht der Deutschen Post AG keine Notwendigkeit, weitere Ermittlungen darüber anzustellen, ob die Voraussetzungen des materiellen Absenderbegriffes erfüllt waren. [...] Die Sendungen waren zeitnah weitergeleitet worden. Es ging lediglich noch darum, die Zahlungsansprüche geltend zu machen.)

<sup>(78)</sup> Communication from the BPO to the Commission of 10 May 2001.

<sup>(79)</sup> DPAG letter to the Commission of 18 May 2001, p. 2.

## The 1996 autumn catalogue

- (55) The BPO has referred to a mailing containing autumn catalogues which formed part of a Gant Store advertising campaign. The mail items were distributed to European customers in September 1996. On 16 September 1996 DPAG informed the BPO that the mailing had been intercepted <sup>(80)</sup>. On 25 September 1996 the BPO requested that DPAG should release the mailing immediately <sup>(81)</sup>. In its reply of the same day DPAG reiterated that it considered the mailing to be A-B-A remail and concluded that '...the letters will stay for the present in Köln West.' <sup>(82)</sup> Yet another fax from DPAG to the BPO of 26 September 1996 confirms that the mailing was still being held by DPAG <sup>(83)</sup>. In order to secure the release of this time-sensitive mailing, the BPO agreed to pay the claimed amount. Neither the exact date of interception, nor the exact date of the release of the mailing is known to the BPO.
- (56) In a letter to DPAG dated 31 October 1996, the German subsidiary of Pyramid Sportswear AB complained about the fact that the Gant autumn catalogue mailing was held back for six weeks and that the BPO was not notified until 20 days after the mailing had been stopped. In the letter Pyramid Sportswear GmbH maintained that the marketing campaign was a failure due to the excessive delay. Many articles advertised in the catalogue were no longer available in the Düsseldorf store. Pyramid Sportswear GmbH therefore claimed reimbursement amounting to EUR 20 500 from DPAG for the costs of the 'lost' advertising campaign and the loss of goodwill <sup>(84)</sup>. DPAG refused to reimburse Pyramid Sportswear GmbH.
- (57) DPAG maintained — in its response to the complaint of 20 July 1998 — its position that the material sender of the 1996 mailing was the German subsidiary Pyramid Sportswear GmbH. This assessment was based *inter alia* on the fact that reply coupons carrying the address of the Gant Store in Düsseldorf were attached to the catalogues. DPAG has confirmed that the BPO was notified of the interception on 16 September 1996 but has not disclosed when the mailing was intercepted. Moreover, DPAG maintained that the delays were entirely caused by the BPO's unwillingness to meet DPAG's claims <sup>(85)</sup>. In its reply to the Statement of Objections, DPAG stated that the Commission did not have any evidence when the mailing was intercepted by DPAG and claimed that it did not know when the BPO agreed to pay the surcharge <sup>(86)</sup>. However, the date on which DPAG claims to have forwarded the mailing — 4 October 1996 — was finally disclosed by DPAG <sup>(87)</sup>.

## The 1998 autumn catalogue

- (58) The BPO has submitted to the Commission copies of a letter and a remail case control form from DPAG — both dated 17 September 1998 — with which the BPO was notified of the interception of two Gant mailings. The letter and the form both indicate that the mailings — consisting of 2 571 items in total — had been intercepted on 27 and 28 August 1998. In the letter of 17 September 1998 DPAG stated the following:

'In the absence of sufficient information about the contents and the real sender we recorded the circumstances and delivered the letters to the addressees <sup>(88)</sup>.'

<sup>(80)</sup> Fax from DPAG to the BPO of 16 September 1996 (documents 66-68 in the Commission file). In the fax DPAG claimed to have discovered an A-B-A remailing from Pyramid Sportswear GmbH containing 6 076 items. DPAG did not indicate any case control number for this mailing. A copy of a sample envelope but not the catalogue itself was attached to the fax.

<sup>(81)</sup> Fax from the BPO to DPAG of 25 September 1996 (document 69 in the Commission file).

<sup>(82)</sup> Fax from DPAG to the BPO of 25 September 1996 (document 71 in the Commission file).

<sup>(83)</sup> Fax from DPAG to the BPO of 26 September 1996 (document 77 in the Commission file).

<sup>(84)</sup> Letter from Pyramid Sportswear GmbH to DPAG of 31 October 1996 (documents 64-65 in the Commission file). In the letter Pyramid Sportswear GmbH makes it clear that the distribution of Gant catalogues for all Gant Stores in Europe is done centrally from the UK.

<sup>(85)</sup> DPAG response to the complaint of 20 July 1998 pp. 15-16 (documents 181-182 in the Commission file).

<sup>(86)</sup> DPAG reply to the Statement of Objections of 22 September 2000.

<sup>(87)</sup> Copy of an internal DPAG record which was faxed within DPAG on 4 October 1996. In the fax, the forwarding of the mailing is approved following the BPO's agreement to pay the surcharge. The record does not indicate whether the mailing was actually released on that day. DPAG reply to the Statement of Objections of 22 September 2000, annex 12.

<sup>(88)</sup> DPAG letter and remail case control form of 17 September 1998 (documents 317-319 in the Commission file).

- (59) In the same letter DPAG — 'after receiving reliable information about the contents' — claimed a surcharge amounting to EUR 2 827 from the BPO <sup>(89)</sup>. The mailings in question contained the autumn 1998 Gant Store catalogue which was distributed to Gant's German customers. This catalogue was produced and distributed in the same manner as the 1996 catalogue. When the remail case control form was returned to DPAG, the BPO had added the following message:

'It is incredible that it has taken DPAG nearly one month to notify us of this stopping to which we do not agree at all! <sup>(90)</sup>'

- (60) At a very late stage in the proceedings — in its submission to the Commission of 2 May 2001 — DPAG stated that the mail was released before the remail case control form and the letter were sent to the BPO on 17 September 1998. DPAG's submission did not contain any information about the actual date of release of the mailing. Instead DPAG argued that since the mailing had already been forwarded to the addressees, there was no longer an urgent need for DPAG to notify the BPO <sup>(91)</sup>. Requested by the Commission to clarify the issue, DPAG stated — on 18 May 2001 — that the mailing had been forwarded on 8 September 1998 <sup>(92)</sup>.

#### *Multiple Zones*

- (61) The BPO submitted, in February 1999, further evidence regarding mailings from the UK which had been intercepted, delayed and surcharged by DPAG. One of the examples referred to was a mailing sent by the company Multiple Zones, which is a firm belonging to the American Extensis Corporation group of companies. The mailing in question — containing in total 14 166 items — emanated from the European head office of the group, Plantijn Groep BV, situated in the Netherlands. On the letters the following return information was given.

'If undeliverable please return to:/HOL000119E/FS P.O Box 456/London/EC1A 1QR/United Kingdom <sup>(93)</sup>'

- (62) By means of a fax, the BPO was informed on 11 February 1999 that the mailing from Multiple Zones had been stopped by DPAG on 4 February, i.e. seven days earlier. DPAG claimed a surcharge amounting to EUR 18 547 <sup>(94)</sup>. Returning the remail case control form, the BPO replied on the same day agreeing to pay the claimed surcharge. On the form, the BPO had added the statement below:

'As with all previous cases it is without prejudice to our contention that you do not have the right to stop and surcharge this mail that the British Post Office is prepared to undertake to settle the surcharge levied by Deutsche Post AG in order to secure the immediate release of the mail. We do however reserve the right to recover from you any payments which you have wrongfully demanded <sup>(95)</sup>.'

- (63) Despite the BPO's agreement to pay, the mailing was not released until 18 February, i.e. seven days after the BPO had agreed to reimburse DPAG and 14 days after the initial interception of the mailing. The customer has since informed the BPO that the response rate of the mailing was very low in Germany.
- (64) DPAG has argued — in its reply to the Commission's Statement of Objections — that the envelopes of the mailing in question did not contain any information about the sender of the mailing <sup>(96)</sup>. In DPAG's view, the UK return address indicated on the back of the envelope should not be regarded as such a piece of information. On the basis of the contents of the letter, DPAG argued that the material sender was the German company Multiple Zones GmbH. While acknowledging the fact that the name of the Dutch company Extensis Europe actually appeared in the contents of the mailing, DPAG claimed that the fact that the name of Multiple Zones GmbH was written in a larger typeface was one of the determining factors for identifying a German sender <sup>(97)</sup>.

<sup>(89)</sup> DPAG letter and remail case control form of 17 September 1998 (documents 317-319 in the Commission file).

<sup>(90)</sup> Remail case control form of 17 September 1998 (document 317 in the Commission file).

<sup>(91)</sup> DPAG letter to the Commission of 2 May 2001, p. 3.

<sup>(92)</sup> DPAG letter to the Commission of 18 May 2001, p.3. DPAG did not, however, submit any supporting evidence confirming the date of release.

<sup>(93)</sup> DPAG reply to the Statement of Objections of 22 September 2000, annex 13.

<sup>(94)</sup> Remail case control form sent by DPAG to the BPO on 11 February 1999 (document 991, annex 2-1 in the Commission file).

<sup>(95)</sup> Underlining by the Commission. Remail case control form returned to DPAG by the BPO on 11 February 1999 (document 992 in the Commission file).

<sup>(96)</sup> DPAG reply to the Statement of Objections of 22 September 2000, pp. 25-26.

<sup>(97)</sup> DPAG reply to the Statement of Objections of 22 September 2000, pp. 25-26.

- (65) Furthermore, DPAG claimed that the BPO's failure to submit an agreement to pay without conditions and the fact that the BPO failed to react for another seven days, was the reason for DPAG holding back the mailing until 18 February 1999. If the BPO had not been so slow to react, DPAG would have released the mailing earlier, DPAG claimed <sup>(98)</sup>. DPAG confirmed the release of the Multiple Zones mailing in a fax dated 18 February 1999. DPAG added the remark below.

'Since Royal Mail refuses payment or links payment to certain conditions, which are tantamount to a refusal, we reserve the right to claim payment direct [sic] from the sender <sup>(99)</sup>.'

- (66) In another fax to the BPO, dated 20 February 1999, DPAG made the following statement:

'We take note of the fact that your priority is not to safeguard the interests of Deutsche Post's customers.

[...]

The items of the company Multiple Zones Germany GmbH [...] were released on 18.02.99. This regrettable delay was due to the surprising statement of Royal Mails reservations. We had to change our response procedures in order to safeguard our claims vis-à-vis the senders. We thus tried to contact the senders with a view to clarifying whether the items had been produced in Great Britain or whether they had been transferred there simply for posting <sup>(100)</sup>.'

- (67) In its submission to the Commission of 2 May 2001, DPAG stated that the BPO's refusal to pay without conditions obliged DPAG to substantiate its claim vis-à-vis the sender by contacting the addressees and requesting samples of the contents of the letters. Once DPAG had acquired the evidence it deemed to be necessary, the mailings were forwarded to the addressees on 18 February 1999 <sup>(101)</sup>.

DPAG's procedures concerning incoming cross-border letter mail from the UK

- (68) The volumes of cross-border mail coming into Germany which — according to DPAG — fall under Article 25 UPU are very large. DPAG estimated that 18 % of all incoming cross-border mail in 1999 qualified as remail falling under Article 25 UPU <sup>(102)</sup>. Each year, DPAG claims to handle approximately [> 5 000] (\*) cases of bulk mailings falling under this article. The total number of mail items which DPAG classified as remail amounted to [10-20] (\*) million in 1998 and [10-20] (\*) million in 1999 <sup>(103)</sup>. In 1996-97 alone, DPAG handled [> 500] (\*) cases in which DPAG invoked Article 25 UPU 1989 against the BPO <sup>(104)</sup>.
- (69) The procedure whereby DPAG examines incoming cross-border letter mail from the UK can be summarised as follows <sup>(105)</sup>.
- (70) Incoming mailings are screened by the responsible sorting office in order to determine, from the outer appearance of the postal items, whether the mailings could have a domestic sender. Mailings for which it is evident to DPAG that the sender resides in the UK are always forwarded to addressees without delay. The same applies to mailings which DPAG considers to be time-sensitive.

<sup>(98)</sup> DPAG submission of 23 April 1999 (document 991, p. 7, in the Commission file) and DPAG reply to the Statement of Objections of 22 September 2000.

<sup>(99)</sup> In this context the sender referred to by DPAG is the entity in Germany which DPAG considers to be the material sender. Fax from DPAG to the BPO of 18 February 1999 with the title Remailingfallbearbeitung (document 992, annex 2-3 in the Commission file).

<sup>(100)</sup> Underlining by the Commission. Fax from DPAG to the BPO of 20 February 1999 (document 992, annex 2-3, in the Commission file).

<sup>(101)</sup> DPAG submission to the Commission of 2 May 2001, p. 3.

<sup>(102)</sup> DPAG Magazine Post Forum Spezial, November 1999, p. 6 (document 1199 in the Commission file).

(\*) Passages between brackets [...] indicate business secrets deleted.

<sup>(103)</sup> DPAG reply to the Statement of Objections of 22 September 2000, p. 31.

<sup>(104)</sup> DPAG reply to the Statement of Objections of 22 September 2000, p. 24.

<sup>(105)</sup> DPAG response to Commission Article 11 request for information of 24 April 1999 (document No 991 in the Commission file). In addition, DPAG has addressed the same issue in its reply to the Commission's Statement of Objections of 22 September 2000 and at the hearing held on 23 November 2000.

- (71) If DPAG suspects that mailing has a domestic sender (according to its own definition of the material sender), the mailing is intercepted, whereupon approximately ten addressees are contacted by post and asked to provide DPAG with a sample of the mailing <sup>(106)</sup>. DPAG has confirmed that the process of contacting addressees by mail and receiving their written consent to open their mail takes 5 to 6 working days on average <sup>(107)</sup>. The fact that this procedure often takes a week is confirmed further by a statement made by DPAG in a fax sent to the BPO in 1996. In the fax, DPAG stated the following:

'The abovementioned mail was stopped on December 10th. We checked it by asking some addressees [sic] about the contents. This checking lasted one week and we informed you on December 17th <sup>(108)</sup>.'

- (72) Once DPAG has established the existence of what it considers to be a domestic sender, a remail case control form is sent by fax to the BPO <sup>(109)</sup>. This form includes *inter alia* a DPAG case number, the day of interception of the mailing, the name of the presumed domestic sender and the amount of the claimed surcharge. The BPO is then requested to return the form indicating its view on the origin of the mailing. Only after the BPO has agreed to pay the claimed amount does DPAG release the intercepted mailings.
- (73) The Commission has requested DPAG to estimate the average delay caused by the procedures applied by DPAG (i.e. the time needed for interception, examination of the contents, notification of the BPO, receipt of agreement to 'add costs' from the BPO and the release of the mailing). In its response to the Commission of 24 April 1999, DPAG stated that, due to the inability of the BPO to respond quickly to DPAG's demands, the average response time for the BPO amounted to one week, something which prolonged the total delays of intercepted mailings <sup>(110)</sup>. Mailings for which no evidence of a UK sender has been presented to DPAG are not forwarded until the sending postal operator — or the entity residing in Germany which DPAG considers to be the sender — has made a binding commitment to pay the claimed amount. In such cases the mailings may be delayed for another week <sup>(111)</sup>.
- (74) In the second half of 1997 DPAG adopted an alternative method for dealing with alleged cases of A-B-A remail. Instead of using the remail case control form, DPAG 'recorded the circumstances' of the mailing, whereupon the mailing was forwarded to addressees. According to DPAG, this recording process entails the registration of the date of arrival, the number of mail items in the mailing and the weight and size of these items <sup>(112)</sup>. In its reply to the Commission's request for information of 23 April 1999, DPAG claimed that all mailings which had been handled in this manner were cases of so-called non-physical remail which were forwarded and delivered to the addressees without delay <sup>(113)</sup>. However, the correspondence which DPAG sent to the BPO in this regard indicates that sample items from these mailings were opened and examined before the mailings were forwarded. DPAG appears to have used both procedures in parallel for some time <sup>(114)</sup>.

<sup>(106)</sup> At the hearing on 23 November 2000, DPAG disclosed the approximate number of token addressees which is contacted after a mailing has been intercepted, something which DPAG had not done previously.

<sup>(107)</sup> Statement by DPAG at the hearing held on 23 November 2000 in response to a direct question. DPAG had not hitherto communicated this information to the Commission.

<sup>(108)</sup> Fax from DPAG to the BPO of 18 December 1996 concerning the company Super Foto (BPO memorandum of 17 November 2000, annex 1).

<sup>(109)</sup> The remail case control form was introduced in October 1996. BPO memorandum of 22 February 1999, p. 2 (document 548 in the Commission file).

<sup>(110)</sup> DPAG response to Commission request for information of 26 April 1999 (document 991 in the Commission file).

<sup>(111)</sup> DPAG response to Commission request for information of 26 April 1999 (document 991 in the Commission file). NB: by applying this procedure DPAG in fact puts the burden of proof on the sending PPO and the entity residing in Germany which DPAG considers to be the sender. DPAG will only deliver the mail at the international rate if they can prove the existence of a foreign sender.

<sup>(112)</sup> DPAG submission to the Commission of 2 May 2001, p. 2. NB: the remail case control forms used by DPAG do not mention the date of arrival but always 'the date of interception'.

<sup>(113)</sup> DPAG reply to the Commission's request for information of 23 April 1999, p. 8 (document 991 in the Commission file).

<sup>(114)</sup> BPO memorandum of 22 February 1999, p. 2.



- (75) In 1997 alone, DPAG intercepted and examined [...] mail items coming from the UK. The following year, this number had risen to [ $> 1\,000\,000$ ] (\*) items, i.e. a percentage increase of approximately [...]. The steep increase in the number of intercepted mailings is explained by the fact, DPAG claims, that the BPO initiated a major marketing campaign in 1999 which targeted companies situated in Germany and encouraged them to re-route their domestic mail via the UK. In DPAG's view, the alleged marketing efforts made by the BPO in Germany obliged DPAG to intensify its examination of incoming cross-border mail from the UK <sup>(115)</sup>.

#### F. Financial settlement

- (76) On 17 October 2000 the BPO and DPAG announced that they had reached a settlement as regards the financial aspects of their dispute by concluding a Memorandum of Understanding <sup>(116)</sup>. At the time of the settlement, the BPO had paid to DPAG a sum of EUR [...] <sup>(117)</sup>. According to the BPO, the total sum which DPAG considered itself entitled to had increased to EUR [...] at that point in time <sup>(118)</sup>. In the Memorandum the parties agreed *inter alia* the following:
- (i) [...]
  - (ii) [...]
  - (iii) [...]
- (77) The parties recognised that they continue to differ in their understanding of the application of Article 25 UPU and its application within the EU and that the BPO would pursue its complaint with the Commission <sup>(119)</sup>.

#### G. Undertaking

- (78) On 1 June 2001 DPAG made the following undertaking in relation to the Commission.
- (i) Deutsche Post AG will not invoke the rights set out in Article 25 UPU 1994 or Article 43 UPU 1999 respectively, regarding any letter mailings that correspond to the type described in the Commission's Decision (paragraphs 32, 34, 41, 53, 54, 61, 110 and 114-117) that were produced outside Germany and that are delivered to Deutsche Post AG from countries whose postal operators pay terminal dues that are at least equal to what is determined as the standard amount — at the time of delivery of each mailing — in current and future versions of the REIMS II agreement.
  - (ii) As regards the handling of letter mailings of the type described in paragraph (i), Deutsche Post AG consequently declares that no claims for payment of the domestic tariff pursuant to Article 25 UPU 1994 or Article 43 UPU 1999 will be made and that these mailings will not be returned. Should any doubts arise as regards the applicability of this undertaking in a specific case, Deutsche Post will attach — on the outside of maximum 50 letter items — an accompanying letter to the addressee, in which the addressee is asked — for evidence purposes — to provide Deutsche Post AG with the opened mail item. Deutsche Post will forward these mail items without delay.
  - (iii) As an alternative to the procedure described in paragraph (ii), Deutsche Post will immediately forward and deliver to domestic addressees all letter mailings of the type described in paragraph (i), if the sending foreign postal operator at the time of delivery provides Deutsche Post AG with at least one opened sample item whose contents correspond to the contents of the letter items in the mailing.
  - (iv) This undertaking enters into force 3 months after the notification of the Commission's decision in case no COMP/36.915 — Deutsche Post AG — Interception of Cross-border Mail <sup>(120)</sup>.

(\*) Passages between brackets [...] indicate business secrets deleted.

<sup>(115)</sup> DPAG response to Commission request for information of 26 April 1999 (document 991 in the Commission file). When asked by the Commission, the BPO stated the following: The BPO has eight sales staff operating in Germany marketing services to German based customers. The BPO only offers services permitted under German law. It does not knowingly allow German customers — whose mail is produced in Germany — to send mail via the UK back to Germany. It is company policy to refuse the provision of such mailings. The BPO refutes the allegation that it has encouraged German customers to engage in A-B-A remail activities.

<sup>(116)</sup> Undated Memorandum of Understanding between the BPO and DPAG. The provisions of this agreement took effect as of 1 October 2000. The parties have agreed to review after 12 months the terms and conditions of the agreement, which will cease to apply if the review does not lead to mutual consent.

<sup>(117)</sup> GBP [...]. Average exchange rate in 2000 as published by the European Central Bank. BPO letter to the Commission of 7 March 2001.

<sup>(118)</sup> DEM [...]. BPO letter to the Commission of 7 March 2001.

<sup>(119)</sup> Undated Memorandum of Understanding: letter from the BPO to the Commission of 17 October 2000.

<sup>(120)</sup> Communication from DPAG to the Commission of 1 June 2001.

## H. Procedural issues

### *Chronology of the procedure*

- (79) The main steps of the Commission's examination and the formal procedure may be summarised as follows (for correspondence which is particularly relevant for the procedural aspects of this case, a brief description is given in a footnote).
- 4 February 1998: Filing of the complaint.
  - 20 July 1998: DPAG response to the complaint.
  - 21 October 1998: Submission from the BPO.
  - 8 December 1998: Request for information to the BPO
  - 21 January 1999: BPO reply to request for information.
  - 22 February 1999: Submission from the BPO.
  - 1 March 1999: Request for information to DPAG.
  - 2 March 1999: Request for information to American Express Services Europe Ltd.
  - 23 April 1999: DPAG reply to request for information.
  - 16 April 1999: Submission from DPAG.
  - 27 April 1999: American Express Services Europe Ltd. reply to request for information.
  - 2 June 1999: Complementary American Express Services Europe Ltd. reply to request for information.
  - 25 May 2000: Issue of Statement of Objections.
  - 30 May 2000: Letter from DPAG to the Member of the Commission responsible for competition.
  - 9 June 2000: Letter from DPAG to the Commission. <sup>(121)</sup>
  - 14 June 2000: Letter from DPAG to the Commission.
  - 21 June 2000: Letter from the Commission to DPAG. <sup>(122)</sup>
  - 26 June 2000: DPAG was granted access to case files.
  - 13 July 2000: Letter from DPAG to the Commission. <sup>(123)</sup>
  - 20 July 2000: Letter from the BPO to the Commission.
  - 24 July 2000: Letter from the BPO to the Commission.
  - 27 July 2000: Letter from the Commissioner to DPAG.
  - 27 July 2000: Letter from the Commission to DPAG. <sup>(124)</sup>
  - 4 August 2000: Letter from DPAG to the Commission. <sup>(125)</sup>
  - 8 August 2000: Letter from the Commission to DPAG. <sup>(126)</sup>
  - 16 August 2000: Letter from the Commission to DPAG. <sup>(127)</sup>
  - 22 September 2000: DPAG reply to Statement of Objections.
  - 17 October 2000: Letter from the BPO to the Commission. <sup>(128)</sup>
  - 17 November 2000: Submission from the BPO.
  - 23 November 2000: Hearing.
  - 11 December 2000: Submission from DPAG.
  - 11 December 2000: Submission from PTT Post BV. <sup>(129)</sup>
  - 11 December 2000: Submission from Center Parcs NV. <sup>(130)</sup>

<sup>(121)</sup> In the letter DPAG requested four months to provide its reply to the Statement of Objections.

<sup>(122)</sup> The Commission denied DPAG additional respite in addition to the 13 weeks already granted (i.e. the normal period of eight weeks plus the holiday month of August).

<sup>(123)</sup> In a letter addressed to the Director-General for Competition, DPAG requested the Commission to close the proceedings against DPAG owing to alleged procedural errors.

<sup>(124)</sup> The Commission responded to DPAG's allegations that procedural errors had been committed.

<sup>(125)</sup> In its letter, DPAG made further allegations of procedural errors, reiterated its request for closure of the proceedings and its request to be granted an additional respite to submit its reply to the Statement of Objections.

<sup>(126)</sup> In his response to DPAG the Hearing Officer granted DPAG an additional respite of three weeks (i.e. 16 weeks in total).

<sup>(127)</sup> The Commission responded to DPAG's allegations that procedural errors had been committed.

<sup>(128)</sup> The letter informed the Commission of the fact that DPAG and the BPO had reached a financial settlement.

<sup>(129)</sup> PTT Post BV participated in the hearing as an interested third party pursuant to the first sentence of Article 19(2) of Regulation No 17 and Article 9(3) of Regulation (EC) No 2842/98.

<sup>(130)</sup> Center Parcs NV participated in the hearing as an interested third party pursuant to the first sentence of Article 19(2) of Regulation No 17 and Article 9(3) of Regulation (EC) No 2842/98.

- 19 January 2001: Letter to the BPO from the Commission. <sup>(131)</sup>
- 29 January 2001: Letter to DPAG from the Commission.
- 5 February 2001: Letter to DPAG from the Commission. <sup>(132)</sup>
- 6 February 2001: Letter from DPAG to the Commission.
- 13 February 2001: Letter from DPAG to the Commission.
- 14 February 2001: Letter from DPAG to the Commission.
- 27 February 2001: Letter from the Commission to DPAG.
- 2 March 2001: Letter from the Commission to DPAG. <sup>(133)</sup>
- 12 March 2001: Letter from the BPO to the Commission.
- 14 March 2001: Letter from DPAG to the Commission.
- 16 March 2001: Letter from DPAG to the Commission. <sup>(134)</sup>
- 27 March 2001: Letter from the Commission to DPAG. <sup>(135)</sup>
- 9 April 2001: Letter from the Commission to DPAG. <sup>(136)</sup>
- 26 April 2001: Letter from DPAG to the Commission.
- 2 May 2001: Submission from DPAG. <sup>(137)</sup>
- 18 May 2001: Letter from DPAG to the Commission. <sup>(138)</sup>
- 1 June 2001: Undertaking from DPAG submitted to the Commission.

#### *Rights of defence*

- (80) During the course of the procedure, DPAG alleged that its rights of defence had been infringed. These allegations — made in a series of letters to the Commission, in DPAG's reply to the Statement of Objections and at the hearing — included the following elements.
- (i) Numerous documents were allegedly missing from the file to which DPAG was granted access on 26 June 2000.
  - (ii) The memorandum from the BPO to the Commission of 21 October 1998 was not immediately forwarded to DPAG.
  - (iii) Exculpatory documents had deliberately been removed from the file to which DPAG was granted access <sup>(139)</sup>.
  - (iv) DPAG was not given sufficient time to prepare its defence against the objections raised by the Commission.
- (81) As regards the allegations above the Commission makes the following assessment.
- (i) The Commission has ascertained that in all cases but one, the allegedly missing documents were in fact present in the file at the time when DPAG was granted access to it. The allegedly missing documents thus resulted from copying errors made by DPAG's representatives. Furthermore, several of the allegedly missing documents emanated from DPAG itself or had previously been received by DPAG. Only one document was inadvertently removed from the file at the time of access, namely a six-page fax sent by DPAG to the Commission on 16 April 1999. Not only must DPAG have been fully aware of the contents of its own communication but all the arguments raised by DPAG in this fax were addressed by the Commission in the Statement of Objections, which means that it formed an integral part of the file on which the Commission based these objections.

<sup>(131)</sup> A non-confidential version of DPAG's submission of 11 December 2000 was annexed to this letter.

<sup>(132)</sup> A non-confidential version of the BPO's submission of 17 November 2000 was annexed to this letter.

<sup>(133)</sup> Excerpts from the draft Commission decision — containing additional facts — were annexed to this letter.

<sup>(134)</sup> DPAG requested a total period of two months to submit its comments on the excerpts from the draft decision sent to DPAG on 2 March 2001.

<sup>(135)</sup> The Commission granted DPAG an additional period of two weeks (i.e. five weeks in total) to submit its comments on the excerpts from the draft decision.

<sup>(136)</sup> At DPAG's request, the Commission granted DPAG a second period of two weeks (i.e. seven weeks in total) to submit its comments on the excerpts from the draft decision.

<sup>(137)</sup> The submission contained DPAG's comments on the excerpts from the draft Commission decision sent to DPAG on 2 March 2001.

<sup>(138)</sup> The letter contained clarifications — requested by the Commission — to some issues mentioned in the submission of 2 May 2001.

<sup>(139)</sup> DPAG reply to Statement of Objections, p. 4.

- (ii) The BPO memorandum of 21 October 1998 was made available to DPAG at the time of access to the file. The Commission is under no obligation to submit documents to the respondent before formal proceedings have been initiated <sup>(140)</sup>.
  - (iii) Despite being specifically requested to so, DPAG has failed to substantiate its serious allegation that exculpatory documents had been removed from the file.
  - (iv) DPAG was granted 16 weeks to prepare its reply to the Commission's Statement of Objections, as opposed to the normal period of eight weeks. At DPAG's request, the date of the hearing was postponed for four weeks. DPAG was given an additional period of four weeks (in addition to the three weeks given at the outset) to prepare its comments on the excerpts from the draft decision.
- (82) Bearing the above considerations in mind, the Commission considers that DPAG's rights of defence have not been infringed during the course of the present proceedings.

## II. LEGAL ASSESSMENT

### A. Applicability of Article 82 of the Treaty

- (83) PPOs such as DPAG are subject to the provisions of Article 82 of the Treaty, since they are undertakings carrying out an economic activity against payment, namely the provision of postal services.

### B. Relevant market

#### *Relevant product market*

- (84) The present case concerns the conveyance of normal — as opposed to express — cross-border letter mail sent from the UK to addressees residing in Germany <sup>(141)</sup>. This process can be divided into two separate product markets:
- (i) the market for outgoing cross-border letter mail on which postal operators collect mail from senders residing in one Member State for delivery to addressees in another Member State, and
  - (ii) the market for incoming cross-border letter mail in one Member State on which the receiving PPO and other postal operators offer delivery services.

- (85) The present case concerns behaviour in the latter market. Considering the fact that there is only very limited competition for the delivery of incoming cross-border mail that falls outside the scope of the postal monopoly, there is no need to delineate a narrower relevant product market. Consequently, the relevant product market is the market for the forwarding and delivery of incoming cross-border letter mail.

#### *Relevant geographic market*

- (86) Postal markets are predominantly national. This applies in particular to the delivery stages of the conveyance process, owing to the existence in most Member States of wide-ranging monopolies reserved for the incumbent operator. As regards incoming cross-border mail, the lack of alternative delivery solutions makes the competitive situation similar also above the monopoly threshold. The present case concerns DPAG's behaviour in the German market. The relevant geographic market must therefore be considered to be national.

#### *Conclusion*

- (87) The Commission finds that the market for the forwarding and delivery of incoming cross-border letter mail in Germany is the relevant market in the present case <sup>(142)</sup>.

<sup>(140)</sup> Commission notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles 85 and 86 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89, OJ C 23, 23.1.1997, p. 3.

<sup>(141)</sup> As described above, some mailings concerned were sent from another Member State to the UK where they were forwarded by the BPO to its German addressees (i.e. A-B-C remail). However, the second leg of this routing (from country B to country C) is no different from normal A-B cross-border mail.

<sup>(142)</sup> This market definition concurs with previous decisions by the Commission, e.g. *REIMS II*. See footnote 18.

### C. Dominant position

- (88) The Court of Justice of the European Communities has repeatedly held that a company which holds a statutory monopoly in a substantial part of the Community may be regarded as having a dominant position within the meaning of Article 82 of the Treaty <sup>(143)</sup>. DPAG has been awarded a wide-ranging and exclusive licence for the forwarding and delivery of incoming cross-border letter mail in Germany. By virtue of the exclusive rights granted to it, DPAG is the only operator controlling the public postal network covering the whole territory of Germany.
- (89) In its reply to the Commission's Statement of Objections, DPAG claimed that the Commission's assessment of DPAG's market position was insufficient and that the Commission had failed to demonstrate the existence of a dominant position of DPAG. The German postal monopoly is only partial, DPAG argued <sup>(144)</sup>. Since DPAG's monopoly does not cover bulk mailings where each mail item weighs more than 50 grams, the mailings in the present case belong to a market segment in which the monopoly is of 'no or a very limited significance', DPAG stated. Moreover, the Commission failed to take into account the position of DPAG's competitors, the possibilities for circumventing the monopoly of DPAG and the countervailing market power of the BPO <sup>(145)</sup>.
- (90) DPAG has not submitted to the Commission any information about its position on the German market for incoming cross-border letter mail. Approximately 27 % (expressed in value terms) of the total letter market in Germany — of which the relevant market forms a part — is theoretically open to competition <sup>(146)</sup>. However, in 1998 competitors to DPAG accounted for only 2 % of the 'competitive' market segment. DPAG's share of the total letter market (i.e. including monopoly services) thus exceeded 99 % that year <sup>(147)</sup>. This figure is confirmed by the national regulatory authority in Germany, which estimated DPAG's market share in this market at 99,2 % in 1998 and 98,7 % in 1999 <sup>(148)</sup>.
- (91) DPAG's statement that the types of mailings concerned by the present case belong to a market segment in which DPAG's monopoly is of 'no or a very limited significance' is incorrect.
- (92) First, a large portion of the disputed mailings was sent before 1 January 1998 (i.e. the date when the bulk mail monopoly threshold in Germany was reduced from 100 to 50 grams). The overwhelming part of the revenues in the postal sector is generated from items in the lower weight bands. On average, a monopoly threshold of 100 grams leaves approximately 88 % of revenues derived from letters within the monopoly, whereas a 50-gram threshold leaves approximately 77 % <sup>(149)</sup>. Expressed in terms of volume, an even larger portion of the letter market remains exclusive for the incumbent <sup>(150)</sup>. Consequently, only a fraction of all incoming bulk letter mail exceeds the monopoly threshold.
- (93) Second, only bulk mailings with identical contents fall outside the scope of DPAG's monopoly. Under the German Postal Act, only a very limited number of features may differ in the contents in order to qualify as identical <sup>(151)</sup>. This provision prevents a large portion of mail items weighing more than 50 grams (or before 1998 — 100 grams) from falling outside the monopoly. Therefore, a substantial part of the mailings concerned by the case at hand fall within the scope of DPAG's monopoly.

<sup>(143)</sup> See e.g. Case C-179/90 *Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889, at paragraph 14; Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979, at paragraph 14; Case C-320/91 *Paul Corbeau* [1993] ECR I-2533, at paragraph 9.

<sup>(144)</sup> The following market segments fall outside the scope of DPAG's exclusive licence: postal items weighing more than 200 grams, postal items whose postage exceeds five times the basic tariff, identical bulk mail items weighing more than 50 grams and value-added services. Section 51 of the Postal Act.

<sup>(145)</sup> DPAG reply to the Statement of Objections, pp. 27-28.

<sup>(146)</sup> KEP Nachrichten, No. 51/17, December 1999 (document 1146 in the Commission file).

<sup>(147)</sup> KEP Nachrichten.

<sup>(148)</sup> Mid-2000 Report of RegTP, p. 62, as published on its website ([www.regtp.de](http://www.regtp.de)).

<sup>(149)</sup> 'Study on the Weight and Price Limits of the Reserved Area in the Postal Sector', study by CT Con, published by the Commission in November 1998, pp. 33-34.

<sup>(150)</sup> The relative portion of revenues derived from the heavier weight bands is greater than the corresponding portion of volume.

<sup>(151)</sup> Section 51(2) of the Postal Act.

- (94) Third, the majority of bulk mail items that weigh more than 50 grams (or before 1998 — 100 grams) with identical contents are in reality forwarded and delivered by DPAG, since DPAG is the only postal operator in Germany offering a nation-wide delivery service at a low price. This circumstance is one explanation why DPAG has managed to keep approximately 99 % of total letter market turnover, despite the partial opening of this market. In practice, most senders of bulk mail have no alternative but to use the delivery services of DPAG. The Commission thus concludes that virtually all incoming cross border letter mail in Germany is forwarded and delivered by the incumbent <sup>(152)</sup>.
- (95) Due to the existence of the extensive monopoly and the non-availability of alternative, nationwide delivery networks, the BPO is in practice obliged to use the services of DPAG in order to get its bulk mailings bound for Germany delivered to the addressees. The facts of the case illustrate very clearly the lack of alternative delivery solutions available to the BPO and DPAG's ability to act in a manner which is independent not only of the BPO but of DPAG's competitors in the relevant market.
- (96) The Commission finds that DPAG holds a dominant position in the German market for the forwarding and delivery of incoming cross-border letter mail.
- (97) Germany constitutes a substantial part of the European Community <sup>(153)</sup>.

#### D. Alleged inapplicability of Article 82 of the EC Treaty

- (98) In its original response to the complaint of 20 July 1998, DPAG did not contest the applicability of Article 82 in the present case <sup>(154)</sup>. In a later submission, however, DPAG argued that Article 82 does not apply in the present case since the company is not the instigator of the measures taken against the BPO <sup>(155)</sup>. Since the terminal dues received from the BPO for this mail did not cover DPAG's delivery costs and because of BPO's alleged marketing campaign directed at German senders, DPAG claimed that it was obliged to take these measures. DPAG refers to the case law of the Court of Justice, which stipulates that Article 82 is only applicable to anticompetitive measures which undertakings initiate themselves. Article 82 does not apply if international regulation deprives an undertaking of every possibility to behave in a competitive manner.
- (99) DPAG referred to the following statement by the Court of Justice:
- ‘Articles 85 and 86 of the Treaty apply only to anti-competitive conduct engaged in by undertakings on their own initiative. [...] If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 85 and 86 do not apply <sup>(156)</sup>.’
- (100) However, DPAG failed to mention the statement by the Court of Justice in the following paragraph of the same judgment, in which it said that:
- ‘Articles 85 and 86 may apply, however, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition ... <sup>(157)</sup>.’

<sup>(152)</sup> This conclusion is consistent with recent research. See *Liberalisation of Incoming and Outgoing Intra-Community Cross-border Mail*, 1998, p. 38.

<sup>(153)</sup> Case 322/81 *Michelin* [1983] ECR 3461, at paragraphs 102-104.

<sup>(154)</sup> DPAG reply to complaint of 20 July 1998 (documents 163-249 in the Commission file).

<sup>(155)</sup> DPAG reply to Commission request for information of 26 April 1999, pp. 5-6 (document 991 in the Commission file).

<sup>(156)</sup> Joined Cases C-359/95 and C-379/95 *Commission and France v Ladbroke Racing* [1997] ECR I-6225, at paragraph 33.

<sup>(157)</sup> *Ladbroke Racing*, at paragraph 34. See also Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969, at paragraph 130.

- (101) In fact, all measures concerned were initiated by DPAG itself at its own volition. Neither the UPU Convention, nor German domestic law contains provisions which oblige DPAG to intercept, surcharge and delay incoming cross-border mail <sup>(158)</sup>. Article 25 UPU allows its member countries to intercept such mail, provided that certain conditions are met. The UPU member countries have a wide margin of discretion as to whether or not to intercept incoming cross-border mail which fulfils the criteria set out in Article 25 UPU. The German domestic law, which contains provisions identical to those contained in Article 25 UPU, does not impose any obligation on DPAG to intercept, surcharge and delay incoming cross-border letter mail. These conclusions apply regardless of the version of the UPU invoked at the particular point in time (i.e. Article 25 UPU 1989, Article 25 UPU 1994 or Article 43 UPU 1999) <sup>(159)</sup>.
- (102) The legal framework neither eliminates the possibility of competitive behaviour on DPAG's part, nor does it preclude DPAG from engaging in autonomous conduct which is anticompetitive. It may thus be concluded that DPAG retained all its autonomy of conduct in this regard. DPAG's argument that its actions were 'triggered' by allegedly anticompetitive behaviour from the BPO is irrelevant. Even if this were the case, the behaviour of a competitor could never exclude an undertaking from the application of Article 82.

### E. Abuse of a dominant position

#### Introduction

- (103) An undertaking in a dominant position has a special responsibility not to allow its conduct to impair undistorted competition in the common market. The actual scope of the dominant firms special responsibility must be considered in relation to the degree of dominance held by that firm and to the special characteristics of the market which may affect the competitive situation <sup>(160)</sup>.
- (104) The Commission has analysed the measures taken by DPAG as a pattern of behaviour rather than as a set of separate measures to be assessed individually. DPAG's behaviour consists of the following principal elements:
- (i) frequently intercepting incoming cross-border letter mail,
  - (ii) surcharging incoming cross-border letter mail, and
  - (iii) frequently delaying, for extensive periods of time, the release of incoming cross-border letter mail which has been intercepted.
- (105) In its reply to the Statement of Objections, DPAG claimed that the Commission had failed to investigate in a general manner the behaviour of DPAG and only used evidence submitted by the BPO. According to DPAG, the complaint and the Statement of Objections only contained a very limited number of cases, a number which is inadequate to prove the existence of a company policy. In order to prove this, the Commission should have contacted a representative number of BPO's customers, DPAG argued <sup>(161)</sup>.

<sup>(158)</sup> Article 25 UPU 1989 was adopted as domestic German law in 1992, *Gesetz zu den Verträgen vom 14. Dezember 1989 des Weltpostvereins*, 31 August 1992, *Bundesgesetzblatt* 1992, Part II, p. 749. This law was succeeded by the transposition of the 1994 UPU convention in 1998, *Ratifizierungsgesetz*, 26 August 1998, *Bundesgesetzblatt* 1999, Part II, No 4, 10 February 1999.

<sup>(159)</sup> See section I.D., subsection The Convention of the Universal Postal Union, above.

<sup>(160)</sup> Judgment of the Court of First Instance in Case T-83/91 *Tetra Pak International SA v Commission* (Tetra Pak II) [1994] ECR II-755, at paragraphs 114, 115 and 155, as confirmed by the Court of Justice in Case C-333/94 P [1996] ECR I-5951.

<sup>(161)</sup> DPAG reply to the Statement of Objections, pp. 30-31.

- (106) In fact, the Commission's assessment of the present case is to a very large extent based on documentary evidence (letters, faxes and remail control forms) originating from DPAG itself as well as statements made by DPAG during the course of the proceedings. The documentary evidence comprises a sufficiently large number of incidents in order to identify a pattern of behaviour on DPAG's part. It should be noted that some of the 'cases' referred to by DPAG above include a large number of individual mailings, albeit from a limited number of token senders. The case file contains a number of examples of reactions from senders of mailings which have been intercepted, surcharged and delayed by DPAG <sup>(162)</sup>. Moreover, the mere fact that DPAG has systematically initiated court proceedings in Germany against entities residing in Germany which DPAG considers to be the material senders of incoming cross-border letter mailings, is a clear indication of the existence of a company policy in this regard <sup>(163)</sup>.

#### *Definition of sender*

#### Arguments put forward by DPAG

- (107) DPAG has argued that the notion of the material definition of sender has been confirmed by German courts and that the behaviour resulting from the application of this definition concurs with German case law. Moreover, DPAG argued that the Court of Justice had implicitly condoned the material definition of sender in the GZS & Citicorp judgment.

#### Assessment

- (108) DPAG seeks to justify its treatment of incoming cross-border mail by referring to national case law. It is not for the Commission to judge whether or not DPAG's behaviour in the present case is compatible with national law. Even if this were the case, the behaviour in question may infringe Community law. The Commission must therefore assess whether or to what extent the material definition of sender — as interpreted by DPAG — and the actions taken by DPAG under that pretext in the present case are compatible with Community law.
- (109) In the GZS & Citicorp case the Court of Justice had to consider:
- '... the grant by a Member State to its postal services of the statutory right to charge internal postage on items of mail where senders resident in that State post items, or cause them to be posted, in large quantities with the postal services of another Member State in order to send them to the first Member State <sup>(164)</sup>.'
- (110) It was thus clear here that the postal items originated from Germany and that the senders were resident in that country. In the present case the situation is different, however.
- (111) In GZS & Citicorp, the Court of Justice acknowledged that PPOs could — in principle — charge the domestic tariff for A-B-A remail items by invoking Article 25 UPU 1989 <sup>(165)</sup>. The Court established that Article 25 UPU 1989 could only be invoked on the basis of specific conditions. However, the Court did not address — either explicitly or implicitly — the question of the compatibility of the material definition of sender with Community law. The case before the Court concerned a request for a preliminary ruling pursuant to Article 234 of the EC Treaty regarding a number of legal questions referred to the Court by a national court in Germany. The German court did not ask the Court of Justice to address the question of the material definition of sender and it did not need to examine the definition of sender applied by DPAG in order to respond to the questions put before the Court.

<sup>(162)</sup> See for instance, the factual sections on Fidelity Investments and Gant above.

<sup>(163)</sup> See DPAG reply to the Statement of Objections, pp. 12-13. In its reply, DPAG lists a large number of national court cases where the material definition of sender has been applied.

<sup>(164)</sup> Underlining by the Commission. GZS & Citicorp, at paragraph 54; see footnote 23.

<sup>(165)</sup> The UPU Convention has subsequently been revised twice, in 1994 and 1999.



- (112) The assessment criteria applied by DPAG in the present case cannot be accepted under Community law. The assessment criteria listed by DPAG all concern the appearance of the contents of a mail item. In order to identify the sender of a postal item it is necessary to find the person who has produced the item and the person that is responsible for it. This information cannot be found with any certainty by examining the contents of a postal item. In order to qualify as remail — according to DPAG's definition — there does not have to be any transfer of information at all (neither physical, nor non-physical) from country A to country B. The only link to Germany is the inclusion of a reference in the contents of the mailings to an entity residing in that country. This link is entirely virtual and leads to the erroneous classification by DPAG of normal cross-border mail as virtual A-B-A remail. The behaviour resulting from this classification impedes the free flow of mail between Member States.
- (113) Following an examination of the relevant facts, the Commission has come to the following conclusion as regards the identity of the senders of the disputed mailings, given as examples of DPAG's allegedly anticompetitive behaviour.
- (114) *Ideas Direct*: The mailings in question were all produced and posted by Ideas Direct in the UK and it was this company that entered into a contractual relationship with the sending postal operator. Neither the letters, nor the information contained therein came from Germany in order to be posted back to Germany via the UK. Ideas Direct of the UK must therefore be considered the sender of these mailings. The sender and the German addressees are not resident in the same Member State. There are no grounds for DP's allegation that the Ideas Direct mailings constituted cases of A-B-A remail. The Ideas Direct mailings must thus be considered ordinary cross-border mail.
- (115) *Fidelity Investments*: The mailings in question did not come from Germany in order to be posted back to German addressees via the UK. The mailings were all produced and posted by Fidelity Investments in the UK. The German subsidiary of Fidelity Investments was not involved at any stage in the production or posting of these mailings. It was Fidelity Investments in the UK which concluded a contractual relationship with the sending postal operator. Consequently, Fidelity Investments in the UK must be regarded as the sender of the mailings in question. The sender and the addressees are resident in different Member States. There are no grounds for DP's allegation that the mailings from Fidelity Investments constituted cases of A-B-A remail. The mailings in question must be regarded as ordinary cross-border mail.
- (116) *Gant*: The mailings concerned did not come from Germany in order to be posted back to German addressees via the UK. The mailings were all produced and made ready for posting by Pyramid Sportswear in Sweden, transported to the UK and posted to Germany (as well as to a number of other European countries) through the BPO. Pyramid Sportswear of Sweden must be regarded as the sender of the disputed mailings. The sender and the addressees are resident in different Member States. These mailings should thus be considered A-B-C remail. It cannot be argued that the postal monopoly of country C is infringed by this type of mail. Since the Swedish and British PPOs are both parties to REIMS II, terminal dues received by DPAG would be the same if the letters were sent directly from the Swedish sender or via the UK. Consequently, when A-B-C remail is transferred from country B to country C the legal situation is no different from the rules which apply to ordinary cross-border mail.
- (117) *Multiple Zones*: The mailing in question did not come from Germany to be posted back to addressees in Germany via the UK. The mailing was produced by the European head office of the Extensis Corporation — Plantijn Groep BV of the Netherlands — transported to the UK where it was posted and then forwarded to Germany by the BPO. Plantijn Groep BV must therefore be regarded as the sender of the mailing, which constituted a case of A-B-C remail.

#### Conclusion

- (118) The material definition of sender — as interpreted by DPAG in the present case — fails to take into account the contractual and economic reality behind mailings and results in the erroneous classification of normal cross-border mail as virtual A-B-A remail. The acceptance of DPAG's interpretation of the material definition of sender would allow DPAG to determine itself the identity of the sender on the basis of irrelevant criteria. It is not for DPAG — or any other postal operator — to determine how postal customers should organise their activities, how they should present themselves to the addressees or how they should prepare their mailings.

- (119) The Commission finds the material definition of sender — as applied by DPAG in the present case — to be incompatible with Community law.

#### *Abuse*

- (120) DPAG's behaviour in the present case — i.e. the interception, surcharging and delaying of normal incoming cross-border letter mail — can be characterised as an infringement of Article 82 of the Treaty on the basis of four separate legal arguments. These arguments are set out below.

#### *Discrimination*

- (121) DPAG treats differently incoming cross-border letter mail which it considers to be 'genuine' international mail (i.e. letter mail without any references to entities residing in Germany) on the one hand and incoming cross-border letter mail which it considers to be virtual A-B-A remail on the basis of the inclusion of a reference to an entity residing in Germany, on the other. Such an entity may be a subsidiary or agent located in Germany. In the former case, DPAG charges the BPO the terminal dues which have been agreed between the respective PPOs. The BPO charges UK senders the normal cross-border tariff, which is calculated on the applicable terminal dues. In the latter case DPAG charges the BPO or the senders the full domestic tariff applicable in Germany, which is higher <sup>(166)</sup>. In both cases DPAG performs exactly the same service, i.e. collecting bags of incoming cross-border letter mail at a reception point, transporting the mail to a sorting centre where it is sorted, then forwarded and delivered to addressees residing in Germany.

#### *Arguments put forward by DPAG*

- (122) In its reply to the Statement of Objections, DPAG refuted that it had engaged in discriminatory behaviour. Based on the abovementioned set of assessment criteria, DPAG applies Article 25 UPU uniformly and objectively. DPAG maintained that its behaviour is covered by Article 25 UPU. In DPAG's view, Article 25 UPU implicitly allows PPOs to intercept and delay mailings. Since all mailings are subject to the same assessment, DPAG does not discriminate between trading parties. Moreover, mailings which — in DPAG's view — do fall under Article 25 UPU and mailings which do not, are not equivalent transactions. Mailings falling under Article 25 UPU must be identified and processed further, something which entitles DPAG to charge a higher price, DPAG claimed <sup>(167)</sup>.
- (123) Moreover, DPAG claimed that 'the persons that deliver the mailings for posting with the BPO' are not trading partners of DPAG. The only trading partner of DPAG in this case is the BPO and DPAG does not discriminate against the BPO. Finally, DPAG claimed that its behaviour does not lead to any direct negative effects for consumers, regardless of whether these consumers are considered to be the addressees or 'the persons delivering the mail for posting with the BPO.' <sup>(168)</sup>

#### *Assessment*

- (124) As an undertaking awarded with a statutory monopoly for the forwarding and delivery of incoming cross-border letter mail, the Commission considers that DPAG has a *prima facie* obligation to ensure that this service is provided in a non-discriminatory manner <sup>(169)</sup>.
- (125) The Court of Justice has recently held — in the GZS & Citicorp judgment — that behaviour similar to the situation in the case at hand constitutes an infringement of Article 82(c) of the EC Treaty, in particular. In its judgment the Court made the following statement:

'In order to prevent a body such as Deutsche Post from exercising its right, provided for by Article 25(3) of the UP, to return items of mail to origin, the senders of those items have no choice but to pay the full amount of the internal postage.

<sup>(166)</sup> 70 % of the domestic tariff in 2001, 65 % in 2000, 55 % between April and December 1999. Before the entry into force of the REIMS II agreement on 1 April 1999 terminal dues were set according to a previous agreement concluded between PPOs — the CENT agreement of 1987. DPAG claims a surcharge corresponding to the full domestic tariff minus terminal dues. The total charge thus equals the domestic tariff.

<sup>(167)</sup> DPAG reply to the Statement of Objections, pp. 33-35.

<sup>(168)</sup> DPAG reply to the Statement of Objections, pp. 35-36.

<sup>(169)</sup> See Commission Decision 2000/12/EC 1998 *Football World Cup*, Case IV/36.888 (OJ L 5, 8.1.2000, p. 55), at paragraph 87.

As the Court has stated in relation to a refusal to sell on the part of an undertaking holding a dominant position within the meaning of Article 86 of the Treaty, such action would be inconsistent with the objective laid down by Article 3(g) of the EC Treaty [...], as explained in Article 86, in particular in subparagraphs (b) and (c) of its second paragraph...<sup>(170)</sup>.

- (126) The situation in the case at hand is comparable to the case put before the Court of Justice, where the Court concluded that discrimination between different categories of domestic mail — i.e. normal domestic mail and circumvented domestic mail (A-B-A remail) — may constitute an abuse under Article 82 of the Treaty. In the present case, however, DPAG discriminates between different categories of cross-border letter mail, depending on whether or not the foreign senders have indicated a reference to an entity residing in Germany.
- (127) By charging different prices for equivalent transactions — i.e. the forwarding and delivery of incoming cross-border letter mail — DPAG is behaving in a discriminatory manner. The different tariffs charged by DPAG cannot be justified on the basis of objective economic factors. DPAG claims that it incurs extra costs for the 'identification and processing' of mail which it classifies as virtual A-B-A remail. DPAG has not specified or quantified in any way these additional costs. Since this classification is based on an erroneous assumption, the extra costs incurred — if they exist — should be charged to all senders of incoming cross-border mail in a non-discriminatory manner.
- (128) Discriminatory behaviour is not limited to the charging of different tariffs. Customers indicating a reference in their mail to an entity residing in Germany also run a higher risk of having their mail delayed by DPAG for extensive periods of time.
- (129) As quoted above, the Court of Justice — in the GZS & Citicorp judgment — concluded that discriminatory treatment of different mail categories may constitute an abuse under Article 82 of the Treaty. The Court reached this conclusion without addressing the question whether the sender was a trading partner of DPAG or not.
- (130) Due to the existence of the postal monopoly in Germany, the term trading partner — which normally refers to a voluntary commercial relationship between two undertakings — must be given a slightly different interpretation. The postal monopoly imposes upon foreign senders a commercial if not directly contractual relationship with DPAG. The sender in the UK that contracts with the BPO to have his mailings sent to Germany knows beforehand that the mail will be delivered by DPAG to German addressees. The actions of DPAG in the German market for incoming cross-border letter mail directly affect the commercial activities of the UK senders. At the very least, there is an indirect relationship between the UK senders contracting with the BPO and DPAG. Under these circumstances, the Commission finds that the senders must be regarded as trading partners of DPAG within the meaning of Article 82(c).
- (131) Among those UK senders being treated in a discriminatory manner by DPAG are companies that compete directly with each other. One example of such a competitive relationship would be two mail order companies operating from the UK selling the same type of goods to German consumers. These companies would be treated differently depending on whether they indicate in the contents of their mailings a reference to an entity residing in Germany or not. The behaviour of DPAG would therefore place the trading party whose mail is intercepted, delayed and surcharged at a competitive disadvantage.
- (132) DPAG has conceded that the BPO is one of its trading partners but has denied having treated BPO unequally. However, DPAG is in direct competition with the BPO, not in the relevant market but in the UK market for outgoing cross-border letter mail<sup>(171)</sup>. The additional costs incurred by the BPO as a consequence of the surcharges claimed by DPAG in combination with the frequent disruptions of the mail traffic routed by the BPO from the UK to Germany puts the BPO at a competitive disadvantage in relation to DPAG. Since DPAG is active on the UK market for outgoing cross-border letter mail, UK customers who have experienced problems when contracting with the BPO will be induced to use the services of DPAG in the UK directly for the entire distribution chain in order to ensure a speedy and uninterrupted conveyance of their mail bound for Germany.

<sup>(170)</sup> Underlined by the Commission. GSS & Citicorp, paragraphs 59 and 60; see footnote 23.

<sup>(171)</sup> DPAG's tender for the American Express contract is an example of this competitive relationship. See section on International Mailing Services provided by DPAG in section I.D. above.

- (133) In any event, the Court of Justice has stated that the list of abuses mentioned in Article 82 itself is not exhaustive and thus only serves as examples of possible ways for a dominant firm to abuse its market power <sup>(172)</sup>. Article 82 may be applied even in the absence of a direct effect on competition between undertakings on any given market. This provision may be also be applied in situations where a dominant undertakings behaviour causes damage directly to consumers <sup>(173)</sup>. The senders of the disputed mailings are consumers of postal services. Due to the behaviour of DPAG, these consumers are affected negatively by having to pay prices for these services which are higher than those charged to other senders and by having their mailings delayed significantly. Likewise, the German addressees are to be regarded as consumers who are affected in a negative manner by the behaviour of DPAG. Having their incoming mail delayed may prevent the addressees from benefiting from commercial offers made by the senders <sup>(174)</sup>.

#### *Conclusion*

- (134) The Commission finds that DPAG's policy of intercepting, surcharging and delaying certain incoming cross-border letter mail is an application of dissimilar conditions to equivalent transactions. DPAG abuses its dominant position in the German market for incoming cross-border letter mail in a manner which puts other trading parties at a competitive disadvantage. In this context, the trading parties are the senders of the disputed mailings and the BPO. Even in the absence of substantial negative effects on these trading parties, the behaviour of DPAG has direct negative effects on consumers. These consumers are the senders of the disputed mailings and/or the German addressees. DPAG's behaviour thus constitutes an abuse of Article 82 of the EC Treaty and in particular subparagraph (c) of its second paragraph.

#### *Refusal to supply*

- (135) For incoming cross-border mail which it has classified as 'virtual' A-B-A remail, DPAG makes the supply of its forwarding and delivery service subject to the condition that the sending postal operator, or the entity in Germany which DPAG considers to be the domestic sender, agrees to pay a surcharge corresponding to the full domestic tariff minus the applicable terminal dues. In the absence of such an agreement, DPAG has repeatedly held back mailings for extensive periods of time.
- (136) DPAG's treatment of incoming cross-border letter mail does not constitute an outright and final refusal to supply its forwarding and delivery service. However, DPAG refuses to deliver the mail on conditions that are acceptable to the sender and/or the sending postal operator. Due to the lack of alternative delivery solutions, DPAG puts the sender and the sending postal operator in a situation where — in order to get the mail delivered without further delays — they have no choice but to pay the surcharge claimed by DPAG.

#### *Arguments put forward by DPAG*

- (137) In its reply to the Commission's Statement of Objections, DPAG referred to the judgment of the Court of Justice in the GZS & Citicorp case and claimed that the mailings in the present case are similar to the mailings examined by the Court. The imposition of the full domestic tariff minus terminal dues under Article 25 UPU should therefore not be regarded as a contravention of Article 82 of the Treaty.

<sup>(172)</sup> See Tetra Pak II: Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Beige Transport and Others v Commission* [2000] ECR I-1365, at paragraph 112.

<sup>(173)</sup> Decision 2000/12/EC, loc. cit.

<sup>(174)</sup> See for instance the section on Gant (the delayed 1996 mailing) in section I.E. above.

- (138) DPAG went on to claim that it had not refused to supply its delivery service since all mailings were ultimately delivered. Referring again to the case law of the Court of Justice, DPAG maintained that a refusal to supply cannot occur if delivery takes place <sup>(175)</sup>. In DPAG's view, the two types of abuse 'refusal to supply' and imposition of unfair trading conditions exclude each other. If supply does not take place, there cannot be any imposition of unfair trading conditions. Similarly, if unfair trading conditions are imposed and supply does take place, there cannot be a refusal to supply. Consequently, the effects of a refusal to supply cannot be strengthened if there is a long delay before the supply (in this case the delivery of the mailing) takes place. In any event, 'no delays at all' took place in the cases of Ideas Direct, Fidelity Investments and Gant, DPAG claimed <sup>(176)</sup>.
- (139) In its reply to the Commission's Statement of Objections, DPAG maintained that it does not have any interest whatsoever in deliberately delaying incoming cross-border mailings and stated that the Commission had failed to demonstrate any such interest on DPAG's part. As a member of the REIMS II agreement, DPAG is subject to strict targets for delivery and the performance of the REIMS II parties is rigorously controlled <sup>(177)</sup>.

#### Assessment

- (140) As stated above, the disputed mailings in the present case must be regarded as ordinary cross-border letter mail. In GZS & Citicorp, the Court of Justice specifically addressed the issue of refusal to supply when mailings are intercepted, surcharged and delayed by a receiving PPO <sup>(178)</sup>. The Court considered that:

'In order to prevent a body such as Deutsche Post from exercising its right, provided for by Article 25(3) UP, to return items of mail to origin, the senders of those items have no choice but to pay the full amount of the internal postage.

As the Court has stated in relation to refusal to sell on the part of an undertaking holding a dominant position within the meaning of Article 86 of the Treaty, such action would be inconsistent with the objective laid down by Article 3(g) of the EC Treaty [...], as explained in Article 86, in particular subparagraphs (b) and (c) of its second paragraph... <sup>(179)</sup>.'

- (141) The concept of refusal to supply covers not only outright refusal but also situations where dominant firms make supply subject to objectively unreasonable conditions. Such conditions may be a refusal to supply otherwise than on terms which the supplier, for objective reasons, knows to be unacceptable — a constructive refusal — or a refusal to supply other than on the basis of unfair conditions <sup>(180)</sup>.
- (142) DPAG's treatment of incoming cross-border mail does not constitute an outright refusal to supply its forwarding and delivery service. For incoming cross-border letter mail which it has classified as virtual A-B-A remail, DPAG makes the supply of its forwarding and delivery service subject to the condition that the sending postal operator, the sender or the entity residing in Germany which DPAG considers to be the sender, agrees to pay the full domestic tariff.
- (143) Virtually all incoming cross-border letter mail is forwarded and delivered by DPAG. Senders residing in the UK have — in practice — no alternative but to use the incumbent postal operator for the delivery of their mail. In accordance with the views expressed by the Court of Justice, the Commission considers that the customers of DPAG are put in a position where, in order to 'save' their mailings, they have no choice but to pay the full domestic tariff. The refusal on DPAG's part to supply its forwarding and delivery service on terms that are acceptable to the sender and/or the sending postal operator is tantamount to a constructive refusal to sell. As a consequence of these refusals by DPAG, mailings have been delayed for extensive periods of time. The anticompetitive effects of a constructive refusal to sell are reinforced substantially by such lengthy delays.

<sup>(175)</sup> DPAG referred to the judgments in Case 311/84 CBE v CLOTTED and IAB [1985] ECR 3261, at paragraph 26, and Case 27/76 United Brands v Commission [1978] ECR 207, at paragraphs 163, 168 and 203.

<sup>(176)</sup> DPAG reply to the Statement of Objections, pp. 37-38.

<sup>(177)</sup> DPAG reply to the Statement of Objections, pp. 15-16.

<sup>(178)</sup> The reasoning of the Court concerned 'non-physical' A-B-A remail and not ordinary A-B cross-border mail. The analysis regarding refusal to supply may still be applied in the case at hand, however.

<sup>(179)</sup> Underlining by the Commission. DP/GSS & Citicorp, paragraphs 59-60.

<sup>(180)</sup> See Commission Decision 1999/243/EC Trans-Atlantic Conference Agreement (TAC), Case COMP/35.134 (OJ L 95, 9.4.1999, p. 1), at paragraph 553.

- (144) The following cases — based on documentary evidence and statements from DPAG itself — prove that DPAG has delayed the delivery of normal cross-border mailings in a number of instances <sup>(181)</sup>.
- (145) *Ideas Direct*: From documentary evidence in the case file, it is clear that DPAG kept detailed records about mailings from Ideas Direct handled in 1997 and 1998 <sup>(182)</sup>. On the basis of the evidence available to the Commission, the following conclusions may be drawn:
- (i) The November 1996 mailing was intercepted by DPAG at the latest on 4 November 1996 and released on 12 November 1996 at the earliest, i.e. a total delay of at least eight days <sup>(183)</sup>.
  - (ii) On 27 November 1998 DPAG claimed surcharges from the BPO for 19 mailings (258 067 items in total) from Ideas Direct. These mailings had been intercepted by DPAG from January to September 1998. From the documentary evidence it is evident that DPAG examined the contents of sample items from all these mailings. DPAG has — at a very late stage in the proceedings — confirmed that the mailings in question were held back by DPAG while the sample addressees were contacted and the contents of the mailing were returned to DPAG by the addressee <sup>(184)</sup>. As stated above, this process takes at least 5 to 6 days on average. Additional time for the processing and eventual release of the mail is needed as well. The Commission therefore concludes that the 19 mailings in question were held back for a period of at least seven days.
  - (iii) On 3 February 1999 DPAG addressed further claims for surcharges to the BPO. According to DPAG, a total of 156 435 mail items from Ideas Direct were intercepted by DPAG from October to December 1998 <sup>(185)</sup>. The documentary evidence shows that DPAG examined the contents of all these mailings <sup>(186)</sup>. DPAG has confirmed that these mailings were held back by it while the sample addressees were contacted and the contents of the mailing were returned to DPAG by the addressee <sup>(187)</sup>. Since this process takes at least 5 to 6 days on average, the Commission concludes that the mailings in question were held back for a period of at least seven days.
- (146) *Fidelity Investments*: From information submitted by DPAG to the BPO in 1999, it is evident that DPAG kept detailed records about all Fidelity Investments mailings it had handled in 1997 and 1998 <sup>(188)</sup>. Based on documentary evidence and statements made by DPAG during the course of the proceedings, the following conclusions may be drawn:
- (i) The Commission has not been able to establish the number of mailings and the exact dates on which the Fidelity Investments mailings sent in March and April 1997 were intercepted and released by DPAG. The claim of DPAG at a late stage in the proceedings that it can no longer identify these mailings lacks credibility considering the detailed records it has kept for other mailings from Fidelity Investments. DPAG has acknowledged the fact, however, that a total of 24 mailings from Fidelity Investments were received in April 1997, all of which DPAG considered to fall under Article 25 UPU <sup>(189)</sup>. In one of these cases, documentary evidence on the file shows that DPAG used the remail case control form to notify the BPO <sup>(190)</sup>. The use of this form necessarily involves an examination of the contents before the entity in Germany which DPAG considers to be the sender can be indicated on the form. As stated above, this process takes at least 5 to 6 days on average. Additional time for the processing and eventual release of the mail is needed as well. The Commission therefore concludes that the mailing in question was held back for a period of at least seven days.

<sup>(181)</sup> NB: During the course of the proceedings DPAG gave in a number of cases conflicting information in its various submissions to the Commission. As regards the factual elements of this case (e.g. release and interception dates) the Commission has established the minimum delays that can be proven on the basis of the documentary evidence and DPAG's statements in the present case.

<sup>(182)</sup> See section on Ideas Direct in section IE above.

<sup>(183)</sup> See section on Ideas Direct in section IE above.

<sup>(184)</sup> DPAG letter to the Commission of 18 May 2001, p. 1.

<sup>(185)</sup> The number of mailings is not known to the Commission. These mailings were listed in an annex to DPAG's letter. The annex has not been submitted to the Commission.

<sup>(186)</sup> See section on Ideas Direct — Retroactive Claims in the factual part above.

<sup>(187)</sup> DPAG letter to the Commission of 18 May 2001, p. 1.

<sup>(188)</sup> See DPAG list of intercepted mailings from Fidelity Investments (documents 506 and 507 in the Commission file).

<sup>(189)</sup> DPAG reply to the Statement of Objections, p. 21.

<sup>(190)</sup> Fax from DPAG to the BPO of 7 April 1997 (document 60 in the Commission file).

- (ii) On 11 December 1998 a letter was sent to the BPO by DPAG, in which it claimed surcharges for 118 mailings (containing 275 027 mail items in total) from Fidelity Investments received in the second half of 1997. The BPO was notified by DPAG eleven months after the last of these mailings was received. It is evident from documents in the case file that the contents of all these mailings were examined by DPAG <sup>(191)</sup>. DPAG has confirmed — at a very late stage in the proceedings — that these mailings were held back by DPAG while the sample addressees were contacted and the contents of the mailing were returned to DPAG by the addressee <sup>(192)</sup>. As stated above, the process of contacting the addressees takes at least 5 to 6 days on average. Additional time for the processing and eventual release of the mail is needed as well. The Commission therefore concludes that the mailings in question were held back for a period of at least seven days.
  - (iii) On 3 February 1999 DPAG addressed further surcharge claims to the BPO, this time for 224 301 mail items received from October to December 1998 <sup>(193)</sup>. Documents in the case file show that DPAG examined the contents of sample items from all these mailings <sup>(194)</sup>. DPAG has confirmed that these mailings were held back by it while the sample addressees were contacted and the contents of the mailing were returned to DPAG by the addressee <sup>(195)</sup>. Since this process takes at least 5 to 6 days on average, the Commission concludes that the mailings in question were held back for a period of at least seven days.
  - (iv) On 1 March 1999 DPAG sent another letter to the BPO, which contained surcharge claims for 1 035 837 mail items from Fidelity Investments received by DPAG from January to September 1998. The BPO was notified six months after the last of these mailings were received by DPAG. Documentary evidence in the Commission's file shows that DPAG examined the contents of sample items from all these mailings <sup>(196)</sup>. DPAG has confirmed that these mailings were held back by DPAG while the sample addressees were contacted and the contents of the mailing were returned to DPAG by the addressee <sup>(197)</sup>. Since this process takes at least 5 to 6 days on average, the Commission concludes that the mailings in question were held back for a period of at least seven days.
- (147) *Gant*: On the basis of documentary evidence in the case files and statements from DPAG itself during the course of the proceedings, the following conclusions may be drawn concerning the actual course of events:
- (i) The interception by DPAG of the 1996 autumn catalogue mailing from Gant was notified to the BPO on 16 September 1996. DPAG has failed to disclose to the Commission the actual date of interception but claims that the mailing was released on 4 October 1996. It may be concluded that the mailing in question was delayed by DPAG for at least 18 days.
  - (ii) DPAG itself has indicated on the remail control form that two mailings from Gant (2 571 items in total) containing the 1998 autumn catalogue were intercepted on 27 and 28 August 1998. The BPO was only notified on 17 September 1998, i.e. after 20 days had expired <sup>(198)</sup>. DPAG has disclosed — at a very late stage in the proceedings — that the mailings in question were forwarded on 8 September 1998 <sup>(199)</sup>. The Commission therefore concludes that the two mailings were held back for 11 and 12 days respectively.
- (148) *Multiple Zones*: On the basis of the documents in the Commission file, the following conclusion may be drawn concerning the actual course of events:
- On 11 February 1999 DPAG notified the BPO of the interception of a mailing on 4 February, i.e. seven days earlier. Despite the agreement of the BPO on the same day to pay the claimed amount, DPAG did not release the mailing until 18 February. It may be concluded that the mailing was delayed for 14 days.

<sup>(191)</sup> Fax from DPAG to the BPO of 11 December 1998 (documents 493-494 in the Commission file).

<sup>(192)</sup> DPAG letter to the Commission of 18 May 2001, p. 2.

<sup>(193)</sup> The number of mailings is not known to the Commission. These mailings were listed in an annex to DPAG's letter. The annex has not been submitted to the Commission.

<sup>(194)</sup> Fax from DPAG to the BPO of 3 February 1999 (documents 929-930 in the Commission file).

<sup>(195)</sup> DPAG letter to the Commission of 18 May 2001, p. 2.

<sup>(196)</sup> Fax from DPAG to the BPO of 1 March 1999 (documents 931-932 in the Commission file).

<sup>(197)</sup> DPAG letter to the Commission of 18 May 2001, p. 2.

<sup>(198)</sup> See section on Gant — The 1998 Autumn Catalogue in the factual section above.

<sup>(199)</sup> DPAG letter to the Commission of 18 May 2001, p. 3.

- (149) As regards bulk mailings it is crucial that the senders can count on a reasonable delivery time. The senders depend on the fact that postal operators can provide a reliable service in order to 'time' the delivery of the postal items with other commercial activities. Consequently, commercial bulk mailings are 'perishable' in the sense that an extended delay may strongly diminish or even negate the commercial impact of a mailing <sup>(200)</sup>. The 'perishable' nature of these mailings emphasises further the obligation for the monopoly operator not to delay their delivery.
- (150) The originating postal operator to whom the sender has entrusted the first leg of the cross-border service (i.e. the collection, sorting and forwarding of outgoing cross-border letter mail) may suffer financially and commercially if the receiving operator delays the delivery of incoming mail for extended periods of time. The sending postal operator may have to reimburse clients and the reliability of its cross-border service may be put into question.
- (151) Since DPAG and the BPO are in direct competition with each other in the UK market for outgoing cross-border mail, DPAG has a clear interest in impeding the timely delivery of mailings sent by the BPO to addressees in Germany. If the services of the BPO are perceived as unreliable and expensive due to frequent disruptions and the imposition of surcharges, UK senders are likely to turn to DPAG's representatives in the UK instead since they are able to offer a less costly and more reliable service. Moreover, transnational firms with centralised, pan-European mailing activities will be induced to relocate their European distribution centres to Germany, or alternatively to send the mail bound for German addressees domestically instead <sup>(201)</sup>.
- (152) DPAG's claim that the quality targets and the control regime under the REIMS II agreement would make it impossible for DPAG to deliberately delay the delivery of incoming cross-border mail is not credible. First, the REIMS II delivery targets only apply to priority mail and a large part of the cross-border mail flows consist of bulk mailings. Second, the quality of each REIMS II members delivery services are controlled each year by the dispatch of a number of test items containing a transponder which enables the tracking of these items. In 1999 a total number of 1 224 such test items were sent from the UK to Germany and in 2000 the number was 1 290, DPAG has stated <sup>(202)</sup>. By comparing the limited number of test items in relation to the total volume of cross-border mail sent from the UK to Germany each year, it can be concluded that the delays described in the case at hand would have only marginal effects on the quality-of-service targets stipulated in the REIMS II agreement. Bearing the above in mind, the Commission concludes that the REIMS II regime would have a very limited restraining impact on the behaviour of DPAG in this respect.

### *Conclusion*

- (153) As regards the mailings from the four companies where it has been demonstrated that the senders of the mailings were resident outside Germany (i.e. Ideas Direct, Fidelity Investments, Gant and Multiple Zones), there were no grounds for DPAG to delay the release of these mailings beyond what is strictly necessary in order to identify the sender. DPAG's counter-argument that these delays were in part caused by the BPO's inability to respond to DPAG's claims is irrelevant since these claims were unjustified in the first place. The terms on which DPAG would supply its forwarding and delivery service for these mailings are thus tantamount to a constructive refusal to supply on DPAG's part. The negative impact of these refusals was aggravated by the ensuing delays. In some cases, these delays were long enough to weaken substantially the commercial impact of the mailings.

<sup>(200)</sup> See sections on Gant and Multiple Zones in section IE above.

<sup>(201)</sup> See section on Fidelity Investments in section IE above.

<sup>(202)</sup> DPAG letter to the Commission of 11 December 2000, p. 7.



- (154) The Commission concludes that DPAG abused its dominant position in the German market for the forwarding and delivery of incoming cross-border letter mail by refusing to deliver these mailings unless the sender or the sending postal operator agrees to pay the full domestic tariff. By doing so, DPAG de facto refuses to supply its forwarding and delivery service. The negative effects of this abusive behaviour were reinforced by DPAG's delaying the delivery for a period of time extensive enough to weaken substantially the commercial impact of the mailings. The Commission finds that this behaviour constitutes a contravention of Article 82 of the EC Treaty

#### Imposition of unfair selling prices

- (155) The Court of Justice has declared that a price which is found to be excessive in comparison to the economic value may infringe Article 82 if it has the effect of curbing parallel trade or of unfairly exploiting customers <sup>(203)</sup>.
- (156) The domestic tariff in Germany for priority mail in the first weight step is currently EUR 0,56 <sup>(204)</sup>. The present tariff was introduced on 1 September 1997. The previous tariff, amounting to EUR 0,51, had remained unchanged for eight years <sup>(205)</sup>. As one of the parties to the REIMS II agreement, DPAG argued that the average cost for delivering to the addressee an incoming cross-border letter-mail item in the corresponding category may be estimated at 80 % of the domestic tariff. Based on the current tariff and the cost estimation submitted by DPAG as one of the REIMS II parties, the average cost may be estimated at EUR 0,45 <sup>(206)</sup>. For incoming cross-border mail items which DPAG considers to be virtual A-B-A remail, DPAG charges the full domestic tariff (EUR 0,56) — a price which is 25 % above the estimated average cost.

#### Arguments put forward by DP

- (157) By referring, in its reply to the Statement of Objections, to the GZS & Citicorp judgment, DPAG maintained that it is not contrary to Article 82 of the Treaty to charge the full domestic tariff minus terminal dues for the forwarding and delivery of A-B-A remail. DPAG reiterated its claim that the mailings in the present case are parallel to those examined by the Court. Since all mailings concerned have German senders in DPAG's view, DPAG cannot be infringing Article 82 <sup>(207)</sup>.
- (158) DPAG maintained that its average cost for delivering an item of incoming cross-border mail is at least 80 % of the domestic tariff. The 80 % estimate advocated by DPAG and the other REIMS II parties in their notification to the Commission is an average of the estimated costs of all the parties to REIMS II. This average cannot be used as a basis for estimating DPAG's costs, DPAG argued.

#### Assessment

- (159) According to the case law of the Court of Justice, the fairness of a certain price may be tested by comparing this price and the economic value of the good or service provided. A price which is set at a level which bears no reasonable relation to the economic value of the service provided must be regarded as excessive in itself, since it has the effect of unfairly exploiting customers <sup>(208)</sup>. In a market which is open to competition the normal test to be applied would be to compare the price of the dominant operator with the prices charged by competitors. Due to the existence of DPAG's wide-ranging monopoly, such a price comparison is not possible in the present case. Furthermore, DPAG has only recently introduced a transparent, internal cost accounting system and no reliable data exist for the period of time relevant to this case. Consequently, the Commission is not in a position to make a detailed cost analysis of DPAG's average costs for the services in question during the relevant time period <sup>(209)</sup>. An alternative benchmark must therefore be used.

<sup>(203)</sup> Case 26/75 *General Motors v Commission* [1975] ECR 1367.

<sup>(204)</sup> DEM 1,10.

<sup>(205)</sup> DEM 1,00. Source: DPAG press release of 1 August 1997 as published on DPAG's website.

<sup>(206)</sup> DEM 0,88.

<sup>(207)</sup> DPAG reply to the Statement of Objections, pp. 38-39.

<sup>(208)</sup> *General Motors*, loc. cit.; *United Brands v Commission*, loc. cit.

<sup>(209)</sup> REIMS II. The parties undertook to introduce, by the end of 1999, a transparent cost accounting system.

- (160) In their notification to the Commission of the REIMS II agreement, DPAG and the other signatories argued that the average cost of forwarding and delivering incoming cross-border mail (including a reasonable profit margin) may be approximated to 80 % of the domestic tariff <sup>(210)</sup>. In its decision on the REIMS II agreement the Commission accepted — in the absence of reliable cost data — the principle of linking terminal dues to domestic tariffs and concluded that — under the circumstances prevalent at that time — the domestic tariff represented the most appropriate yardstick for assessing the cost of delivery <sup>(211)</sup>.
- (161) DPAG has neither substantiated the claim that its estimated average cost for delivering an item of incoming cross-border mail actually exceeds the 80 % estimate that DPAG (as a party to the REIMS II agreement) previously submitted to the Commission, nor has it indicated the percentage which it considers to be accurate for Germany.
- (162) For the purposes of the present Decision and in the absence of reliable cost accounting data, the Commission finds that the estimated average cost of delivery for incoming cross-border mail expressed as a percentage of the domestic tariff and as submitted by DPAG and the other REIMS II parties in their notification to the Commission may serve as a benchmark to estimate DPAG's costs in this respect. As mentioned above, DPAG charges the full domestic tariff (EUR 0,56) for items it has classified as 'virtual' A-B-A remail, i.e. a price which is 25 % above the estimated average cost and the estimated economic value for that service. It should be stressed in this connection that postal services and in particular the bulk mailings examined here involve the processing and mailing of large volumes in respect of which the profit margin per item is low. In 1997 the average profit margin per item came to 3 % <sup>(212)</sup>.
- (163) The REIMS II parties did not submit any conclusive evidence to the effect that 80 % of the domestic tariff is a reliable proxy for the average cost for delivering incoming cross-border mail. Other agreements on terminal dues indicate that the average cost is actually lower. The Nordic terminal dues agreement and the bilateral agreement on terminal dues concluded by the Dutch and Swedish PPOs both set terminal dues at 70 % of domestic tariffs <sup>(213)</sup>. Therefore, the Commission took a cautious approach and declared that the parties had not adduced convincing evidence which would allow the conclusion to be drawn that terminal dues should be set at 80 % of domestic rates. The Commission prescribed that:
- 'The maximum level of terminal dues allowed pursuant to this decision will therefore not exceed 70 % of domestic tariffs, a level which does not appear to be unreasonable <sup>(214)</sup>.'
- (164) If the 70 % level is used as a benchmark for the economic value of the service in question, the price charged by DPAG (EUR 0,56) would be 43 % above the estimated economic value of the service (EUR 0,39) <sup>(215)</sup>.
- (165) Sweden Post — like DPAG — is a high-tariff operator active in a high-cost Member State. The geographical conditions in Sweden (i.e. a large but sparsely populated country) as compared to those in Germany indicate that the cost of delivery should be higher in Sweden than in Germany. Despite this, terminal dues amounting to 70 % of the domestic tariff in Sweden suffice to cover Sweden Post's delivery costs. Bearing this in mind, DPAG's unsubstantiated claim that its costs of delivery for incoming cross-border letter mail should exceed 80 % of the domestic tariff is not credible.

### *Conclusion*

- (166) In the absence of any substantive evidence that the average economic value of delivering an incoming cross-border mail item to its German addressee exceeds EUR 0,45 (80 % of the domestic tariff), the Commission concludes that the price charged by DPAG for incoming cross-border mail which it considers to be virtual A-B-A remail (EUR 0,56) exceeds the average economic value of that service by at least 25 %.

<sup>(210)</sup> REIMS II.

<sup>(211)</sup> REIMS II, paragraph 86.

<sup>(212)</sup> 'Modelling and Quantifying Scenarios for Liberalisation', study carried out by FMD Ltd for the Commission, February 1999, p. 44.

<sup>(213)</sup> The Nordic agreement was notified to the Commission on 30 March 2000 (Case COMP/37.848. The bilateral agreement on terminal dues was notified by Sweden Post and PTT Post on 8 July 1998 (Case COMP/37.142). The case was closed subsequent to the Commission's sending to the parties, on 18 September 1998, an administrative letter indicating the non-applicability of Article 81 of the EC Treaty.

<sup>(214)</sup> REIMS II, paragraph 88.

<sup>(215)</sup> DEM 0,77.

- (167) The Commission — bearing in mind DPAG's status as monopolist and the abovementioned peculiarities of postal services — concludes that the tariff charged by DPAG has no sufficient or reasonable relationship to real costs or to the real value of the service provided. Consequently, DPAG's pricing exploits customers excessively and should therefore be regarded as an unfair selling price within the meaning of Article 82. In conclusion, the Commission finds that DPAG has abused its dominant position in the German market for the forwarding and delivery of incoming cross-border letter mail by imposing on customers an unfair selling price corresponding to the full domestic tariff. The imposition of this tariff cannot be objectively justified. DPAG therefore contravenes Article 82 of the Treaty and in particular subparagraph (a) of its second paragraph.

#### Limitation of production, markets and technical development

- (168) The abuse of an undertakings dominant position may consist in limiting production, markets or technical development to the prejudice of consumers. It follows that a dominant firm which limits the provision of a certain service, to the prejudice of those seeking to avail themselves of it, may infringe Article 82 <sup>(216)</sup>. This provision applies not only to situations where the dominant undertaking — in a monopolistic manner — reduces its own output in order to increase revenue from the consequent increase in price, but also to situations where the actions taken by the dominant firm limit the activities of other firms <sup>(217)</sup>.

#### Arguments put forward by DP

- (169) In its reply to the Statement of Objections, DPAG denied having limited the provision of its services at all and stated that the Commission had failed to submit any evidence to this effect. DPAG only demands the reimbursement to which it is entitled under Article 25 UPU 1989 and Article 25 UPU 1994. If there are any limiting effects on the UK market for outgoing cross-border mail as a consequence of DPAG's behaviour, DPAG's actions are justified by the abovementioned article and the procedures which were agreed between DPAG and the BPO <sup>(218)</sup>.

#### Assessment

- (170) The Court of Justice has previously concluded that certain arrangements are likely to limit markets to the prejudice of consumers within the meaning of Article 82 if they restrict competitors opportunities to compete with the dominant firm <sup>(219)</sup>. In its decision in the *British Telecommunications* case — which concerned provisions restricting the retransmission of telex messages — the Commission found that these provisions constituted an abuse of Article 82 since they:

'... limited message forwarding agencies activities to the prejudice of customers located in other EEC Member States... <sup>(220)</sup>.'

- (171) The Commission went on to say that such a restriction:

'...both limits the development of a new market and the use of a new technology to the prejudice of relay operators and their customers who are thus prevented from making more efficient use of existing telecommunications systems <sup>(221)</sup>.'

- (172) The Commission has previously considered that a dominant firm which placed indirect pressure on a competitor to increase its prices could be construed as a desire of the dominant company to limit production, markets or technological development to the prejudice of consumers <sup>(222)</sup>.

- (173) As referred to above, the Court of Justice made the following conclusion in its judgment in the *GZS & Citicorp* case:

'As the Court has stated in relation to a refusal to sell on the part of an undertaking holding a dominant position within the meaning of Article 86 of the Treaty, such action would be inconsistent with the objective laid down by Article 3(g) of the EC Treaty [...], as explained in Article 86, in particular in subparagraphs (b) and (c) of its second paragraph... <sup>(223)</sup>.'

<sup>(216)</sup> *Höfner und Elser*, loc. cit., paragraph 30.

<sup>(217)</sup> See Joined Cases 40-48, 50, 54-56, 111, 113 and 114-173 *Coöperative Vereniging (Suiker Unie) UA and Others v Commission* [1975] ECR 1663, at paragraphs 398, 526; Joined Cases C-241/91 P and C-242/91 P *Radio Telefís Éirann (RTE) and Independent Television Publications Ltd (ITP) v Commission* [1995] ECR I-743.

<sup>(218)</sup> DPAG reply to the Statement of Objections, p. 39.

<sup>(219)</sup> *Suiker Unie*, loc. cit., paragraph 526.

<sup>(220)</sup> Commission Decision 82/861/EEC *British Telecommunications*, Case COMP/29.877 (OJ L 360, 21.12.1982. p. 36), at paragraph 30.

<sup>(221)</sup> *British Telecommunications*, loc. cit., paragraph 34.

<sup>(222)</sup> Commission Decision 88/589/EEC *London European/Sabena*, Case COMP/32.318 (OJ L 317, 24.11.1988, p. 47), at paragraphs 29-30.

<sup>(223)</sup> Underlining by the Commission. *GZS & Citicorp*, loc. cit., paragraphs 59-60.

- (174) The Court of Justice thus made it clear that restricting the delivery of mail with the effect of impeding senders commercial activities in the territory of the receiving postal operator and the activities of the sending postal operator may constitute an abuse under Article 82 of the EC Treaty.
- (175) As stated previously, the disputed mailings from Ideas Direct, Fidelity Investments, Gant and Multiple Zones all emanated from senders resident outside Germany. DPAG's argument that the delays were partially a consequence of the procedures that had been agreed between DPAG and the BPO is irrelevant. First, these arrangements were a direct consequence of DPAG's insisting on claims that were unjustified. Second, these arrangements were imposed on the BPO by DPAG. Due to the fact that DPAG refused to deliver the mail unless its unreasonable conditions were fulfilled, the BPO had no alternative but to concede to DPAG's will.
- (176) In accordance with the case law of the Court of Justice, the Commission considers that — in the short run — interceptions, surcharges and delays limit directly the output on the German market for the forwarding and delivery of incoming cross-border letter mail. The surcharges imposed on sending operators and — directly or indirectly — on the senders, result in unjustifiable cost increases. Consequently, DPAG's behaviour affects negatively the senders, the sending postal operator and eventually the consumers.
- (177) In the long run, dissatisfied customers will be discouraged from using postal operators in the UK for mail addressed to final destinations in Germany, due to the frequent disruptions and the ensuing quality of service decrease. DPAG places postal operators in the UK under indirect pressure to increase their tariffs. In order to offset the resulting cost increase, UK postal operators would have to increase their UK-Germany cross-border tariffs substantially. Consequently, DPAG limits the production of outgoing cross-border letter mail services from the UK.

#### *Conclusion*

- (178) As regards DPAG's handling of cross-border letter mail coming from the UK, the Commission finds that DPAG: (i) limits the production of services on the German market for the forwarding and delivery of incoming cross-border letter mail to the prejudice of consumers and (ii) limits postal operators opportunities to compete on the UK market for outgoing cross-border letter mail bound for Germany to the prejudice of consumers. DPAG's behaviour in this respect therefore infringes Article 82 of the Treaty and in particular subparagraph (b) of its second paragraph.

### **F. Effect on trade between Member States**

- (179) Trade between Member States is affected due to the international nature of cross-border mail.

### **G. Article 86(2) of the Treaty**

- (180) In so far as postal operators are under a statutory duty to provide certain services they may be considered to be undertakings entrusted with the operation of a service of general economic interest within the meaning of Article 86(2) of the Treaty. If this is the case, the competition rules apply only in so far as this does not obstruct their performance of the particular tasks assigned to them. However, the Article 86(2) derogation does not apply if the development of trade is affected to such an extent as would be contrary to the interests of the Community.

*Arguments put forward by DP*

- (181) Prior to the Commission's issue of its Statement of Objections on 25 May 2000, DPAG did not at any time invoke the Article 86(2) derogation as a justification for its behaviour in the case at hand. However, in its reply to the Commission's Statement of Objections, DPAG claimed that DPAG always invokes this provision in relevant proceedings. This provision was invoked by DPAG in the GZS/Citicorp case and in particular in respect of the mailings from Citicorp which — in DPAG's view — were no different from the mailings concerned in the present case.
- (182) In its judgment in the GZS/Citicorp case the Court of Justice concluded that, as long as there is no system for terminal dues which covers the costs of the receiving PPO, the application of Article 25 UPU 1989 remains a necessary instrument which DPAG may use in order to fulfil its services of general economic interest. Therefore, the Commission may not use Article 82 in a manner which restricts DPAG's possibilities to charge the full domestic tariff by invoking Article 25 UPU 1989 <sup>(224)</sup>.

*Assessment*

- (183) DPAG must be considered to be an undertaking entrusted with the operation of a service of general economic interest within the meaning of Article 86(2) of the Treaty. As stated above, the senders of the disputed mailings in the present case are not resident in Germany. The considerations of the Court of Justice in the GZS/Citicorp judgment regarding Article 86(2) are therefore irrelevant to the case at hand. The present Decision does not restrict DPAG's rights to justifiably invoke Article 25 UPU 1994 or Article 43 UPU 1999.
- (184) The Commission considers that DPAG could rely upon Article 86(2) only if it could be shown — on the basis of transparent, detailed and reliable internal cost accounting and objective and reliable market data — that the application of the competition rules in the present case would obstruct DPAG's activities to such an extent that the financial equilibrium of the universal service would be jeopardised. DPAG has failed to demonstrate how and to what extent its financial equilibrium would be affected.
- (185) The Commission finds that DPAG's ability to fulfil its universal service obligations would not be jeopardised by the application of the competition rules in the case at hand. First, incoming cross-border mail from the UK only generates a fraction of DPAG's total revenue. Second, postal tariffs in Germany are high and the letter services division of DPAG is highly profitable <sup>(225)</sup>. Third, DPAG's overall financial strength is considerable.
- (186) In any event, the Commission considers that DPAG's abusive behaviour affects the development of trade to an extent that is contrary to the interests of the Community. For this reason alone, the Article 86(2) derogation is not applicable.

**H. Article 3 of Regulation No 17**

- (187) Pursuant to Article 3 of Regulation No 17, where the Commission, upon application or upon its own initiative finds that there is an infringement of Article 82 of the Treaty, it may by decision require the undertakings concerned to bring such an infringement to an end.
- (188) The 'material definition of sender' as interpreted by DPAG in the present case and the measures taken by DPAG when applying this definition, are incompatible with Community law. The abusive behaviour described above has been going on at least since September 1996, i.e. the earliest point in time for which there is evidence in the present case of normal cross-border mail having been intercepted, surcharged and delayed by DPAG <sup>(226)</sup>. The Memorandum of Understanding between the parties of October 2000 does not contain a satisfactory solution for the future handling of incoming cross-border mail by DPAG <sup>(227)</sup>. Although delays are likely to be less frequent in the future as a consequence of the Memorandum, DPAG continues to surcharge normal cross-border mail which it classifies as virtual A-B-A remail. The undertaking submitted by DPAG on 1 June 2001 does not bring the infringement described above to an immediate end <sup>(228)</sup>. The abuse must therefore be considered ongoing.

<sup>(224)</sup> DPAG reply to the Statement of Objections, p. 40.

<sup>(225)</sup> See section I.B. above.

<sup>(226)</sup> See section I.E., subsection 'Gant — The 1996 autumn catalogue', above.

<sup>(227)</sup> See section I.F. above.

<sup>(228)</sup> See section I.G. — 'Undertaking', above. According to point (iv) of DPAG's undertaking, the latter will enter into force three months after the Commission's decision has been notified to DPAG.

- (189) The Commission must ensure with certainty that DPAG will genuinely and permanently terminate the infringement described in Section II.E above. In order to ensure that DPAG will for the future refrain from any action which may have the same or similar object or effect, the Commission finds it necessary to adopt a decision in this respect.

#### **I. Article 15 of Regulation No 17**

- (190) Under Article 15 of Regulation No 17, an infringement of Article 82 of the EC Treaty which has been committed either intentionally or negligently may be sanctioned by the imposition of a fine of up to 1 million euro or alternatively of up to 10 % of the turnover of the undertaking in the preceding business year, whichever is the greater.
- (191) DPAG must have been aware of the fact that the behaviour in question — i.e. the interception, surcharging and delaying of a large number of cross-border letter mail items from another Member State — impeded significantly the free flow of mail between the UK and Germany and that this behaviour had adverse effects on competition to the detriment of the BPO and the senders. Bearing this in mind, the Commission concludes that the infringement was committed at least by negligence by DPAG.
- (192) An infringement of the competition rules like the present one should normally be penalised by fines varying in accordance with the gravity and duration of the infringement. However, in certain cases the Commission may impose a symbolic fine on the undertaking that has committed an infringement. For the following reasons, the Commission deems it appropriate to impose on DPAG only a symbolic fine of EUR 1 000.
- (193) DPAG has behaved in a manner which — at least partially — is in accordance with the case law of German courts. Despite the fact that the Commission considers that DPAG's behaviour in some respects goes beyond what can be determined with certainty from German case law, it must be concluded that the said case law resulted in a situation where the legal situation was unclear. Moreover, at the time when the majority of the interceptions, surcharging and delays in the present case took place, no Community case law existed that concerned the specific context of cross-border letter mail services. Finally, the undertaking submitted by DPAG will introduce a detailed procedure for the processing of incoming cross-border letter mailings which will avoid practical difficulties and facilitate the detection of future infringements, should they occur,

HAS ADOPTED THIS DECISION:

#### *Article 1*

Deutsche Post AG has infringed Article 82 of the EC Treaty by intercepting, surcharging and delaying incoming cross-border letter mailings from the UK sent by senders outside Germany but containing a reference in its contents to an entity residing in Germany.

#### *Article 2*

Deutsche Post AG shall immediately bring to an end the infringement referred to in Article 1 in so far as it has not already done so and shall refrain in the future from repeating any act or conduct described in Article 1.

#### *Article 3*

For the infringement referred to in Article 1, a fine of EUR 1 000 is hereby imposed on Deutsche Post AG.

The fine shall be paid, within three months of the date of notification of this Decision, into bank account No 642-0029000-95 (IBAN BE 76 6420 0290 0095, Code SWIFT: BBVABEBB) of the European Commission, Banco Bilbao Vizcaya Argentaria BBVA Avenue des Arts 4, B-1040 Brussels. After the expiry of that period interest shall be automatically payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first working day of the month in which this Decision is adopted, plus 3,5 percentage points, namely 8,05 %.

*Article 4*

This Decision is addressed to:

Deutsche Post AG,  
Heinrich-von-Stephan-Strasse 1,  
D-53175 Bonn

*Article 5*

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

Done at Brussels, 25 July 2001.

*For the Commission*

Mario MONTI

*Member of the Commission*

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