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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,

COMMISSION DECISION

of 7 October 2008

on the Slovakian postal legislation relating to hybrid mail services

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(Only the Slovakian text is authentic)

C(2008) 5912 THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having given the Slovak authorities and Slovenská pošta, a. s. the opportunity, by letter of formal notice of 17 June 2008 to make known their views on the objections raised by the Commission with regard to the Slovak postal legislation relating to hybrid mail services

Whereas:

1. THE FACTS

1. The present case concerns hybrid mail services. In the present decision, hybrid mail service is defined as a service whereby the content of communications is electronically transmitted to the service provider, electronically processed and converted into the physical form of a letter mail item (printed and enveloped) and then physically delivered to the addressee.

1.1. The national measure in question

2. In the Slovak Republic, Act No. 507/2001 Coll. on Postal Services as amended by Act No.15/2004 (hereafter the "Postal Act") contains the legislative rules on postal services.¹ According to § 1 (2) of the Postal Act, the Postal Act implements the Postal Directives of the EU.² Prior to 1 April 2008, the relevant sections of the Postal Act had the following wording:

¹ The Postal Act can be accessed, in the Slovak original, as well as in an English translation, on the website of the Slovak Postal Regulatory Office, <http://www.posturad.sk>.

² Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15/14 of 21.1.1998, as amended by Directive 2002/39 of 10 June 2002, OJ L 176/21 of 5.7.2002 (hereafter: "the Postal Directive"). Directive 97/67/EC has since been further amended through Directive 2008/6 of 20 February 2008, OJ L 52/3 of 27.2.2008. According to Article 2(1) of that Directive, the Member States shall implement the amending rules until 31 December 2010. By derogation to Article 2, certain Member States (amongst which Slovakia) may postpone the

"§ 2 Postal Services

Postal services involved clearance, sorting, transport and delivery of postal items (§ 4).

§ 4 Postal Items

(1) Postal items are communications or items addressed and laid out in the final form in which they are to be delivered by the provider of the universal service.

§ 5 Postal Company

(1) A postal company is an entrepreneur providing postal services.

(2) The provision of postal services occurs if the scope of business of the entrepreneur is clearance and delivery of communications and items that are postal items under § 4.

(3) A postal company may provide postal services only under the trade license, within scope of a general authorisation (§ 14) and under conditions stipulated by this Act.

...

(4) An item of correspondence is a communication in written form on any kind of physical medium to be delivered at the address indicated by the sender on the item itself or on its wrapping. Books, catalogues, newspapers, and periodicals shall not be regarded as items of correspondence but they may be included in the content of letter items or parcels.

§ 7 Postal Reservation

(1) Postal reservation means postal services reserved for the universal service provider only.

(2) Postal reservation comprises clearance (collection) and distribution of

(a) items of correspondence and direct mail items up to 50 g in weight;

(b) items of correspondence to be delivered to the addressees in person involved in legal proceedings and procedures before administrative bodies (hereafter referred to as "official item").

(3) Postal reservation shall not apply to items of correspondence and direct mail items under paragraph 2 (a), if:

(a) the postal charge for such an item is equal to or more than two and a half times the rate charged by the universal service provider for items of correspondence in the first weight step of the fastest standard category;

implementation of this Directive until 31 December 2012, in order to continue to reserve services to universal service provider(s).

(b) such an item is a document accompanying items delivered at the same time; or

(c) such an item is distributed within the domestic service by a postal company that has cleared (collected) this item abroad.

§ 23 Agreement on Providing a Postal Service

(1) Postal services shall be provided on the basis of an agreement on providing a postal service (hereafter referred to as "the agreement") between the postal company and the sender. Under the agreement, the postal company shall undertake to deliver the postal item cleared (collected) or payment remitted to the addressee under the postal terms and conditions, and the sender shall undertake to pay the postal charge according to the tariff.

(2) The type of the postal service and the postal charge are essential particulars of the agreement. The agreement is deemed to be concluded when the postal item is cleared (collected).

(3) The sender's rights arising from the agreement shall come under the prescription period after one year of the date when the postal item is cleared (collected); if the postal item is stored, of the expiration date of the period of storage (§ 31 paragraph 6). "

3. On 5 March 2004, the Postal Regulatory Office adopted a general authorisation for providing postal services under the Postal Act (hereafter the "General Authorisation") in accordance with § 14 of the Postal Act.³ Prior to 18 July 2008 the relevant sections of the General Authorisation read as follows:

Article 1 – General provisions

"1. General Authorisation for providing postal services (hereafter referred to as "authorisation") is decision stipulating general conditions of providing postal services by postal companies on territory of the Slovak Republic.

2. Postal service includes clearance and distribution of postal items.

3. Clearance of postal items is admission of postal items from sender and collection by postal company.

4. Distribution of postal items is their sorting, transport and delivery to the addressee to the place according the address or by other agreed way.

5. Document exchange and hybrid mail do not satisfy terms according the § 2 and 4 of the Act No. 507/2001 Coll. on Postal services as amended by Act No. 15/2004 Coll. (hereafter referred to as "Act") and they are not considered the postal service according the Act.

(...)"

³

Bulletin of the Ministry of Transport, Post and Telecommunications of 5 March 2004.

4. Since hybrid mail was thus not considered a postal service under national law, it could not fall within the reserved area, that is the services reserved to the postal incumbent Slovenská Pošta a.s. (hereafter "Slovenská Pošta"). On that basis, market players gradually entered the hybrid mail market and customers tendered for hybrid mail services.

5. On 8 March 2005, Prvá Doručovacia (hereafter "PD"), a Slovak company asked the Postal Regulatory Office in writing for clarification of the status of hybrid mail services in relation to the reserved area. PD's request was worded as follows:

"Recently, we keep having problems with the interpretation of the legal status and validity of the postal reservation. Since we cannot find a general definition for the hybrid mail, we ask the Postal Regulatory Office for its statement that:

The items that are not delivered to the distribution company in completely prepared condition, and the company has to process them before distribution by packaging them, addressing them and presorting them, etc... are not considered to be an item of the Universal postal service and are not subjected to the postal reservation."

6. By letter of 22 March 2005, the Postal Regulatory Office answered as follows:

"A hybrid mail item in electronic form is not correspondence under Section 4 (4) and Section 7 (2) [of the Act on Postal Services], but a hybrid mail item in written form constitutes correspondence under these provisions of the Act. You have not specified in your letter the form in which the item will be delivered to your company. If it is delivered in electronic form and you will transform it into written form, the provision of Section 4 (4) on correspondence and the related provision of Section 7 (2) on collecting and distribution of correspondence will not be satisfied. The postal service provided in such a way is not subject to postal reservation. The statements in §4, section 4, §7, section 2 and §42, section 6 will be fulfilled in case the item will be delivered to you in written form, into which it was transformed by another person on demand of the sender. In such case it would mean the violation of the postal reservation, because the person who was transforming the item from electronic form in to the written form carried out a posting of correspondence on behalf of sender."

7. On 8 September 2006, the Postal Regulatory Office published in the Bulletin of the Ministry of Transport, Post and Telecommunications a proposal for an amendment of the General Authorisation for providing postal services⁴. The objective of this amendment was to change the wording of Article 1(5) of the General Authorisation. Indeed, under the proposal, that Article, which so far was providing that hybrid mail is not a postal service, was to read: *"hybrid mail is a postal service"*.

8. On 2 October 2006, the Ministry for transport, Post and Telecommunications submitted comments. It notably explained: *"The inclusion of the hybrid mail service under postal services brings out the question of the mutual relationship between hybrid mail and the universal postal service and, specifically, the reserved area. In finding the solution on this issue, we would recommend to take especially into consideration the provisions of the Green Book of 1992 (point 3.7), Directive 97/67/EC together with the Communication of the Commission on the application of*

⁴

Bulletin of the Ministry of Transport, Post and Telecommunications of 8 September 2006.

competition law in the postal sector (...) (98/C 39/02) (point 2.4), especially insofar as the relevant markets are concerned. Furthermore, we would like to draw your attention, for example, to the decision of the Commission no. 2001/176/EC related to the provision of hybrid mail services in Italy (enclosed). At the same time, we recommend to you that you consult the solution of the issue of hybrid mail with the Antimonopoly Office of the Slovak Republic."

9. However, on 6 October 2006, the Antimonopoly Office of the Slovak Republic indicated that, in its view, the draft General Authorisation would infringe the Postal Act as well as EU law⁵. Indeed, the national competition authority stated that:

"by qualifying hybrid mail as a postal service, the Postal Office is going beyond § 2 and § 4 of Act num. 570/2001 on Postal Services". The new authorisation "would enlarge the application of the Act 570/2001 on Postal Services, which is in theory not lawful". Moreover, it indicated that the "Ratification of this proposed amendment could be considered as an infringement of Art. 86(1) of the EC Treaty in conjunction with Art. 82 of the EC Treaty".

10. In the same vein, TNT Post Slovensko (hereinafter "TNT"), which recently started providing hybrid mail services in Slovakia, lodged a detailed statement to the Postal Regulatory Office in October 2006 to protest against the proposed amendment:

"the hybrid service provider provides services where the provider receives an order or communication in electronic form from the ordering party, based on which it carries out the specific activity of producing the obtained electronic information in printed form and creating a postal item. Collection of the postal item pursuant to Section 4 (1) of the Act on Postal Services therefore does not take place in the case of hybrid mail. The provider only subsequently produces the item in its physical form and consequently delivers it to the person as instructed by the ordering party".

11. The Postal Regulatory Office replied to TNT on 5 December 2006, indicating that the amendment would not be adopted owing to the arguments raised by TNT and other objecting parties:

"After reviewing your objections and the resulting request, the proposal for change of the concerned provision and overall contribution to the regulation of market of postal services have been reconsidered. We inform you that your objections were reflected and the Art. 1 (5) [the provision that qualified hybrid mail as a postal service] was released from the changes of the General Authorisation. [...] With respect to the objections and standpoints of other parties concerned we assume that the release of Art. 1 (5) from the proposed change of General Authorisation is a clear expression of their evaluation and reflection."

12. As announced by the Postal Regulatory Office, the draft amendment was *in fine* not adopted.

⁵ Letter from the Antimonopoly Office of the Slovak Republic to the Postal Regulatory Office of 6 October 2006.

13. On 30 March 2007, TNT sought clarification from the Ministry of Transport, Post and Telecommunications as to whether any legislation was in preparation with a view to changing the applicable framework.
14. The Ministry replied on 10 April 2007 that that was not the case:
- "With respect to the provision of postal services, MTPT SR currently does not prepare any amendment to Act No. 507/2001 Coll. on Postal Services as amended."*
15. In June 2007, Slovenská Pošta lodged a complaint with the Postal Regulatory Office against Direct Marketing a.s. ("Direct Marketing") which is PD's mother company. The background of that complaint was a marketing campaign by UniCredit Bank Slovakia and ABB Bank, which had recently merged. As part of that campaign, correspondence content was electronically transferred to Direct Marketing, which printed that content and handed over these items to PD. PD then distributed the items. Slovenská Pošta alleged that this activity infringed its exclusive right and submitted that the service in question fell within the reserved area. Slovenská Pošta lodged a number of similar complaints in 2007 and 2008 for an alleged breach of the postal monopoly, none of which having reached a final decision so far.
16. In a decision dated 25 September 2007, the Postal Regulatory Office rejected the complaint and stated:
- "According to the Postal Service Act, there is no unambiguous obligation to deliver mail exclusively through the network of the universal service provider. Any physical or legal person can choose the mode of delivery, e.g. by its own means. Delivery of mail by its own means (correspondence or addressed advertising mail) provided that the contract pursuant to § 23 of the Act on postal services is not concluded and as long as the postal service within the meaning of § 2 of the Act is not provided and as long as the conditions of § 5 or 7 of the Act are not fulfilled, cannot be qualified as part of reserved service. Any action by an undertaking which does not include collection and distribution of mail or addressed advertising mail cannot be considered as part of reserved service. According to § 5 of the Act, a postal service is provided only if an undertaking performs collection and distribution of mail (material object within the meaning of § 4)".*
17. On 5 November 2007, Slovak Telekom a.s. (hereafter "Slovak Telekom") issued a tender for *"processing and delivering invoices for Slovak Telekom, a.s."*. This tender was considered to be one of the most important contracts in value terms with approximately a yearly turnover of SKK [100 – 150] millions/€ 3.0 – 4.6 millions. Four different companies answered the tender, including Slovak Mail Services, TNT and Slovenská Pošta. Slovak Telekom's tender committee decided first to select TNT and Slovak Mail Services in a shortlist and secondly to award the tender to Slovak Mail Services but the contract was not signed immediately. Slovak Telekom and Slovak Mail Services indeed entered into exclusive negotiations in order to finalise the contractual conditions. The parties planned to engage into a three-year contract, with a possibility of an extension to a five-year contract. Those negotiations were subsequently suspended.
18. On 8 November 2007, members of the Slovak Parliament introduced a legislative proposal aiming at reserving the delivery of hybrid mail to Slovenská Pošta. The

explanatory memorandum prior to the second reading in the Slovak Parliament explained that:

"postal reservation leading to a monopoly for letters up to 50g is a standard form of guaranteeing compensation for the undertaking responsible for universal postal services".

It was furthermore explained that the draft Act should serve to clarify ambiguities in the law as it stood:

"Currently, the alternative postal operators are exploiting the ambiguity of the already mentioned law no. 507/2001 Coll on postal services as later amended. [The Amendment] concerns a grammatical and substantive correction of the text in order to exclude possible errors in interpretation of the meaning of this provision."

19. In an undated document, the Ministry of Transport, Post and Telecommunications recommended that the Government approve the parliamentary draft. The document notably finds that the draft does not infringe EU postal directives.

20. On 30 November 2007, the Postal Regulatory Office issued a statement entitled *"viewpoint on hybrid mail"* according to which

"the phase of the hybrid mail from creation of the postal item up to its delivery is a postal service. [...] The Postal Regulatory Office will assess the activity of providers of services related to the hybrid mail in the meaning of this standpoint as of its publication on 30 November 2007."

21. On 22 January 2008, the President of the Postal Regulatory Office repealed the Office's decision of 25 September 2007 to reject the complaint submitted by Slovenská Pošta as follows:

"It is obvious from the established facts that the first-instance body did not make it sufficiently clear that Direct Marketing, a.s., PARCO, s.r.o. and UniCredit Bank Slovakia, a.s. had not carried out activities meeting the requirements of Section 2 of the Postal Service Act and that in pursuing their activities, the companies never concluded a contract for the provision of postal services pursuant to Section 23 of the Postal Services Act and that, as a result, no clearance or distribution of mail items covered by the reserved postal services pursuant to Section 7(2) and (3) of the Postal Service Act occurred."

22. The case has now been remanded to the Postal Regulatory Office for a new decision. However, this procedure is still ongoing and no decision has been taken yet.

23. In reaction to the Parliament's legislative proposal of 8 November 2007, the Department of Approximation of Law, the unit in charge of reviewing compliance of national law with EC law within the *Governmental Legislation Division* of the Slovak Republic Government Office, warned about the risk of illegality of such law in its opinion dated 3 January 2008:

"Based on the aforementioned, we are of the opinion that the proposed extension of the postal reservation by the provision of partial postal services could contravene the aim of the Directive 97/67/EC, and therefore it is not possible to reserve the

distribution itself and the collection itself of items of correspondence only to a universal service provider. The proposed reservation would contravene not only the aim of the Directive 97/67/EC, but as the proposal does not declare that it is not possible to conduct this service in case of non-reservation, nor that this reservation is necessary for the conduct of this service under economically acceptable conditions, the presented proposal is inconsistent even with the judgment of the EC Court of Justice No. C-162/06."

24. On 30 January 2008, the Legislative Council of the Government, which is in charge of ensuring the legality of all new legislation to the government, also took a negative stance on the proposed extension:

"By the proposed change the scope of the postal reservation and provision of postal services would be extended. [...] The proposed extension of the postal reservation would in addition be possibly in contradiction with the aims of Directive 97/67/EC."

25. In spite of these reactions, the proposal was eventually adopted in second and third reading on 15 February 2008 and entered into force on 1 April 2008 (hereafter: "the Amendment").

26. § 5(2) of the Postal Act, now reads in its amended form:

"The provision of postal services occurs if the scope of business of the entrepreneur is clearance or delivery of communications and items that are postal items under § 4."

27. Similarly, §7(2) of the Postal Act has been amended and now reads:

"Postal reservation comprises clearance or distribution of (...) items of correspondence and direct mail items up to 50g in weight (...)".

28. As a result, the delivery component of hybrid mail services, which does not include the clearance, that is to say the collection of postal items, now falls within the scope of the reserved area. It follows that postal operators which previously exercised this activity are prevented by law from delivering items of hybrid mail correspondence below the price and weight limit of §7 of the Postal Act.

29. On 24 April 2008, the Postal Regulatory Office published the draft of an amended General Authorization and issued a press release. The proposal foresaw in particular to delete §1 (5) of the text then applicable (namely the sentence stating that hybrid mail is not a postal service).

30. The amended General Authorisation was published on 18 July 2008 and entered into force the same day. As proposed, it deletes §1 (5) of the previous General Authorization.

31. As a consequence of these changes, the delivery of hybrid mail by companies other than Slovenská Pošta is no longer allowed by the Postal Act. In particular, in April 2008, the Postal Regulatory Office received and instructed a complaint from Slovenská Pošta concerning a possible breach of its exclusive rights in relation to the Slovak Telekom's tender. On 22 April 2008, the Postal Regulatory Office received confirmation from Slovak Telekom that :

"the tender in question held for the processing and delivering of invoices for Slovak Telekom, a.s. was not completed; Slovak Telekom, a.s. did not conclude any contract with a postal undertaking authorised to provide postal services other than Slovenská pošta, a.s. and no clearance or distribution of mail up to 50g in weight by an alternative distributor occurred".

32. On 9 September 2008, the Postal Regulatory Office has presented a revised draft General Authorization (published on 16 September 2008). In its relevant part, the text reads as follows:

"Postal services provided together with services with added value do not fall within the reserved area, provided the postal charge payable on such service is at least equal to or higher than 2,5 x the tariff price of the provider of the universal service for correspondence in the first weight group of the fastest standard category. Services which increase the speed or reliability of postal items deliveries may be considered as services with added value."

33. The Commission however notes that since 1 January 2006, a service whose price is equal to, or more than, two and a half times the public tariff for an item of correspondence in the first weight step of the fastest category, can in any event not be reserved under Article 7 of the EU Postal Directive (and under the corresponding provision of the Postal Act). The draft General Authorisation therefore only confirms that services which cannot be reserved under the Postal Directive (and which, in fact, are not reserved under the Postal Law) are not reserved.

1.2. The relevant service

34. For the purpose of the present decision, hybrid mail means a service whereby the content of communications is electronically transmitted to the service provider, electronically processed, converted into the physical form of a letter mail item and physically delivered to the addressee. In the words of the Commission's 1991 Green Paper on the development of the single market for postal services, hybrid mail (called "postal electronic mail") *"involves the transmission of an electronic image of a document or its conversion in digital format and transmission to a distant point, where the image is printed out, enveloped and sent to the addressee"*⁶. Since the collection of physical mail items is thus replaced by the electronic transmission and processing of the sender's message, hybrid mail in principle avoids storage and sorting of paper mail and reduces transportation costs.

⁶ COM(1991) 476 final, p. 46. The Universal Postal Union, a specialised agency of the United Nations, defines hybrid mail as follows: *"Hybrid mail is an electronic-based postal service whereby the sender posts the original message in either a physical or an electronic form, which is then electronically processed and converted into a letter-post item for physical delivery to the addressee. [...] Where physical delivery to the addressee is used, the information is generally transmitted by electronic means for the longest possible part of the process and physically reproduced at a premises as close to the recipient's address as possible."* (Article RL 255 of UPU's Letter Post Regulations)

35. Hybrid mail constitutes a breakthrough in postal services. In its report "*Global Postal Market: past, present and future indicators*"⁷ (2004) the Universal Postal Union stated that :
- "postal operators also increasingly use new information and communication technologies to develop new products and services and improve their operations in order to become more competitive. Barcodes, track and trace technology, delivery performance and hybrid mail are just a few examples. Almost a quarter of public operators already offer hybrid mail services and already 70% of those who do not yet provide them plan to do so within 5 years."*
36. This service fulfils in particular the specific needs of certain large companies such as banks, insurance companies or telecom operators for marketing and consumer relation purposes, typically involving large mail volumes and mail items consisting mainly in bills, invoices, etc. the content of which is often already available in electronic form. Given the nature of such documents, the weight of hybrid mail items is in practice typically below 50g.
37. Conversely, this service is less appropriate for residential customers or small businesses, which usually print and envelope letters by themselves and post them in mail boxes.
38. Moreover, certain hybrid mail service providers in Slovakia, such as Slovak Mail Services, offer additional services such as track and trace services and 7 days a week delivery. For the purpose of hybrid mail, track and trace services are distinct from those relating to express delivery services (which generally allow for online checking). With regard to hybrid mail, Track and Trace service rather consists in the transmission of an electronic report by the postal service provider to the sender reporting for each postal item information on whether it has been delivered or not, and when. Slovenská Pošta claims that it is the only company in Slovakia to provide a number of specialized services (registered, insurance, delivered to addressee in person, delivered with advice of delivery, delivered to addressee in person with advice of delivery and - for first class mail only - a service called "RS-Special"⁸). It however does not claim to provide a track and trace service (delivery reports) for hybrid mail items.
39. This additional service enables companies to keep track of mail items such as invoices and to know when these invoices have been distributed. In the course of this investigation, Slovak Telekom confirmed that this feature was one of the tender's

⁷ See http://www.upu.int/news_centre/documents/en/brochure_the_global_postal_market_past_present_and_future_indicators_en.pdf.

⁸ The "RS – Special" service, as described on the website of Slovenská Pošta, presents the following features: "the service is provided only to "1st Class" letters in domestic service; it provides a guarantee of routing time, a flat-rate guarantee against risks of loss, damage and deficiency of content or destruction of a postal item, and a certificate of its posting for a sender; it gives the information about a result of delivery on the website www.posta.sk or through the Customer Service; posting is made at post office counters, with receipt; in the left top corner of the address side, a sender gives the note "RS" and the note "1. trieda" ("1st Class"). He may ask for this service also verbally." <http://www.eng.posta.sk/page/279>

selection criteria and is of key importance for consumer relation purposes. It allows Slovak Telekom to reduce the cost for collecting payments and avoid bad debts⁹.

40. Under EU law, the delivery of hybrid mail falls within the definition of postal services as set out in Article 2(1) of the Postal Directive. Other aspects of hybrid mail services (such as the electronic transmission and processing of the information and the printing) are not postal services within the meaning of the Postal Directive and cannot therefore be reserved.
41. It follows that at least all aspects of hybrid mail up to but not including the actual delivery of hybrid mail items are liberalised throughout the EU. Conversely, in certain Member States the delivery of hybrid mail items is reserved to the universal service provider. In this case, hybrid mail companies prepare mail from an electronic format and inject them into the network of the universal service provider, who is therefore in charge of delivery.

1.3. The companies concerned

Slovenská Pošta

42. Slovenská Pošta is the provider of the universal postal service in the Slovak Republic. In addition to postal services, it also provides financial services and express and logistic services. In 2007, Slovenská Pošta employed 15,849 registered employees including 5941 postmen¹⁰.
43. Pursuant to the Postal Act 349/2004 on the transformation of the Slovak Post of 1 October 2004, Slovenská Pošta is an undertaking wholly owned by the Slovak State. Before 1 October 2004, Slovenská Pošta was a public corporation.
44. As provider of the universal service, defined in §3 of the Postal Act, Slovenská Pošta is obliged to provide a set of postal services to all users on every working day, at least with one clearance and delivery per day at the same price throughout the territory of the Slovak Republic. This activity includes clearance and distribution of letters and parcels and services for registered items and insured items. Slovenská Pošta's prices must be affordable. Slovenská Pošta also provides hybrid mail services; the delivery of items of hybrid mail is considered by Slovenská Pošta as being part of its universal service obligation. As a consequence, Slovenská Pošta's

⁹ By way of further explanation of the operation of track and trace services, reference is made to SMS's answer to the following tender criterion in the Slovak Telekom tender: "Supplier will execute a control upon delivering of documents by the Track & Trace system at every invoice submitting to the Slovak Telekom, a.s.". SMS answered: "Slovak Telekom, a.s. will receive an evaluation of delivered items with the date of delivering and undelivered items with the reason of not being delivered stated, within the frame of Track & Trace solution after delivering is finished. In case that a postman will deliver all of the items on the first delivering day, he will report finished delivering as well as all of the undelivered items including a reason of miscarriage to the supplier by SMS. In case that a postman will not deliver all of the items on the first delivering day, he will report this to the supplier by SMS. An employee responsible for the postman will contact him and will note down in the system delivered items. At the end of the second delivering day a postman will send an SMS with a list of undelivered items including a reason of miscarriage. Documents' delivering quality control includes also standard procedures like imaginary items or revisory addresses".

¹⁰ Source: Annual Report 2007.

price for hybrid mail delivery is the one set by the Postal Regulatory Office for the delivery of mail items below 50g.

45. Under § 16(1) of the Postal Act, the Postal License imposes the universal service obligation on an undertaking and defines the scope and the conditions of its provision. Under these rules (and in particular under an Annex to the Postal License which further defines the quality requirements incumbent on the universal service provider), Slovenská Pošta has to fulfil certain quality requirements for delivering items falling within the scope of the universal service. These quality requirements include an obligation to deliver a certain percentage of mail items within a defined period of time¹¹. The Postal License and the above-mentioned annex define obligations with regard to the accessibility of contact points of the postal network. Under § 21 Postal Act, state regulation applies to the charges for the provision of services which are part of the universal service obligation. Decisions on the regulation of charges are made by the Postal Regulatory Office. § 21 of the Postal Act refers to "economically justified expenses incurred by the universal service provider" as a guiding principle for the regulation of these charges. There is no legal obligation to provide track and trace services or 7 days a week delivery and Slovenská Pošta did not offer such services as part of its offer to Slovak Telekom.
46. The turnover (in SKK) as provided by Slovenská Pošta to the Postal Regulatory Office for the years 2005 to 2007 corresponding to respectively the reserved area, the universal service area (including reserved area) and other services are displayed below (in thousand SKK):

Year	2005	2006	2007
Reserved area	2.473.500	2.344.530	2.658.953
Universal service area	4.837.244	5.181.969	5.452.461
Other services	3.252.320	3.402.095	3.615.688
Total	8.089.565	8.584.064	9.068.149

47. The profits of respectively the reserved area, the universal service area and the total profit before tax as indicated in the separated accounts of Slovenská Pošta are displayed below (in thousand SKK) :

	2005	2006	2007
Profit of the reserved area	72.086	282.315	327.666
Profit of the universal service area	558.978	655.873	437.306
Total Company profit before tax ¹²	626.167	554.404	311.949

48. Slovenská Pošta has been profitable since 2005 and has distributed every year a dividend to its shareholder.

The competitors

¹¹ For instance in 2006, 96% of items falling in the "first class letter" category had to be delivered in day + 1.

¹² Certain of the activities of the company are not profitable but are not part of the universal service.

49. The main competitors of Slovenská Pošta in the market for hybrid mail services are Slovak Mail Services, Cromwell and PD.
50. Slovak Mail Services and Cromwell have complementary activities in the field of hybrid mail. While Cromwell disposes of the equipment for printing, Slovak Mail Service has the delivery network for the distribution of postal items. In practice, Cromwell has direct access to Slovak Mail Service's network on the basis of labour-law relations with Slovak Mail Services employees.
51. Cromwell started printing hybrid mail items in 2006 and handed them to Slovenská Pošta for delivery. Slovak Mail Services was founded in April 2007. The two companies joined forces and started gradually to deliver hybrid mail through their own delivery network as of 1 June 2007. The coverage of Slovak Mail Services' network had reached 87.9% in terms of households at the end of 2007. Slovak Mail Services is also active in non-addressed publicity (including printing) and direct mail above 50g.
52. PD has been both printing and delivering hybrid mail items since 2005. Since that date, PD has used both its own distribution network and the distribution network of Slovenská Pošta for the delivery of hybrid mail. PD covers approximately 65% of the country in terms of households. PD distributed respectively 0.5, 4.9 and 5.8 million hybrid mail items in 2005, 2006 and 2007. PD is also active in the distribution of postal items above 50g.
53. On 1 January 2008, Slovak Mail Services and PD employed 3200 postmen and 640 postmen respectively under a performance contract. On 1 January 2008, Slovak Mail Services, PD and Cromwell had 53, 88 and 58 full time employees respectively.
54. Slovak Mail Services and PD have recently invested in hybrid mail equipment and in the further development of their distribution network. In 2007, Slovak Mail Services and PD made a total loss of SKK 9 million (€ 295 000) and SKK 12 million (€ 369 000) respectively.
55. TNT is a Dutch postal operator active in Slovakia since the acquisition of Shiculka&Macatch S.R.O in 2001. TNT informed the Commission that it recently started to provide hybrid mail services in Slovakia (it is so far a marginal player on the market) and that it planned to develop its hybrid mail business in Slovakia, as illustrated by the fact that it replied to Slovak Telekom's tender of 5 November 2007.

Situation after 1 April 2008

56. The Amendment which entered into force on 1 April 2008 had immediate consequences for the competitors of Slovenská Pošta. The Amendment made it illegal for any other company but Slovenská Pošta to distribute items of hybrid mail correspondence. In addition, the Postal Regulatory Office engaged in proceedings against PD and Slovak Mail Services.
57. Some clients of both Slovak Mail Services and PD's therefore ended certain of their business relations with them pending clarification of the legal situation. Cromwell still provides mail preparation services but since 1 April 2008 hands mail items over Slovenská Pošta exclusively.

58. Slovak Mail Services and PD already informed their shareholders that they would continue to make important losses in 2008 and, on 11 April 2008, asked for a capital injection to avoid insolvency in the short term. Shareholders answered positively to this request and agreed to secure the financial situation of these two companies for a limited period of time.

1.4. Procedure

59. After having received information from Slovenská Pošta's competitors and following an informal exchange of emails between the Commission services and the Slovakian authorities, the Commission services sent on 6 February 2008 an informal letter to the Permanent Representative of the Slovak Republic at the EU and to the Minister in charge of postal services, expressing concerns that the new legislation would:

"not comply with the requirements of the Postal Directive, particularly Article 7 when read in conjunction with recital 21, and may be contrary to the application of the principle of proportionality as defined in European case law".

60. On 12 March 2008, the Slovak Permanent Representative answered the letter of the Commission's services. As explained further below, the reply states that:

"neither the legislative nor the regulatory framework of postal services provision is changed by the Amendment to the Act".

61. It expressed the view that the delivery of hybrid mail has always been reserved to Slovenská Pošta. The letter further refers to the need to ensure the stability of the provision of universal postal service.

62. On 28 March 2008, the Commission services sent a request for information letter to Slovak Mail Services and Slovak Telekom which answered respectively on 4 and 2 April 2008. On 18 April 2008, the Commission services sent an additional questionnaire to Slovak Mail Services which answered on 24 April 2008.

63. The Commission services also sent on 28 March 2008 a request for information to the Slovak Postal Regulatory Office asking in particular for the separate accounts of Slovenská Pošta from 2005 to 2007, pursuant to Article 14 of the Postal Directive.

64. The Postal Regulatory Office answered on 8 April 2008 but only provided the accounting system applicable to Slovenská Pošta and not the accounts themselves.

65. On 21 April 2008, the Commission services sent to the Postal Regulatory Office a second request for information reiterating its demand for the accounting information needed.

66. The Postal Regulatory Office answered on 25 April 2008 by e-mail and provided Slovenská Pošta's accounts for 2005 and 2006. On 6 May 2008, it provided the 2007 accounts.

67. Further requests for information have been sent to Slovak Mail Services by the Commission services during the third week of May 2008.

68. On 18 June 2008, the Commission notified a letter of formal notice to the Slovak Authorities.¹³ A copy of the letter of formal notice was also sent to Slovenská Pošta. In this letter, the Commission took the preliminary view that the Slovak Republic infringes Article 86 in conjunction with Article 82 of the Treaty. Furthermore, the letter of formal notice suggested that the state measure in question could cause serious and irreparable harm to competition unless interim measures are ordered.
69. The Commission thus invited the Slovak Government and Slovenská Pošta to submit their comments in relation to the infringement within one month upon reception of the letter. It also invited the Slovak Government and Slovenská Pošta to comment the possibility to adopt interim measures within two weeks upon reception of the letter.
70. The Slovak Government answered by two letters on respectively the 27 June 2008 and 14 July 2008. Slovenská Pošta answered on 1 July 2008.
71. On 8 August, the Commission sent a further request for information to Slovak Mail Services, PD and Slovak Telecom. Slovak Telecom answered on 19 August 2008. Slovak Mail Services and PD answered on 31 August 2008.
72. The Commission also sent a request for information to the Slovak Government and to Slovenská Pošta on 14 August. They both answered on 28 August 2008.
73. On 2 September 2008, TNT sent a document to the Commission on its own initiative.
74. On 20 September 2008, the Commission addressed a letter of fact to the Slovak Republic and to Slovenská Pošta. Both answered on 26 September.
75. Discussions about possible ways to address competition concerns took place at different levels in July, August and September between Commission services and Slovakian authorities. No appropriate solution could however be found.

2. OBSERVATIONS BY THE SLOVAK GOVERNMENT AND SK POST

76. In its observations submitted to the Commission by letters of 27 June 2008 and 14 July 2008, the Slovak government argued that the delivery of hybrid mail items had always been part of the reserved area (and therefore not open to competition) as a matter of Slovak law and that therefore no extension of a monopoly had taken place. The Slovak government in effect stated that the scope of the reserved area had remained unchanged.
77. Furthermore, while acknowledging that certain doubts about the interpretation of the Postal Act may have arisen, the Slovak government argues that in so far as the Commission referred to certain statements, letters or decisions by Slovak authorities (and in particular to statements, letters and decisions by the Postal Regulatory Office), the Commission had either misunderstood these or that they had been overturned on appeal. In reply to the letter of facts, the Slovak government reiterated that hybrid mail delivery had never been liberalized in Slovakia. To that end, it

¹³ Given the fact that the cover letter of the letter of formal notice which was notified to the Slovak Republic contained a translation error, a corrigendum was addressed to the Slovak Republic on 8 August 2008.

produced a set of documents which – it argues - would have had no sense had the delivery of hybrid mail already been liberalized.

78. The Slovak government claims that no one is providing hybrid mail services in the Slovak Republic, as – in the opinion of the Slovak government – the provision of such services only occurs if the content of the communication is physically produced (printed out and put into envelopes) as near as possible to the site of the addressee. This, it is argued, is not possible in the Slovak Republic, as postal service providers will print out the letters typically in one single site, at Bratislava. This, it is argued is also true for the competitors of Slovenská Pošta.
79. Also, the Slovak government regards hybrid mail services as merely an evolution of traditional mail services and submits that a market for traditional mail services on the one hand and for mail services with so-called "value added services" on the other hand should be distinguished as separate product markets.
80. The Slovak government furthermore alleged that certain mail items which were to be distributed by the competitors of Slovenská Pošta had been found in waste bins.
81. The Slovak government asserted that any possible infringement of Article 86(1) of the Treaty was justified under Article 86(2) of the Treaty as the provision of the universal service by Slovenská Pošta was threatened if the delivery of hybrid mail items was opened to competition.
82. In its answer to the Commission, Slovenská Pošta supported and reiterated many of the arguments raised by the Slovak government, in particular with regard to the question whether the delivery of hybrid mail items had ever been open to competition and whether hybrid mail services were in fact offered and provided in the Slovak Republic.
83. Furthermore, Slovenská Pošta provided the Commission with two statements, one of which prepared by outside consultants, designed to show that the reservation of the delivery of hybrid mail items was necessary for the provision of the universal service by Slovenská Pošta.
84. In reply to the letter of fact, Slovenská Pošta pointed out that there was no valid and legally binding administrative decision which would entitle alternative operators to operate in the hybrid mail market segments for items up to 50 grams. In this respect, it also referred to a number of complaint procedures it had initiated against PD in 2007 and 2008. Furthermore, it considered that additional services offered by competitors are not value-added services, since they only relate to the management of postal items and do not improve the quality of the distribution. It recalled that it offers a number of specialized services to its customers. It finally stressed that most of the on-call contracts entered into by competitors with employees would breach Slovakian labour law.

3. COMMISSION ANALYSIS

3.1. Applicability of Article 86(1) of the Treaty

85. Article 86 (1) reads as follows: *"In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89 ."*

86. A public undertaking is defined as *"any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it"*¹⁴. Since 1 October 2004, Slovenská Pošta is a joint stock company controlled by the Slovak State, which holds 100 % of its shares. Slovenská Pošta is thus a public undertaking within the meaning of Article 86(1) of the Treaty.

87. The Postal Act reserves to Slovenská Pošta the right to distribute certain postal items, as defined in Article 7 of the Act. Slovenská Pošta thus also enjoys exclusive rights within the meaning of Article 86 (1).

88. The Amendment constitutes a State measure within the meaning of Article 86(1) of the EC Treaty as do the enforcement measures by the Slovak authorities against an alleged breach of the reserved area. The Postal Regulatory Office, notwithstanding the fact that it might enjoy independence with regard to the central government and administration of the Slovak Republic, is a public body under Slovak law, invested with public powers and is as such, as regards the application of the Treaty rules, to be regarded as bound by the rules incumbent on the Member States. Enforcement activities of the Postal Regulatory Office are state measures which must conform to the rules of the EC Treaty.

3.1.1. The relevant service markets

89. Two markets are relevant for this case:

- Traditional mail services involving the physical clearance, sorting and distribution of mail items.
- Hybrid mail services involve the electronic transmission of communication content, electronic sorting and routing of mail items and their subsequent physical production and delivery to the addressee.

90. In its reply to the Commission's letter of formal notice, the Slovak Republic has alleged that hybrid mail services – at least as they are, according to the Slovak Republic, offered and practised in that country, do not form a distinct market from traditional mail services. More specifically, the Slovak Republic has submitted that, if the (hybrid) mail items in question are physically produced at one single printing

¹⁴ Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17).

and production site, no genuine difference exists to traditional mail items with regard to the transportation costs incurred. The Slovak Republic contends that such mail items are not genuine hybrid mail items and that they do not belong to a separate market.

91. The Commission has carefully assessed these submissions but comes to the conclusion that hybrid mail services (regardless of the number of printing sites per country) and traditional mail services constitute distinct product markets.
92. These two services present certain similarities, mainly the fact that the item of correspondence in question is ultimately delivered in physical format to the person to whom it is addressed. On a technical level, the difference between the two kinds of services stem from the fact that these items of correspondence are subject to a different chain of procedure and treatment before being delivered to the addressee.
93. In items of traditional mail services, it is necessary to maintain a network of post boxes or post offices which allow the sender to personally either deposit the mail item in a post-box or hand it over the counter of a post office. From these access points, the items of correspondence have then to be transported and sorted before being delivered. The complexity of sorting a large volume of individual mail items means that sophisticated methods of sorting (through sorting machines) and different stages of sorting takes place and that a detailed harmonization between transport services and sorting activities is necessary in order to ensure delivery.
94. Items of hybrid mail, on the other hand, have a completely different path on their way to delivery. These items are electronically produced and electronically transmitted to the site where they are printed, enveloped and finally distributed. The difference to traditional mail services as described above is therefore twofold:
95. First, hybrid mail items do not require many of the kinds of services which are required for traditional mail items: the collection, pre-sorting and parts of the transport of such items are not necessary for items of hybrid mail. The electronic transmittance of the content of these items renders it possible to effectuate the sorting as near to the distribution site as possible (depending on the circumstances of the individual service) and to limit the amount of sorting to be done.
96. Also, the way in which hybrid mail items are treated means that this kind of service is linked to the way certain companies nowadays deal with invoicing: the influence of data treatment possibilities available today (such as complex customer databases) allow companies to function with ever less paper. This is of particular importance for those companies which have significant customer correspondence, such as insurance companies, telecommunication companies and utilities. For example, a telecommunications company will regularly have to send, for each fixed- or mobile phone contract, a monthly invoice. A company facing such a requirement will therefore be particularly interested in managing the paper flow as (cost-) efficiently as possible.
97. Furthermore, hybrid mail users will have a special interest in the security of that transmittance and in additional services such as track-and-trace. It will also have an interest to link, as far as possible, the process of distribution to its own internal data treatment system and to integrate the two, because this will be particularly cost-

efficient and it will allow the advantages of electronic data treatment systems (avoidance of bad credit, address changes and so on) to be used.

98. Such companies will rely on the above-mentioned data treatment possibilities to build and develop their customer-relations and customer-treatment procedures. The particular importance of hybrid mail services stems from the fact that these services are linked to their data treatment systems. For a company which relies on databases for its invoicing (including its treatment of information such as address changes, problems of bad credit and security of invoicing), it is much more efficient to have the possibility to distribute these items of correspondence through a system which is directly linked to its electronic data treatment facilities. Hybrid mail is the link between the internal data treatment system and the external distribution of correspondence. Hybrid mail services are thus linked to product innovation through technological advances.¹⁵
99. These advantages do not, however, mean that hybrid mail services are uniformly well suited for business clients. Hybrid mail services are sought for by clients as a "package" including all stages of the distribution chain, including printing and delivery. This package is not suitable for senders who have an interest in printing their own correspondence for economic reasons or for confidentiality issues. Against this background, users which have invested in in-house printing centres, for instances most of the banks in Slovakia, have no interest to switch to hybrid mail solution. Conversely, companies which already outsource mail preparation may have an interest in switching to hybrid mail.
100. Moreover, hybrid mail services are not appropriate solutions to customers and small businesses that generally do not have the kind of sophisticated data treatment equipment needed.
101. Against this background, it is apparent that traditional mail services on the one hand and hybrid mail services on the other hand fulfil different business and service needs. While a part of these services is similar – both of them concern, in the end, the delivery of an item of correspondence to the addressee – from the point of view of customers who are looking for these kinds of services, each service as a whole corresponds to different needs.
102. From the point of view of the service customer, traditional mail services and hybrid mail services are perceived as two alternative, different means of effectuating the transmittance of content, which are not, as such interchangeable.
103. These two services not only fulfil different needs, but they were also subject to different regulatory constraints. The regulatory environment of a service is recognised as one distinguishing factor for the purposes of market definition. In Slovakia, prior to the adoption of the State measure at stake, traditional postal services were reserved while hybrid mail services, including the delivery of hybrid

¹⁵ Report from the Commission to the European Parliament and the Council on the application of the Postal Directive (97/67/EC Directive), COM (2002) 632final, p. 5.

mail items, were not (see on this aspect below). It follows that the two categories of services were subject to different market dynamics¹⁶.

104. The distinction between hybrid mail services on the one hand and traditional mail services on the other as separate markets is not called into question by the assertion of the Slovak Republic that there is no "genuine" hybrid mail service offered in the Slovak Republic, as the service providers do the printing and the physical production of the mail items in one single printing site. As has been mentioned above, the Slovak government argues that this means that there is no genuine difference in the transportation costs between such "non-genuine" hybrid mail items and traditional mail items. Furthermore, the Slovak Republic has made reference in its responses to the Commission to the definition of hybrid mail by the UPU and alleges that that definition is not fulfilled if the printing and the production of mail items is done at one single site within the country. The Commission has assessed these arguments and has come to the conclusion that they do not alter its assessment that hybrid mail services (regardless of the number of printing sites in the country concerned) and traditional mail services constitute separate markets.
105. The Commission notes, firstly, that even where there is only one printing and production site in any one country, there are considerable cost differences between hybrid mail items printed and produced at that site and traditional mail items. As has been described above, traditional mail items need to be cleared, transported to a sorting centre and sorted. These are relevant steps in the process of dealing with a traditional mail item and these steps do entail costs (including transportation costs) which are absent in a hybrid mail item even if there is only one printing and production site per country.
106. Furthermore, it must be underlined that the UPU definition, to which the Slovak authorities refer for their argument, only mentions that the printing should "*generally*" be done as near to the site of delivery as possible. That definition in itself does not, therefore, suggest an absolute requirement that this be so.
107. Also, the question how near "as possible" the printing should be done to the delivery site is clearly a question of the various costs involved: a printing site necessitates printing machines which are generally expensive assets. An economically rational service provider will decide on the location and number of printing sites by putting into relationship the cost of a supplementary printing site with the transportation costs. The decision will therefore depend on a number of variables, including the size of the country to be served, labour costs, etc... The outcome of such decision-making cannot be prejudged by requiring that there must be more than one printing site, regardless of the economic realities of the individual case, which would be likely to determine such decision.
108. The Slovak Authorities and Slovenská Pošta have made several statements in the past referring to hybrid mail as an economic activity currently offered in the Slovak Republic. The fact that hybrid mail was referred in the General Authorisation in

¹⁶ See Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5, and Commission Notice on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, OJ C 39, 6.2.1998, p. 2.

March 2004 indicates that there was already on that date a common understanding on the notion of hybrid mail. In its 2006 and 2007 annual reports, Slovenská Pošta provides data and figures on its own hybrid mail activities¹⁷. On 30 November 2007, the postal Regulatory Office also made a statement on hybrid mail. Furthermore, in its letter of 12 March 2008, the Slovak Government took the view that "*Since extensive discussions arose which led to the above-mentioned amendment to the Act, the Postal Regulatory Authority published on its website an opinion on hybrid mail clarifying the part of hybrid mail to which the general authorisation refers*". These statements show that hybrid mail constitutes an economic activity with special characteristics and a particular market environment.

109. Consequently, in the course of this procedure, the question of whether or not the notion of hybrid mail as referred to by the Slovak Authorities and Slovenská Pošta fulfils the UPU definition and the UPU standard is without importance to the analysis of this case.
110. On the basis of the above, hybrid mail services and traditional mail services are thus part of two separate, but neighbouring service markets.

3.1.2. *The relevant geographic markets*

111. The case at hand concerns both domestic hybrid mail and traditional mail services. The geographic scope of the markets concerned is Slovakia.
112. The fact that the monopoly granted to Slovenská Pošta covers only the Slovak territory makes the geographic dimension of the traditional postal services market coincide with this territory.

3.1.3. *Dominant Position on the market for traditional mail services*

113. According to constant case law, an undertaking holding a statutory monopoly on a substantial part of the common market is considered to occupy a dominant position within the meaning of Article 82 of the Treaty¹⁸. Slovakia is a substantial part of the common market¹⁹ within which, as demonstrated earlier, Slovenská Pošta has been granted an exclusive statutory licence to provide basic postal services.

¹⁷ For instance, in its 2007 Annual Report, Slovenská Pošta indicates that "Hybrid mail is a service of Slovenská pošta, a. s., through which it provides complex solutions for the processing of bulk mail. It consists of a full service starting with the safe transmission of data, through processing of mail (printing and enveloping) and ending with posting of the processed mail to distribution by post".

¹⁸ See, inter alia, Case C-41/90 *Höfner and Elser* [1991] ECR p. I-1979, para. 28; Case C-260/89 *ERT* [1991] ECR p. I-2925, para. 31; Case C-320/91 *Corbeau* [1993] ECR p. I-2538, para. 9; Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR p. I-5889, para. 14; Case C-163/96 *Raso and others* [1998] ECR p. I-533, para. 25.

¹⁹ The territory of a Member State may form a substantial part of the common market: see e.g. Case 322/81 *Michelin v. Commission* [1983] ECR p. 3461, at para. 28; Case C-7/97 *Bronner* [1998] ECR p. I- 7791, para. 36.

3.1.4. *Infringement of Article 86(1) in conjunction with Article 82 of the Treaty*

114. In its 1998 Postal Notice²⁰, the Commission set out its approach as regards the respect of competition rules in the postal sector. The Notice stresses that "... *the Commission will ensure that monopoly power is not used for extending a protected dominant position into liberalized activities.*" The Notice further clarifies that "... *the use, without objective justification, of a dominant position on one market to obtain market power on related or neighboring markets which are distinct from the former, at the risk of eliminating competition on those markets*" would be contrary to Articles 86 in conjunction with Article 82 EC. More particularly, the use of a dominant position to extend the monopoly from the reserved market to a previously liberalized market would be "...*incompatible with the Treaty provisions, in the absence of specific justification, if the functioning of services in the general economic interest was not previously endangered. The Commission considers that it would be appropriate for Member States to inform the Commission of any extension of special or exclusive rights and of the justification therefore.*"

115. The Commission has come to the conclusion that the State measure at stake infringes Article 86(1) in conjunction with Article 82 of the Treaty in two ways:

3.1.4.1. Extension of Slovenská Pošta's exclusive right

116. According to the Court of Justice of the European Communities, an abuse within the meaning of Article 82 is committed where, without any objective justification, an undertaking holding a dominant position on a particular market reserves to itself other ancillary activities in neighbouring but distinct markets, although these activities could also be carried out by another undertaking as part of its activities on this neighbouring but separate market.²¹ With regard to Article 86(1) in conjunction with Article 82, it is settled case law that the extension by means of a measure adopted by the State, of a monopoly into a neighbouring and competitive market, without any objective justification, is prohibited as such by Article 86(1) in conjunction with Article 82²².

117. According to the explanatory memorandum, the objective of the Amendment is to ensure that the delivery of all items of correspondence below 50 grams is reserved to Slovenská Pošta. In its letter of 8 April 2008, the Postal Regulatory Office explicitly confirmed that "*Act No 80/2008, which was adopted by the National Council of the Slovak Republic on 15 February 2008, amending the Postal Services Act No 507/2001 changed the wording of Section 5(2) and, subsequently, also Section 7(2) of the Postal Services Act. Under Section 7 of the Act, the distribution of correspondence specified in the Act as being part of the reserved service is also included in the hybrid service process and falls within the scope of reserved postal services*". The state measure in question therefore reserves a part of the value chain

²⁰ Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, OJ C 39 of 6.2.1998, p. 2.

²¹ Case 311/84 *CBEM* [1985] ECR p. 3261, at para. 27; see also Commission Decision of 21 December 2000 concerning proceedings pursuant to Article 86 of the EC Treaty in relation to the provision of certain new postal services with a guaranteed day- or time-certain delivery in Italy, *OJ L 063*, 3.3.2001 p.59, para. 24-28.

²² Case C-271/90 *Spain and others v Commission* ECR [1992] p. I-5833, at para. 36-38, with further reference to judgment in Case C-18/88 *GB-INNO-BM* [1991] ECR p. I-5941, paragraph 18 and 21.

of the hybrid mail service (the distribution of such items) to the incumbent postal operator Slovenská Pošta, while it was liberalised before that state measure.

118. In their replies to the letter of formal notice as well as in subsequent submissions, the Slovak authorities and Slovenská Pošta argued that the legislative changes did not amount to an extension of Slovenská Pošta's exclusive right to the activity of distributing hybrid mail items since this activity already fell within the reserved area before the Amendment. In their view, the purpose of the new law was merely to *"eliminate the possibility of incorrect interpretation of the postal service act"* and to *"confirm and maintain"* the current legal situation.²³
119. The Commission has carefully considered the arguments put forward by the Slovak government and Slovenská Pošta in support of their contention that the delivery of hybrid mail items was always part of the reserved area and that therefore the Amendment merely provides further clarification to the matter. For the reasons set out below, the Commission maintains its conclusion set out in the letter of formal notice that the delivery of hybrid mail items was an activity open to competition prior to the adoption of the state measure in question.

De iure liberalisation by way of the Postal Act

120. Even though the Postal Act in force prior to 1 April 2008 did not mention hybrid mail, its § 5 (2) and § 7 (2) stipulate that only services covering both clearance and distribution of postal items qualify as postal service and are reserved for the incumbent operator. In the same vein, § 23 (1) clarifies that only agreements covering both clearance and delivery qualify as postal service agreements:

"The provision of postal services occurs if the scope of business of the entrepreneur is clearance and delivery of communications and items that are postal items under § 4." (§ 5 (2) of the Postal Act);

"Postal reservation comprises clearance (collection) and distribution of (a) items of correspondence and direct mail items up to 50 g in weight [...]." (§ 7 (2) a of the Postal Act);

"Postal services shall be provided on the basis of an agreement on providing a postal service (hereafter referred to as "the agreement") between the postal company and the sender. Under the agreement, the postal company shall undertake to deliver the postal item cleared (collected) [...], and the sender shall undertake to pay the postal charge according to the tariff." (§ 23 (1) of the Postal Act).

121. As explained above, in hybrid mail the clearance of mail items is replaced by the electronic transmission and processing of the sender's message. A literal interpretation of the Postal Act would thus suggest that hybrid mail services do not qualify as postal services and are not reserved to Slovenská Pošta.
122. In its reply to the letter of formal notice, the Slovak government argues that the wording of the Postal Act should be understood to mean that postal services are

²³ Point 10 of the reply submitted by the Slovak authorities on 1 July 2008, page 3 of the reply submitted by Slovenská Pošta on 1 July 2008.

services involving the clearance, sorting, transport and delivery of postal items and that, therefore, a service provider that provides one or more of these services is a postal service provider. According to the Slovak government, this interpretation is fully in line with the Postal Directive.²⁴ Article 2 (1) of the Postal Directive defines postal services as *"services involving the clearance, sorting, transport and delivery of postal items"*. Article 2 (1a) defines a postal service provider as an *"undertaking that provides one or more postal services"*.

123. It is true that the activities of clearance and delivery, even performed separately, are postal services within the meaning of the Postal Directive. That does not mean, however, that the wording of the Postal Act must necessarily be interpreted in that sense, especially where the wording suggests otherwise. Indeed, the definitions set out in Article 2 of the Directive apply only *"for the purposes of this Directive"*. According to Article 1 of the Directive, the *"common rules"*, i.e. the rules from which Member States are not allowed to deviate, are limited to the universal postal service (including minimum quality standards, tariff principles and transparency of accounts of universal service provision); the (maximum) scope of the reserved area; the harmonisation of technical standards and the creation of independent national regulatory authorities. Member States are not obliged to copy the definitions or the structure of the Postal Directive, as long as they comply with the common set of rules set out in Article 1.
124. The Commission considers, therefore, that the Postal Act in its version prior to 1 April 2008 was at the very least ambiguous in relation to the reservation of hybrid mail services.²⁵

Confirmation of the legal situation by way of the General Authorisation

125. To the extent that Postal Act was unclear concerning the treatment of hybrid mail services, this ambiguity was lifted by the General Authorisation dated March 2004. The General Authorisation explicitly excluded hybrid mail from the scope of postal services: *"hybrid mail" does "not satisfy the terms according the § 2 and 4 of the Act No. 507/2001 Coll. on Postal services [...] and they are not considered the postal service according the Act."* (Article 1(5) of the General Authorisation)
126. In its reply to a request for information, the Postal Regulatory Office seems to argue that the Postal Act takes priority over the General Authorisation by stating that *"the definition of 'postal service' is laid down in the Act, whereas hybrid service was only defined in the General Authorisation, i.e. by secondary legislation"*.²⁶
127. The Commission cannot accept this argument. First, there is no legal act or court ruling overruling Article 1(5) of the General Authorisation, which was therefore valid until the coming into force of the Amendment. The statement of the Postal Regulatory Office of November 2007 in support of the law in preparation does not constitute a legal act in itself and does not annul Article 1(5) of the General

²⁴ Points 1 and 7 of the letter dated 1 July 2008.

²⁵ This ambiguity is even recognised in the Explanatory Memorandum to the new Postal Act which states that the *"aim of the draft bill is to foreclose any misdoubts in the interpretation of the meaning of the enactment §5 and §7"* of the then Postal Act.

²⁶ Letter of the Postal Regulatory Office dated 8 April 2008.

Authorisation. Second, given the ambiguous wording of the Postal Act, rather than contradicting it, the explicit General Authorisation confirmed the interpretation of Postal Act according to which hybrid mail services did not fall into the reserved area.

128. The Postal Regulatory Office also argued that *"the original wording stated that hybrid mail (overall) is not deemed to be a postal service. This is not in conflict with a particular part of it being counted as a postal service"*.
129. This view is supported neither by the wording, nor by the context. The General Authorisation of 5 March 2004 indicated that hybrid mail as such is outside the scope of postal services, without making a distinction between the various phases of the value chain (such as printing, sorting, transport and delivery). Furthermore, the General Authorisation clearly stated that hybrid mail was not considered a postal service because it did not fulfil the conditions set out in § 2 and 4 of the Postal Act, that is collection, clearance, sorting, transport and delivery. As also follows from the legislative changes now made to the Postal Act (change from the conjunction *"and"* to *"or"*) as well as from the decision of the Postal Regulatory Office from September 2007, these conditions were understood as being cumulative.
130. The Commission therefore considers that the General Authorisation, depending on the interpretation of the Postal Act, either explicitly and validly confirmed the *de iure* liberalisation of hybrid mail, or *de iure* liberalised hybrid mail services. On that basis, competitors started engaging in the entire value chain of hybrid mail services, including the business activity of distributing such items.

Confirmatory statements and actions by the Postal Regulatory Office

131. Moreover, the Postal Regulatory Office issued a number of statements that fully confirmed the legal situation as described above.
132. First, in reply to PD's request of 8 March 2005, the Postal Regulatory Office indicated on 22 March 2005 that *"if it is delivered in electronic form and you will transform it into written form, the provision of Section 4 (4) on correspondence and the related provision of Section 7 (2) on collecting and distribution of correspondence will not be satisfied. The postal service provided in such a way is not subject to postal reservation."* The Postal Regulator therefore referred to the distribution aspects of the hybrid mail services and stated that the delivery of such items was not reserved.
133. In its reply to the letter of formal notice, the Slovak government considers that the above quotation, whilst giving rise to certain doubts about its interpretation²⁷, is *"inaccurate, incomplete and taken out of context"*.²⁸ In the Slovak government's view, the Postal Regulatory Office stated, rather, that the qualification depended on the stage (content) of the item delivered: A hybrid mail item in electronic form is not an item of correspondence; however, a hybrid mail item in written form is an item of correspondence.

²⁷ In their letter of 14 July 2008, the Slovak authorities admit that "it is possible that certain doubts about interpretation arose on the basis of the letter from the Postal Regulatory Office".

²⁸ Point 10 of the reply submitted by the Slovak authorities on 1 July 2008.

134. The Commission can only disagree with the statement according to which the above quotation would be out of context. Indeed, the objective of PD's letter dated 8 March 2005 was precisely to ask clarification in relation to *"the interpretation of the legal status and validity of the postal reservation"* concerning its business activity, which it described as follows:

"The items are not delivered to the distribution company in completely prepared condition, and the company has to process them before distribution by packaging them, addressing them and presorting them, etc. ..."

The statement of the Postal Regulatory Office (*"in case that the mail is delivered in an electronic format [...] such postal service is not part of the reserved area"*) can thus only be read as to mean that PD's activity did not fall into the reserved area.

135. Second, the reply of the Postal Regulatory Office to TNT dated 5 December 2006 contains the same assessment of the then legal situation. TNT had protested against the inclusion of hybrid mail into reserved postal services by way of an amended General Authorisation. It argued that legal qualification of hybrid mail as a postal service went beyond the framework of the Postal Act in particular because (i) hybrid mail was not a postal service under the Postal Act and (ii) hybrid mail services could not be provided on the basis of an agreement on providing a postal service within the meaning of § 23 (1) of the Postal Act. The Postal Regulatory Office informed TNT that the plan of qualifying hybrid mail as a postal service in the amended General Authorisation had been abandoned *"after reviewing your objections"*.
136. Third, in its decision dated 25 September 2007 on the complaint by Slovenská Pošta against the delivery of items of hybrid mail by Direct Marketing as part of the marketing campaign of Unicredit Bank and ABB Bank, the Postal Regulatory Office explicitly stated that an activity, which includes the delivery of postal items but not the collection of such items, did not fall within the reserved area and was therefore not covered by the exclusive right of Slovenská Pošta.
137. It is true that this decision has been repealed and returned to the Postal Regulatory Office by the President of the Office on 22 January 2008. However, the repeal was only adopted once it became clear that there was political will to amend the Postal Act in order to qualify hybrid mail as a postal service and to include into the reserved area and after the Office had issued its *"viewpoint on hybrid mail"* dated 30 November 2007. This document stated that *"the phase of the hybrid mail from creation of the postal item up to its delivery is a postal service"*. The last sentence of the viewpoint reveals clearly that the Postal Regulatory Office considered that this constituted a change and that prior to this statement, the Postal Regulatory Office had a different interpretation: *"The Postal Regulatory Office will assess the activity of providers of services related to the hybrid mail in the meaning of this standpoint as of its publication on 30 November 2007."* (emphasis added).
138. The Commission therefore considers that the statements issued by the Postal Regulatory Office further confirmed the *de iure* liberalisation of hybrid mail. On that basis, several operators formed legitimate expectations and invested and engaged in the provision of hybrid mail, without the Postal Regulatory Office acting against

them for breach of the postal monopoly²⁹. From that point in time, hybrid mail services were also *de facto* liberalised.

139. In its reply to the letter of facts, the Slovak government referred to a set of documents in order to confirm its views that the delivery of hybrid mail had never been liberalized in Slovakia. However, the Commission fails to see the relevance of some of the documents referred to by the Slovak government³⁰, since they cannot be understood as meaning that the delivery of hybrid mail items had not been open to competition before. In addition, since some of these documents relate to the events since November 2007, once the proposed modification of the Postal Act was launched, it is not surprising that they refer to the alleged simple need of clarifying the Postal Act.
140. The Slovak government also refers to resolution No 376 of 10 May 2005, by which the government adopted a document called "*analysis of possible means of accelerating the liberalisation of the postal services market from 1 January 2006*". It argues that this document, which contains options with a view to full liberalization, would make no sense if hybrid mail services had already been liberalized. However, the Commission notes that this document is precisely based on the fact that "*only a business activity involving all four stages mentioned above [i.e. clearance, sorting, transport and delivery of postal items] can be regarded as a postal service*". Far from contradicting the views of the Commission, this document is therefore based on the same premise as the letter of the Postal Regulatory Office of 22 March 2005: a service which includes only part of these stages is not a postal service and cannot, by nature, be reserved to the universal service provider.
141. The letter of 2 October 2006 of the Ministry of Transport, Post and Telecommunications to the Postal Regulatory Office, in reply to the public consultation on a draft General Authorization, does not appear conclusive either. It contains open statements which do not reflect any clear and firm views in relation to hybrid mail. The Minister only invites the Postal Regulatory Office to take account of a number of elements in its assessment.
142. Finally, the fact that the Slovak government had notified a planned State aid scheme to the Commission – which was later withdrawn – with a view to compensate the universal service provider for the costs of its universal service obligations once full liberalization of the postal market in Slovakia would have taken place does not exclude the possibility that some postal services would already be open to competition.

Statements by other Slovak authorities in relation to the planned amendment of the General Authorisation and the Postal Act

143. Several authorities issued statements in relation to the planned amendment of the General Authorisation in 2006 and of the Postal Act with a view to including hybrid mail into the reserved area. These statements clearly demonstrate that all these

²⁹ Contrary to Slovenská Pošta's claim, the fact that it had engaged in a number of proceedings against providers of hybrid mail services and some of their customers cannot as such invalidate these expectations.

³⁰ See in particular the documents attached as annexes 4, 5 and 6 of the reply to the letter of fact.

authorities were of the opinion that hybrid mail services were then liberalised in Slovakia.

144. In reaction to the planned amendment of the General Authorisation in 2006, the Antimonopoly Office stated that the new Authorisation *"would enlarge the application of the Act 570/2001, which is in theory not lawful."* (emphasis added)
145. In reply to the proposal for an amendment of the Postal Act introduced in Parliament, the Department of Approximation of Laws noted that the *"proposed extension of the postal reservation [...] could contravene the aim of Directive 97/67/EC [...]."* (emphasis added)
146. Similarly, the Legislative Council of the government stated: *"The proposed amendment would extend the extent of the postal reservation and the extent of postal services provision. [...] Moreover, the proposed extension of the postal reservation could contravene the aim of Directive 97/67/EC."* (emphasis added)
147. In its reply to the letter of formal notice, the Slovak Government indicates that the *"Antimonopoly Office did not base its opinion on the technical aspects of the issue"*.³¹ It is true that the Antimonopoly office has no specific competences in relation to the Postal Act. However, this does not prevent the Commission from noting that the Antimonopoly Office, consistent with the understanding of other authorities and market players, understood the Postal Act prior to the state measure in question to mean that the delivery of hybrid mail is not reserved.³²

Conclusion

148. Consequently, the Commission considers that before the entry into force of the Amendment, hybrid mail delivery services were *de iure* and *de facto* open to competition in Slovakia. Thus, the Amendment extended the exclusive rights of Slovenská Pošta to the activity of distributing items of hybrid mail, an activity which, before the Amendment, was open to competition.

3.1.4.2. Limitation of the output to the end-user

149. It is settled case law that *"an abuse may in particular consist in limiting the provision of a service, to the prejudice of those seeking to avail themselves of it. A Member State creates a situation in which the provision of a service is limited when the undertaking to which it grants an exclusive right ... is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind and when the effective pursuit of such activities by private companies is rendered impossible..."*.³³
150. To the extent that only private operators are able to offer additional services such as tracking services and seven day a week delivery together with their offer of hybrid mail services, the reservation of hybrid mail delivery would deprive customers of these services. These extra services, in particular track-and-trace services, appear to

³¹ Point 5 of the reply submitted by the Slovak authorities on 1 July 2008.

³² The Commission notes that in its letter of 2 October 2006, relating to an earlier proposal to amend the General Authorization (see above, point 7), the Ministry of Transport, Post and Telecommunications had itself recommended the Postal Regulatory Office to get the views of the Antimonopoly Office.

³³ Case C-41/90 *Höfner and Elser* [1991] ECR p. I-1979.

be one of the main criteria used by customers to select postal service providers. As has been explained above, hybrid mail is a particularly attractive form of postal services for customers such as banks, insurance and telecommunications companies which have regular invoices to send to end-users. For such customers of postal service operators, additional services such as track-and-trace are of particular importance as they allow them to avoid bad credit and to have precise information on whether a particular postal item has been distributed to the end user. Such information is valuable for companies sending invoices. In its reply to the letter of facts, whilst Slovenská Pošta contests the "other" additional services alleged by SMS, it does not contest that the track and trace services offered to Slovak Telekom by SMS are value-added services.

151. Slovenská Pošta is currently not offering such additional services for items of hybrid mail correspondence. In fact, insofar as the private competitors have to rely on the distribution network of Slovenská Pošta, they are themselves not able to offer their customers such services.³⁴ After the reservation of the delivery of hybrid mail services, these additional services as offered by the private competitors (such as track-and-trace service and seven days a week delivery) will thus no longer be available to customers.
152. The Slovak government acknowledged that Slovenská Pošta a.s. did not offer track and trace services or seven days a week delivery in reply to Slovak Telekom's tender, but it nevertheless added: *"the fact that Slovenská pošta, a.s. did not offer the track and trace service or the seven-days-a-week service to Slovak Telekom does not mean that Slovenská pošta, a.s. does not provide these services"*. Slovenská Pošta raised an identical argument.
153. In addition, in its reply of 1 July 2008, Slovenská Pošta claimed that it offers such services for "*certain*" products. The Commission has therefore asked Slovenská Pošta to specify for which products it offers tracking services, in particular in relation to letters of less than 50 grams. On 28 August 2008, as well as in its reply to the letter of facts, Slovenská Pošta replied that it is the only company in Slovakia providing the following services: "registered", "insurance"³⁵, "delivered to addressee in person", "delivered with advice of delivery", "delivered to addressee in person with advice of delivery" and, for first class mail only, the "RS-Special" service. It added that it is "*capable of providing all these services in the hybrid mail context too*". The services offered are however specialized services whose costs make them totally inappropriate to hybrid mail items.³⁶ Slovenská Pošta actually does not claim that it provides such specialized services in relation to hybrid mail items. It does not even claim that there would be demand for such specialized services in relation to hybrid mail.

³⁴ In practice, this means that the private competitors, when they take part in a tender, can only guarantee these additional services for distribution to a – large – part of Slovakian households insofar as those can be served by their own distribution network.

³⁵ These first two services are part of the universal service obligation.

³⁶ By way of examples, on the basis of the public tariff of Slovenská Pošta available on its website, the tariff of a registered first class letter below 50 grams is twice as much as the tariff of a normal first class letter; the tariff of a first class letter below 50 grams with the "RS Special" service is two and a half times higher than the tariff of a normal first class letter.

154. Slovenská Pošta does not claim that it currently offers, and a fortiori provides, additional services such as track and trace in relation to hybrid mail items (delivery reports). It does not claim that it would be in a position to offer, and a fortiori to provide, such services in the future.
155. By reserving the delivery of hybrid mail to Slovenská Pošta's, the Slovak Republic thereby limits the services available to users so far, although there is demand for such services.

3.1.5. Effect on trade between Member States

156. Articles 86(1) and 82 of the Treaty are only applicable where the abuse is capable of affecting trade between Member States.
157. Such an effect exists in this case because the exclusion of competition in a market distinct from and separate to the reserved area prevents undertakings established in other Member States, who have considerable expertise in providing hybrid mail services, from entering the market in Slovakia. Furthermore, it should be pointed out that in the present case the Dutch postal operator TNT – which is only a marginal player on the hybrid mail market so far - had the clear intention to substantially enter the market as is evidenced by its reply to the tender of Slovak Telekom.

3.1.6. Conclusion

158. On the basis of the above, the Commission considers that the Slovak Republic has infringed Article 86(1) in conjunction with Article 82.

3.2. No justification under Article 86(2) of the Treaty

159. Under Article 86(2) of the Treaty, *"undertakings entrusted with the operation of services of general economic interest [...] shall be subject to [Treaty rules], in particular the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact of the particular task assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community"*.

3.2.1. Burden of proof

160. As the Court held in a number of cases, it is incumbent on a Member State which invokes Article 86(2), as a derogation from the fundamental rules of the Treaty, to show that the conditions for application of that provision are fulfilled.³⁷
161. In their replies to the letter of formal notice of 14 July, the Slovak authorities have dedicated limited comments to the possible justifications of the State measure. First, they repeat that hybrid mail services had never been liberalised. This is however not relevant for the purposes of Article 86(2) and has been assessed above with regard to the application of Article 86(1). Second, the Slovak authorities argue that Slovenská

³⁷ Case C-157/94, *Commission v Netherlands*, [1997] ECR p. I-5699, see in particular paragraphs 51 and 58, Case C-158/94, *Commission v Italy*, [1997] ECR p. I-5789, see in particular paragraph 54 and Case C-159/94, *Commission v France*, [1997] ECR p. I-5815, in particular paragraphs 94 and 101. See also Case C-162/06, *International Mail Spain*, [2007] ECR p. I-9911, paragraph 49 and the case law cited.

Pošta's profits would be reduced (in addition to the 30% decrease compared to 2006 due to allegedly increased public service costs) to such an extent that they would not cover the costs of providing the postal universal service and that competition would impact negatively its revenues due to the diversion of large volumes of bulk mail items to operators offering hybrid mail. Third, and although they did not specifically raise the argument in the framework of the Article 86(2) section of their replies, the Slovak authorities have referred to the need to guarantee the quality of postal services. For its part, Slovenská Pošta claimed that without the legislative change the market segment for bulk mail and Slovenská Pošta's revenues from these activities would be under threat. It considered it highly likely that this would seriously undermine the financing and provision of the public service referring to public service costs amounting to 1.7 billion SKK currently financed by the revenues from the reserved area.

162. The Commission sent further requests for information to Slovakia and Slovenská Pošta in August 2008, in order to notably clarify some of the points made by them in their replies to the letter of formal notice and obtain more information to that end. In particular, the Commission asked the Slovak Government to provide a detailed estimate, in volume and value, of mail diverted to other postal operators in a scenario where the delivery of hybrid mail items would remain subject to competition and of the consequences on the financial situation of Slovenská Pošta. In its reply, the Slovak Government informed the Commission that the Postal Regulator could not provide a reliable estimate of hybrid mail outputs under fully liberalised conditions. Nevertheless, the Slovak Government asserts that outputs from the classical postal services which will move to hybrid mail would amount to between 0.7 – 1 billion SKK, whilst an increase in costs for providing the public service amounting to about 1 – 1.5 billion SKK was also expected. For the rest, the Slovak Government referred to the answer submitted by Slovenská Pošta. In a further request for information the Commission had asked Slovenská Pošta to explain in detail the methodology used to evaluate the cost for providing the universal service in Slovakia and to explain the developments in the bulk mail segment and give an overview of hybrid mail services provided in the past (turnover, reference to biggest customers). In reply, Slovenská Pošta sent notably two studies according to which the cost of providing the universal service would amount to at least SKK 1.5 billion. Slovenská Pošta provided estimates on the loss of revenues should the delivery of hybrid mail not be reserved to it. It confirmed the growth of bulk mail up to 50 grams for Slovenská Pošta in 2007 compared to 2006, both in terms of volumes (above 10%) and value (above 13%). Slovenská Pošta reiterated that no-one in Slovakia actually provides hybrid mail services. It nevertheless provided figures relating to its two branches in Bratislava and Kosice, which are in its view the closest to hybrid mail services. These figures show a significant increase both in terms of volume (+ 21%) and revenues (+ 21%) from 2007 compared to 2006.
163. All arguments raised are analysed below.
164. For the purpose of the assessment of a possible justification of the reservation of hybrid mail delivery to the universal service provider under Article 86 (2) EC – read in conjunction with Article 7 of the Postal Directive³⁸, the Commission takes into

³⁸

See footnote 2 above.

account the universal service obligations with which Slovenská Pošta is entrusted to the extent they concern universal postal services within the meaning of Article 3 of the Postal Directive.

3.2.2. *No obstruction of the universal service in case hybrid mail remains open to competition*

165. Even though there is a presumption of *prima facie* justification under Article 86(2) for services covered by the reserved area as defined in the Postal Directive (cf. point 8.3 of the Postal Notice), this is different if a service was already liberalised and if the functioning of the public service was not previously endangered. In such a case the extension of the monopoly in the previously liberalised activity would be incompatible, in the absence of a specific justification (cf. point 6.2 of the Postal Notice).
166. Article 7 of the Postal Directive only allows such reservation "*to the extent necessary to ensure the maintenance of universal service*". In *International Mail Spain*³⁹, the Court held that Member States may extend the postal monopoly if they "*establish that, in the absence of such a reservation, achievement of that universal service would be precluded, or that reservation is necessary to enable that service to be carried out under economically acceptable conditions*".
167. In light of this jurisprudence, the Member State has to demonstrate that, without the requested extension or reservation, the achievement of the universal service would be either precluded or could at least not be carried out under economically acceptable conditions. The Commission considers that the Slovak government has not met this standard.

No reliable estimate of the cost of providing the universal service

168. The Commission notes that, although the need to guarantee a proper compensation for the universal service provider was mentioned in the explanatory memorandum of the Amendment (see above point 17), there is no indication that this was supported by any evidence at any stage during the legislative process. In this respect, the Commission notes in particular that, in its opinion of 3 January 2008, the Department of Approximation of Law found that the proposal did not declare that in the absence of the reservation, universal service would be precluded or could not be provided under economically acceptable conditions.
169. The Slovak Government did not provide any detailed information regarding the universal service costs of Slovenská Pošta but merely asserted that Slovenská Pošta's universal service costs had increased in 2007 compared to 2006. However, it did not provide any further explanation or evidence in this respect. Only in its letter of 28 August 2008, and upon request from the Commission Slovenská Pošta submitted an internal study according to which the cost of the universal service in Slovakia would be at least SKK 1.7 billion. Slovenská Pošta also provided a study prepared by an

³⁹ Case C-162/06, *International Mail Spain*, [2007] ECR p. I-9911.

external consultant [...] according to which the cost of the universal service would be at least SKK 1.5 billion⁴⁰.

170. These estimates are based on the net avoided cost methodology. According to Annex I of Directive 2008/6 the postal universal service obligations shall be calculated as the difference between the net cost for a designated universal service provider of operating with the universal service obligations and the same postal service provider operating without the universal service obligations. The calculation should also take into account any intangible and market benefits that accrue to a postal service provider designated to provide universal service. Both Slovenská Pošta and *[the external consultant]* consider that if Slovenská Pošta was not constraint by its obligation to provide the Universal Service it would close down unprofitable postal offices, respectively 1193 according to the internal study⁴¹ and 1143 according to *[the external consultant]* on a total of 1557. This would subsequently represent a cost saving of respectively at least SKK 1,7 and 1,5 billion, which is the sum of all the losses made by individual non profitable postal offices.
171. Whilst the Commission agrees with using the net avoided cost methodology for that purpose as a matter of principle, it cannot accept this methodology as implemented in these studies for the three following reasons:
172. First, the studies are based on a number of questionable assumptions. In particular, as explicitly mentioned, these studies do not take into consideration the intangible benefits resulting from Slovenská Pošta's universal service obligation. The benefits associated to Slovenská Pošta's status include the advantage in terms of image which derives from the fact that Slovenská Pošta delivers 100% of households in Slovakia⁴². They also include special privileges such as the right to issue stamps⁴³ and VAT exemption which applies to the postal universal service in Slovakia and also to other services⁴⁴. As mentioned above, the Postal Directive (as amended by

⁴⁰ The figure of 1.5 billion is based on a return on capital reflecting Slovenska Posta's current asset profitability. In another scenario, an Weighted Average Cost of Capital of 11,3% is chosen resulting in universal service cost of SKK 2.4 billions. In principle, the Commission is not opposed to ensuring to the universal service provider a return on capital employed which would reflect in a market based approach the risk of the investments necessary to provide the universal service. However, this approach requires the universal service provider to be equally efficient in relation to the services offered under purely commercial conditions. Moreover, it is not proven that setting the WACC level at 11.13% reflects the risk and the capital structure necessary for Slovenská Pošta to fulfil its universal service obligation.

⁴¹ Slovenska Posta considers as a universal service burden all the post offices having the following characteristics: "*they exceeded the 2007 loss limit of SKK 55 000; they are located in settlements with fewer than 10 000 inhabitants*".

⁴² By comparison, most of courier services companies offer full territorial coverage because they consider that the advantages for doing so overcompensate the extra cost for providing the service to all households.

⁴³ Article 38 of the Postal Act.

⁴⁴ As mentioned by the Slovak authorities, the right not to charge VAT is a competitive advantage enabling Slovenská Pošta to offer competitive prices to consumers or customer not subject to VAT. Alternatively, Slovenská Pošta can charge a mark up of 19% without altering its competitive position. In countries where the postal markets have been fully liberalised, studies have taken the view that these advantages associated to the universal service obligation may overcome the cost for providing the universal service. See for instance the study "What is the cost of Post Danmark's universal service obligation?" prepared by Copenhagen Economics to the Danish Chamber of Commerce available at http://www.freefairpost.com/pdf/What_is_the_cost_of_Post_Danmarks_Universal_Service_Obligation.pdf

Directive 2008/6) explicitly provides that such benefits shall be taken into account when calculating the net cost of postal universal service obligations⁴⁵.

173. Second, the obligations of Slovenská Pošta are defined in the postal licence, including requirements regarding the accessibility of contact points of the postal network. However, the study has not taken into account that the provision of the postal universal services only requires as many contacts points as defined in the postal licence and not necessarily the maintenance of the current entire network of postal offices.⁴⁶
174. Moreover, the fact that Slovenská Pošta's post offices are unprofitable is not only related to the provision of universal postal services. For instance, Slovenská Pošta offers through the network of post offices in rural areas not only postal services in compliance with the universal service obligation, but also other services. For instance, according to the postal licence, Slovenská Pošta has the obligation to provide postal financial services throughout the Slovak territory⁴⁷.
175. Article 7 of the Postal directive provides that "*to the extent necessary to ensure the maintenance of universal service, Member States may continue to reserve services to universal service provider*". According to Article 3 of the Postal Directive users should enjoy a right to a universal service involving the "*permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users.*" It is thus not allowed under the Postal Directive to finance other than universal postal services with the maintenance or the extension of the reserved area. The cost of providing other services, such as financial services, cannot be included in the cost of the universal service. However, the studies do not distinguish the network costs attributable to postal services and those attributable to non postal services, including, services of general economic interest provided pursuant to national legislation as well as other services provided under purely commercial conditions. Even if any such non postal public service obligations may justify State support under Article 86(2) EC, their financing may not be ensured through postal reservation.⁴⁸
176. Third, the Commission observes that these studies consist in dividing the country in as many "*business centres*" as there are postal offices. Most of the revenues are direct revenues and are directly assigned to the profit centres which generate them. Conversely, most of the costs are common costs and are allocated to individual profit

⁴⁵ Directive 1997/67/CE as amended by Directive 2008/06/CE provides that "*The net cost calculation should assess the benefits, including intangible benefits, to the universal service operator*".

⁴⁶ Other Member States have chosen to maintain a network of postal office beyond what is necessary to provide the postal universal service in order to ensure territorial cohesion. Against this background, in its decision N 388/2007 of 28 November 2007, the Commission has approved State aid granted by the United Kingdom in order to maintain a post office network which "*performs an important social and economic role which extends beyond the specific postal and Government services offered over the post office counter*".

⁴⁷ According to Article 16 (1) of the Postal Law, the obligation to execute postal payment service may be imposed by the postal license. The postal licence yields that "*the universal service provider will provide the universal service and the postal payment service on the whole territory of the Slovak Republic*"

⁴⁸ By way of example, in its Decision dated 21 December 2005 (N 531/2005 – France), the Commission has approved a State aid measure consisting in financing non profitable postal offices partly by the reserved area and, as far as non postal services were concerned, by the French State as a compensation of a service of general economic interest (§ 117-134).

centres using "various allocation keys". [The external consultant] and Slovenská Pošta conclude that certain business centres are unprofitable and that they would be removed⁴⁹ in the absence of the obligation to provide the universal service. Closing down these postal offices would entail at least SKK 1.5 billions cost saving, according to [the external consultant] or a SKK 1.7 billion saving, according to Slovenská Pošta, of cost savings.

177. These methodologies do however not take into consideration the very nature of postal activities and the specificities of network industries. As mentioned by the Slovak Government itself, traffic in the postal sector is unbalanced. Only a very limited number of profit centres generate revenues. These profit centres are located in areas where companies post significant amounts of mail items. Conversely, profit centres at the receiving end only generate costs. However, the revenues generated in the profitable areas could not be achieved without the non profitable centres. It is therefore incorrect to assume that Slovenská Pošta would remove these unprofitable centres if it were relieved of its universal service obligation. In particular, it is doubtful that the profits generated by important post offices such as the main post centres of Bratislava or Kosice which are specialised in receiving large quantities of mail items would not be affected if 73% of the network (in terms of number of post offices) would be dismantled.

178. Against this background, the Slovak authorities have not provided a reasonable estimate of the cost for providing the universal service in Slovakia justifying the extension of the reserved area.

No reliable estimate of the impact of the liberalisation of hybrid mail delivery on the profitability of Slovenská Pošta.

179. As shown in point 44 above, Slovenská Pošta's annual reports provided by the Slovak authorities for the years 2005 to 2007 show that the provision of the universal service (the profit of the postal activities in 2007 amounting to 437 million SKK), has been profitable during these years and that Slovenská Pošta has distributed a dividend to its shareholder every year

180. The Slovak government concedes that Slovenská Pošta is profitable today: *The favourable financial situation of Slovenská Pošta is currently influenced by the favourable trend in the area of mail submitted in bulk, such as invoices and account statements*".⁵⁰ It claims, however, that in the long run the development of competition in the hybrid mail market might negatively affect Slovenská Pošta's financial stability. However, when further asked by the Commission to provide a detailed estimate of mail which could be diverted to other operators, the Slovak Government acknowledged that the Postal Regulatory Office could not provide a reliable estimate of hybrid mail outputs under fully liberalised conditions and did not explain how this would affect Slovenská Pošta's financial stability.

⁴⁹ Or the removal of postal offices which generates losses of more than SKK 55000 per year in case of Slovenská Pošta's internal study. The Slovak Authorities have not explained why they consider that only postal offices whose loss would exceed this particular threshold is appropriate.

⁵⁰ Letter of the Slovak government dated 1 July 2008, comments to point 100-108 of the letter of formal notice.

181. For its part, Slovenská Pošta has submitted estimates according to which, on a basis of 215 million bulk mail items per year (currently worth SKK 2.1 billion), a price decrease of 30% or more would reduce the total market value to SKK 1.47 billion or less ($0.7 \times$ SKK 2.1 billion). Moreover, Slovenská Pošta estimates that a loss of market share of up to 20% or more would reduce its turnover in the bulk mail segment to SKK 1.17 billion or less ($0.8 \times$ SKK 1.47 billion). Consequently, Slovenská Pošta argues that a full liberalisation of hybrid mail delivery would result in revenue losses amounting to 924 million SKK⁵¹. According to Slovenská Pošta, this situation will not occur immediately but it is likely to happen as early as in 2010.
182. Slovenská Pošta's forecast is based on several premises or assumptions which are not reasoned. First, reserved bulk mail represents 80% of total mail traffic in volume. Second, all bulk mail customers would switch to hybrid mail services. Third, Slovenská Pošta's share in the bulk mail segment would decrease by as much as 20%. Fourth, mail volumes will remain unchanged in the long run. Fifth, prices will decrease by at least 30% in 2010.
183. The Commission considers that these assumptions are not supported by evidence.
184. First, the statement that domestic bulk mail currently accounts for 215 million postal items and SKK 2.1 billion is contradicted by the facts presented in Slovenská Pošta's 2007 annual report, according to which the turnover of its domestic bulk mail activity reached SKK 1.7 billion. The bulk mail (i.e. mail sent in large quantities) segment thus represents only 65% of the letter mail market in terms of value. The difference is accounted for by corporate mail which is not sent in large quantities and which is therefore not relevant for estimating the impact that the maintenance of competition in hybrid mail services would have on Slovenská Pošta.
185. Second, bulk mail is a wide category which just means that postal items are mailed in relatively large quantities, usually by business clients. As mentioned in point 86 above, not all bulk mail senders have an economic incentive to switch from traditional mail services to hybrid mail. According to the data provided by Slovenská Pošta in relation to its own services, the price for a hybrid mail solution is SKK 12.2 per item. The price for delivering these items is SKK 9.6. The price for printing postal items is approximately SKK 2.6 (22% of the total price).
186. For senders which have already invested in in-house printing facilities, the incremental cost for sending a letter is thus only SKK 9,6. It is thus unlikely that senders have a clear incentive to switch to hybrid mail even if provided by an alternative postal operator even if the latter offers a price for delivery 20% lower than Slovenská Pošta. Against this background, in its letter of 28 August 2008, Slovenská Pošta takes the view that "*the selected largest companies operating billing centres are in a position to immediately operate "hybrid mail" services in conjunction with an alternative postal undertaking*". This assumption is not based on any evidence, since there is *prima facie* no economic incentive on behalf of those companies which have invested in their own printing centre to switch to hybrid mail services. Moreover, it has been observed in other Member States that business clients prefer in-house solutions for reasons of confidentiality. On that basis, the assumption

⁵¹ This figure is the result of a "optimistic scenario". The "pessimistic scenario" would according to Slovenská Pošta lead to revenues losses of about 1.3 billion SKK.

according to which the delivery of all bulk mail items may potentially be diverted from it is consequently not supported by facts.

187. Third, the material made available to the Commission by the Slovak government and by Slovenská Pošta as factual background for their submission on Article 86(2) do not support the contention according to which Slovenská Pošta would lose at least 20% of the market for the delivery of bulk mail in general by 2010, in a market environment where prices would have already gone down by 30%. Against this background, such a scenario has not been observed in Sweden⁵², Germany or the UK where postal market have been liberalised where postal incumbents were able to sustain their market share above 90% despite competition.
188. Fourth, the Slovak government itself conceded that the bulk mail segment has been growing significantly in Slovakia over the two last years: "*The favourable financial situation of Slovenská pošta is currently influenced by the favourable trend in the area of mail submitted in bulk, such as invoices and account statements*".⁵³ According to Slovenská Pošta's annual reports, the growth in value of this segment in terms of revenues was indeed 13.58% in 2007 and 20.58% in 2006. According to the data submitted by Slovenská Pošta, the growth in volume was indeed 11% in 2007. Moreover, in the studies on the cost of the universal service mentioned above, Slovenská Pošta indicated that the number of delivered items per inhabitant in Slovakia is currently low compared to the EU average, which suggests that the segment still has a significant growth potential in the long term⁵⁴. The assumption under which the mail volume will remain unchanged is thus not supported by facts.
189. Fifth, Slovenská Pošta's assumption according to which prices may decrease by 30% is purely speculative. A price decrease requires first an alleviation of the pricing obligations currently imposed on Slovenská Pošta. In this context, the VAT advantage which has been granted to Slovenská Pošta as a result of its universal service obligation will enable Slovenská Pošta to maintain higher net prices than its competitors for clients which are exempted from VAT themselves, such as financial institutions, thus limiting the impact on the potential decline of prices on Slovenská Pošta. Moreover, a decrease in prices would further accelerate market growth in volume, thus limiting the impact in terms of revenues.
190. Finally, the Commission notes that Slovenská Pošta did not deduct from the alleged loss in revenues any cost saving a reduced output would entail and did therefore not provide the Commission with a reliable estimate of the overall impact of allegedly reduced output on its profitability.
191. On the basis of the above, no evidence supports the assertion that the financial stability of Slovenská Pošta's postal services would be threatened.
192. The Commission therefore considers that the Slovak government and Slovenská Pošta did not provide sufficient evidence that the maintenance of the liberalisation of

⁵² In Sweden, the market has been liberalised since 1993. Posten still has a market share above 90% (both in value and volume) on the addressed mail segment.

⁵³ Letter of the Slovak government dated 1 July 2008, comments to point 100-108 of the letter of formal notice.

⁵⁴ Slovenská Pošta's internal cost model annexed to the letter of 28 August 2008.

hybrid mail would jeopardise the achievement of the universal service or that such service could not be carried out under economically acceptable conditions.⁵⁵

193. Finally, the Slovak Republic would still have to establish that the extension of the postal monopoly to hybrid mail delivery is proportionate to the needs of universal service. In the *Air Inter* case, for instance, the CFI rejected the Article 86(2) defence considering that the applicant had "...not argued and still less established that, following the entry into force of Regulation No 2408/92, there was no appropriate alternative system capable of ensuring regional development and in particular of ensuring that loss-making routes continue to be financed."⁵⁶ In *RTT*⁵⁷, the ECJ held that the exclusion or restriction of competition on the market for telephone equipment could not be justified under Article 86(2). It stated that the aim of ensuring that the equipment meets the essential requirement of the safety of the users, the safety of operating the network and the protection of the public networks could also be achieved by less restrictive means, e.g. by laying down specifications and establishing a procedure for type-approval.
194. In this respect, neither the Slovak Republic nor Slovenská Pošta have established that the reservation of the delivery of hybrid mail would constitute the most proportionate measure to ensure the achievement of the universal service or that such service could not be carried out under economically acceptable conditions, taking into account the investments made by private operators to enter this market. Furthermore, given the uncertainty as regards the determination of any revenue losses and further taking into account that in any event the alleged negative effects on Slovenská Pošta's profitability would not occur before 2010 in a context where market opening is in any case due on 31 December 2012, it does not stem from the facts that the reservation of hybrid mail delivery would be proportionate to the needs of universal service.
- 3.2.3. *Extension of the monopoly is not necessary to ensure the quality of postal service provided by Slovenská Pošta's competitors*
195. The Slovak Authorities further submit that the *status quo* "might impair the quality of the postal services provided in Slovakia". They argue that alternative postal operators have destroyed postal items: "After 1 April 2008 it has been demonstrated that certain items of mail up to 50g have been distributed by alternative operators; some cases have been documented by the police. The mail items concerned were found in rubbish bins and did not bear the logo of Slovenská Pošta a.s., i.e. they were not distributed by means of the distribution network of Slovenská Pošta"⁵⁸.
196. The Commission cannot accept this line of argument. First, under competitive conditions postal service providers have an obvious incentive to ensure that mail items entrusted to them are delivered to the recipients. Contracts are concluded

⁵⁵ See also Case T-260/94 *Air Inter* [1997] ECR II-997, paragraph 142, where the Court rejected the applicants' claim related to Article 90 (2) EC [now Article 86(2)] observing that "It does not put a figure on the probable loss of revenue if other air carriers are allowed to compete with it on the two routes in question. Nor has it shown that that loss of income will be so great that it will be forced to abandon certain routes forming part of its network."

⁵⁶ Case T-260/94 *Air Inter* [1997] ECR II-997, paras. 138-143.

⁵⁷ Case C-18/88 *RTT* [1991] ECR I-5941.

⁵⁸ See answer of the Slovak Government of 27 June 2008.

accordingly. In particular, postal operators commit themselves to achieve certain quality targets. If they do not reach these targets and do not satisfy their customers, they risk losing these customers to competitors featuring a higher quality performance.

197. Moreover, Article 9 of the Postal Directive allows Member States to condition the granting of authorisations to certain requirements in terms of quality, availability and performance of the postal services. To the extent that competitive forces are not sufficient to prevent postal items ending up in rubbish bins, this authorisation regime constitutes a much less intrusive and more flexible tool to ensure high quality standards. Against this background, the Commission considers that it is disproportionate to extend Slovenská Pošta's monopoly on the grounds that alternative postal operators have in some instances provided a service of bad quality.
198. In its letter of 26 September 2008, Slovenská Pošta further alleges that the employment contracts of certain of its competitors are illegal. However, even if this were correct, it can properly be addressed under labour law and cannot justify the extension of postal reservation.

3.2.4. *Conclusion*

199. On the basis of the above, the Slovak government and Slovenská Pošta have failed to prove that the extension of the postal monopoly to hybrid mail services was necessary for the universal service to be provided under economically acceptable conditions.
200. Pursuant to Article 86 (3) EC Treaty, "[T]he Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States."

HAS ADOPTED THIS DECISION:

Article 1

Article 5(2) of Act No. 507/2001 Coll. on Postal Services as amended, the General Authorization of the Postal Regulatory Office of 18 July 2008, the interpretation of these acts and their preceding versions by the Slovak authorities, in particular by the Postal Regulatory Office, as well as enforcement measures undertaken against private operators, are contrary to Article 86(1) of the EC Treaty, read in conjunction with Article 82 of the EC Treaty to the extent that they reserve to Slovenská Pošta the delivery of hybrid mail items which was previously open to competition and that they enforce such a reservation.

Article 2

The Slovak Republic shall inform the Commission, within one month of being notified of this decision, of the measures it has taken to put an end to the infringement identified in Article 1.

Article 3

This Decision is addressed to the Slovak Republic.

Done at Brussels,

For the Commission

[\[...\]](#)

Member of the Commission