

# **The Application of EC Competition Rules in the Postal Sector**

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## 1. INTRODUCTION

In the early 1990s a process began by which the postal markets of the European Community and their main operators started to transform from state-owned public administrations enjoying wide-ranging national monopolies facing virtually no competition on their “home” markets into more market-oriented public companies. In order to increase financial and commercial flexibility, some Public Postal Operators (PPOs) have been incorporated under Private Company Law and certain Member States have chosen to partially privatise their PPOs. In 1993 the postal monopoly in Sweden was abolished altogether and Finland followed suit a few years later. By reducing the postal monopoly to letters weighing less than 200 grams in 1997, the German government opted for a gradual reduction of the postal monopoly in Germany. Other Member States have taken a similar approach.

By publishing its Green Paper on postal services in 1992, the Commission announced its intention to gradually create a single market for postal services within the Community.<sup>1</sup> The process initiated by the Commission resulted in the adoption in 1997 by the Council and Parliament of a Directive, which constituted a first step towards market integration (“the Postal Directive”).<sup>2</sup> Despite these developments it is clear that postal services have lagged behind in the process towards market opening, compared to other industries previously operated under statutory monopolies, i.e. telecom, gas, electricity and water. A significant number of Member States have chosen to maintain their postal monopolies at the highest level permissible under the Postal Directive and have been reluctant to transform their PPOs still operating as public administrations.

At the same time, PPOs face increased competition from alternative messaging technologies (e.g. fax and e-mail) while companies active on neighbouring markets such as express and freight services have taken an interest in market segments open to competition. Larger operators (the TNT Post Group of the Netherlands, Deutsche Post and Consignia of the UK) have – by making a number of strategic acquisitions – positioned themselves in other markets such as freight and express services in a number of Member States. Another important development – despite the persistence of wide-ranging delivery monopolies in most Member States – is the fact that PPOs have started to compete directly with each other for international mail traffic, both by supplying so-called remail services and by offering to pick up cross-border mail directly in Member States other than their own.

The postal markets have evolved with tremendous pace during the last few years while the liberalisation process has lagged behind. PPOs have reacted to the market-driven changes in two different ways; by adopting defensive strategies (i.e. by trying to protect their home “turfs” by rigorously defending or even extending their existing monopolies) on the one hand, and by pursuing offensive strategies (expanding into new geographic and product markets), on the other.

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<sup>1</sup> Green paper on the development of the single Market for postal Services, Commission Communication COM(91) 476, 11 June 1992.

<sup>2</sup> European Parliament and Council Directive 97/67 on common rules for the development of the internal market of Community postal services and the improvement of the quality of service, OJ [1998] L-15/14.

These changes have increased the importance of the enforcement of Community competition rules in the postal sector in order to ensure that competition is distorted to the minimum in a sector which is still heavily regulated in most Member States. The increased reliance on the competition rules has manifested itself in a rising number of complaints filed with the Commission's Directorate-General for Competition during the last few years.

The purpose of the present paper is to outline the existing Community regulation in the postal field, describe the ongoing process with the objective to adopt a second postal Directive in 2002, present and discuss recent competition Decisions concerning the postal sector - since December 2000 the Commission has adopted five Decisions under Articles 82 and 86 of the EC Treaty (the Treaty). Moreover, we intend to draw some conclusions from previous Commission action, briefly mention important postal cases that still are in the Commission "pipeline" and - finally - give some indications how the Commission intends to enforce the competition rules in the future. It should be noted that the Paper at hand only addresses what is sometimes called anti-trust action (i.e. Articles 81, 82 and 86 of the Treaty). The rules on mergers and state aid in the postal field will therefore not be addressed here.

## **2. SECTOR-SPECIFIC REGULATION**

### **2.1. The Postal Directive**

In December 1997 the European Community took the first step towards the realisation of a single market for postal services by adopting the Postal Directive. At the time, some Member States had started or even completed the opening-up to competition of their domestic postal markets. Nevertheless, the Postal Directive set out the objectives for ensuring a gradual and controlled market opening throughout the European Union. The Postal Directive aims at combining a gradual opening to competition of postal services while safeguarding a universal postal service in all Member States. The most important elements of the Directive are the following.

Definition of the universal service: Member States shall ensure that users enjoy the 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.<sup>3</sup>

Definition of the reservable area: Member States may reserve to the universal service provider(s) the clearance, sorting, transport and delivery of domestic mail weighing less than 350 grams the price of which is less than five times the public tariff in the first weight step of the fastest standard category. The reservable area also includes cross-border mail and direct mail. However, these services may only be reserved "to the extent necessary to ensure the maintenance of universal service".<sup>4</sup>

Definition of non-reservable services: Member States are not allowed to reserve to the universal service provider(s) "new services (services quite distinct from conventional services) and document exchange". Since they do not form part of the

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<sup>3</sup> Article 3(1) of the Postal Directive.

<sup>4</sup> Article 7 of the Postal Directive.

universal service there is no justification for reserving them to the universal service provider(s).<sup>5</sup> However, the Member States are given the possibility to introduce authorisation procedures to the extent it is necessary to guarantee compliance with the requirements of the Directive and to safeguard the universal service.<sup>6</sup>

Timetable for the completion of the single postal market: The Postal Directive stipulates that - on 1 January 2000 at the latest – the Council and the Parliament should adopt a Decision (on the basis of a proposal from the Commission) which determines the next step towards market opening with effect from 1 January 2003.

## **2.2. The Proposal for a New Directive**

The Commission tabled its proposal for the modification of the Postal Directive on 30 May 2001.<sup>7</sup> In conformity with the conclusions of European Council in Lisbon, the Commission proposed further opening-up to competition of European postal markets while safeguarding and maintaining the universal postal service in the Member States. The Commission proposal included the following three concrete steps.

A further reduction of the weight/price limits: As of 1 January 2003, the reservable area were to be reduced to 50 grams and 2.5 times the standard tariff.

Outgoing cross-border mail and special services: As of 1 January 2003 outgoing cross-border mail and express services could no longer be reserved for the universal service provider(s).

A further step towards market opening in 2007: On the basis of a new Commission proposal a further reduction of the reservable area would be introduced on 1 January 2007.

In the Council, some Member States supported the Commission's proposal but argued that the final date for the complete realisation of the internal postal market should be determined in the new Directive. However, other Member States opposed this and argued that the Commission's proposal went too far and that it jeopardised the maintenance of the universal postal service.

The debate in the Council mainly concerned three topics: i.) the definition of special services, ii.) the timetable for further market opening and iii.) the opening to competition of outgoing cross-border mail. Following the debates in the Council and the first reading of the European Parliament of 14 December 2000, the Commission tabled an amended proposal on 21 March 2001. The Council subsequently arrived at a compromise text (a so-called Common Position) that is scheduled for formal adoption in December 2001. The three topics mentioned above are discussed below in the light of these subsequent developments.

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<sup>5</sup> Recital 21 of the Postal Directive.

<sup>6</sup> Article 9 of the Postal Directive.

<sup>7</sup> Proposal for a European Parliament and Council Directive amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, OJ[2000],C-337 E, pp. 220 – 224.

i). The definition of special services: The original as well as the revised Commission proposal introduced in the Directive a definition of special services.<sup>8</sup> The proposed definition set out the general characteristics of special services, i.e. services that are clearly distinct from the universal service, which meet particular customer requirements and which offer additional added-value service features not offered by the standard postal service. The proposal also includes a non-exhaustive list of such added-value service features.

The objective of the Commission proposal in this respect was to clarify the issue and provide legal certainty for postal operators. However, some Member States considered the definition too vague and that it would jeopardise the universal service. The impossibility of finding a reasonable compromise on this issue eventually led to the Council removing the definition of special services from the revised text adopted by the Council.

ii.) The timetable for further market opening: The compromise text that is scheduled for adoption by the Council in December 2001 stipulates a reduction of the price and weight limits to 100 grams and three times the standard tariff as of 1 January 2003 and to 50 grams and 2.5 times the standard tariff as of 1 January 2006. On the basis of a study regarding the impact on the universal service in each Member State of the previous market openings, the Commission shall - if appropriate - table by 31 December 2006 a proposal for a further, “decisive step” towards market opening in 2009. This Commission proposal shall be adopted by the Council and the European Parliament by 31 December 2007.

The modified timetable and weight/price thresholds of the Common Position resulted from a fundamental disagreement between the Member States about the pace of the process towards market opening. One group of countries wished to see a swifter opening of EU postal markets than the one proposed by the Commission and considered that a final date for full market opening should be determined in the new Directive. However, another group of countries wanted to proceed more cautiously than the Commission because they feared that the provision of the universal postal service might be jeopardised if postal markets were opened too swiftly. The compromise solution was to set a date (1 January 2009) when a further “decisive step” towards market opening should be taken. However, what will constitute such a “decisive step” has not been determined.

iii.) Outgoing cross-border mail: The Council has accepted the Commission's proposal of opening outgoing cross-border mail to competition. However, the Council has added the provision that these services may continue to be reserved if the revenue is necessary to ensure the provision of the universal service. Given the limited significance of outgoing cross-border mail for the total turnover of most universal service providers, very few Member States could credibly argue that the opening of outgoing

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<sup>8</sup> The definition proposed by the Commission was the following: “*Special services: services clearly distinct from the universal service, which meet particular customer requirements and which offer additional service features with added-value not offered by the standard postal service [...]*”.

cross-border mail to competition would jeopardise the provision of the universal service.<sup>9</sup> This provision – if finally adopted - will give a legal basis for the *de facto* opening to competition of outgoing cross-border mail which has already taken place in most Member States.

The Council compromise will be re-submitted to the European Parliament for a second reading. It ought to be pointed out, however, that the European Parliament – after its first reading – proposed a slower market opening (150 grams and 4 times the standard tariff in 2003). If the European Parliament should reject the Common Position of the Council, conciliation procedures between the two institutions will be initiated.<sup>10</sup>

As will be shown below, many of the issues debated in relation to the Postal Directive are relevant when applying the competition rules in the postal sector. In most cases the Decisions adopted by the Commission are, in fact, directly related to these issues.

### 3. COMPETITION CONCERNS IN THE POSTAL SECTOR

The rapidly changing market conditions and the first steps towards an opening to competition of European Union postal markets have led to an increased influx of complaints to the European Commission. In these complaints it is alleged that certain Member States have put into place national legislation which is incompatible with Article 86 of the Treaty and that certain incumbent operators are abusing their dominant market positions, thereby infringing Article 82.

The majority of these complaints – as well as the Commission Decisions that have followed them – fall within the following four categories.

i.) Monopoly extension: Following the entry-into-force of the Postal Directive on 10 February 1998, Member States have introduced new legislation transposing the provisions of said Directive into national law. However, some Member States have interpreted the Directive in a very restrictive manner. In some cases legislation was enacted that actually *increased* the scope of the monopoly reserved for the incumbent operator, something which is completely contrary to the objectives of the Postal Directive. The Commission has adopted one Decision concerning such an attempt by a Member State to extend its postal monopoly – the “Hybrid Mail” case, which is discussed below.

ii.) Lack of independent national regulation: Some Member States have adopted legislation that in some respects fails to meet the requirements of the Postal Directive. The Commission has adopted one Decision which addresses this problem – the “SNELPD” case. It concerns the putting into

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<sup>9</sup> Within the EU, the average percentage of PPO turnover generated by outgoing cross-border mail weighing less than 50 grams is ca 3%. Only a few PPOs (e.g. the PPOs of Ireland, Greece and Austria) have percentages that exceed significantly this average. However, more than 20% of Luxembourg Post's turnover is generated by this type of mail.

<sup>10</sup> In accordance with Article 251(3) of the Treaty.

place in France of an independent regulatory authority in the postal field. The Commission's Decision is discussed below.

iii.) Predatory pricing, cross-subsidisation, tying and excessive pricing: A number of complaints filed with the Commission concerns the behaviour of the PPOs in markets outside the scope of the postal monopolies. It is alleged that incumbent operators compete with very low prices in markets subject to competition and that losses incurred on competitive markets are covered by cross-subsidies emanating from monopoly markets. Moreover, incumbents' sales of services subject to competition have been combined with rebates for monopoly services (so-called tying of monopoly and non-monopoly services). In the "Deutsche Post I" case, monopoly revenue from the letters market was used to cover losses in the parcels market which is open to competition, whereas the "Hays" case concerned tying practices. Both Commission Decisions are discussed below.

In 2001 a so-called Statement of Objections was issued against Deutsche Post in which the Commission took the preliminary position that the domestic letter tariffs charged in Germany infringed Article 82 of the Treaty, since they do not bear any reasonable relation to the economic value of the services provided (so-called excessive pricing). Deutsche Post has subsequently submitted its comments on the objections raised by the Commission. The Commission has yet to adopt a formal decision in this case.

iv.) Remuneration for international mail traffic: The system by which postal administrations compensate each other for the delivery of incoming cross-border mail on each other's behalf is known as the terminal dues system. Under this arrangement, the receiving PPO is remunerated for the delivery of cross-border mail by the sending PPO. These delivery charges are called terminal dues. The Commission has received a number of complaints in which it is claimed that normal cross-border mail has been intercepted, surcharged and delayed in an abusive manner by certain PPOs. The Commission Decision in the "Deutsche Post II" case is discussed below.

Points i.) and ii.) above – concern the behaviour of *Member States* in the postal field. In this regard it must be pointed out that such issues can be dealt with by the Commission in two different manners. First, infringement procedures can be initiated under Article 226 of the Treaty against Member States that fail to comply with the provisions of the Postal Directive. Second, infringement procedures against the Member State under Article 86 in conjunction with Article 82 of the Treaty may be introduced. Since the former alternative is the responsibility of the Commission's Directorate-General for the Internal Market, only the latter option falls within the scope of the present paper.

#### 4. MONOPOLY EXTENSION - THE “HYBRID MAIL” CASE

With respect to the extension of the postal monopoly in Italy, the Commission, on 21 December 2000, adopted a Decision based on Article 86(3) of the EC Treaty.<sup>11</sup> The new value-added service at issue was a “hybrid” electronic mail service offering a contractual guarantee that items created and transmitted electronically arrived at either a predetermined date or a predetermined time.

The decision followed a complaint lodged by several small and medium sized operators which had established in Italy the necessary infrastructure (i.e. electronic transmission and printing facilities) to provide hybrid electronic mail services. The complainants alleged that the delivery phase of the new service (in which postal items are generated and transmitted electronically, printed and delivered physically) had - as part of the transposition in Italy of the Postal Directive - been reserved for the incumbent operator. The Commission took the view that the Italian Legislative Decree establishing those arrangements, prevented private suppliers from offering the full range of hybrid mail services.<sup>12</sup> This was incompatible with Article 86(1) of the Treaty, read in conjunction with Article 82. No Member State apart from Italy had - at the time - stage reserved the delivery phase of hybrid electronic mail services that guaranteed a predetermined date or time of arrival.

The Commission considered that the physical delivery phase of hybrid mail entailed a series of added-value elements, e.g. the guarantee that electronically generated postal items arrive at a predetermined date or time. According to the Commission, the delivery at a predetermined date or time is therefore a market which is significantly different from conventional delivery services included in the general letter service.

Applying Articles 86 and 82 of the Treaty in combination, the Commission considered - in accordance with the jurisprudence of the Court of Justice - that the extension of a monopoly into a neighbouring and competitive market by means of a State measure without any objective justification was prohibited by Article 86(1) in conjunction with Article 82.<sup>13</sup>

According to the Commission there was no objective justification for extending the general letter mail monopoly to guaranteed day- or time-certain deliveries. The Commission investigation revealed that i.) competition with respect to day or time-certain deliveries would not jeopardise the financial equilibrium of the incumbent operator and ii.) the opening of day or time-certain delivery to private operators would not result in any significant “cream skimming” of the incumbent’s revenues.

The Commission’s decisional practice does not put into question the Member States’ definition of services of general economic interest, their latitude in defining the exact scope of this interest or the safeguarding of the financial equilibrium of the undertakings that are entrusted to provide such services. The Commission’s

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<sup>11</sup> Commission Decision 2001/176/EC of 21 December 2000 *New postal services with a guaranteed day- or time-certain delivery in Italy*, OJ [2001] L-63/59.

<sup>12</sup> Italian Legislative Decree No 261 of 22 July 1999.

<sup>13</sup> Cf. Case C-18/88 *Régie des télégraphes et des téléphones v GB-Inno* [1991] ECR I-5941, para. 24.



decisions aim, however, at protecting a series of innovative services that will not endanger the traditional revenue streams that incumbents derive from their statutory monopolies.

According to Article 86(2) of the Treaty, the Treaty provisions and in particular the competition rules apply to incumbent postal operators entrusted with a service of a general economic interest, unless their application obstructs the performance of the particular tasks assigned to the operator. This was not the case for the following reasons.

i.) The incumbent did not himself offer day or time-certain delivery as part of its postal services. Therefore the Commission concluded that the incumbent would not suffer any loss of revenue, which it would otherwise have generated in this market.

ii.) In order to provide day or time-certain delivery, the incumbent would have had to re-organise completely its sorting and delivery facilities, which makes market entry in the short and medium term unlikely. In any event, the additional revenue generated by providing these highly specialised time-sensitive mailings would have remained marginal in relation to the total losses incurred by Poste Italiane.

iii.) The Commission's market analysis disclosed that day or time-certain delivery satisfied only a particular and rather limited demand – i.e. the demand for time-sensitive mailings. Such mailings were considered as a new service which generated additional mail volume. Therefore, they did not replace or detract demand from the general letter mail service.

iv.) Since the delivery infrastructure of the private operators already covers several provinces in Italy, the services in question were clearly not limited to the profitable urban mail routes while leaving the unprofitable rural mail routes to the incumbent operator.

The Commission Decision concerning hybrid electronic mail services was primarily aimed at creating legal certainty for private operators and obliging the Italian Government to clarify the fact that delivery of mail at a predetermined date or time is not a postal service which can be reserved to the incumbent. The Commission emphasised the fact that the Decision was taken by applying the competition rules and not the Postal Directive and without reference to the ongoing procedure in the Council and the European Parliament concerning proposed amendments to Postal Directive.

#### **4.1. Lack of Independent National Regulation – The “SNELPD” Case**

On 23 October 2001, the Commission adopted a decision against France with regard to the lack of supervision by an independent regulatory authority concerning the relationship between La Poste and so-called mail preparation firms.<sup>14</sup> This decision

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<sup>14</sup> *Commission Decision C(2001)3186 of 20 October 2001 against the French Republic on the basis of Article 86 in conjunction with Article 82 of the Treaty, relating to the lack of exhaustive and independent monitoring of the conditions applied by La Poste to mail preparation firms.* Decision not yet published.

was based on the jurisprudence of the Court of Justice regarding the notion of conflict-of-interest.

In late 1998, the Commission received a complaint against the French Government from the SNELPD, a trade association representing the majority of French mail preparation firms. The SNELPD-members a wide range of services; from the making up of postal items on behalf of large mail originators to the handing-over to La Poste of pre-sorted mailbags. The term "mail preparation" covers two different types of activities.

i.) Services provided on behalf of mail originators, e.g. the preparation and sending of direct mail items. These services include inter alia printing, enveloping, plastic wrapping, labelling, addressing, franking, collecting, bundling, sorting and finally delivery of the processed mail to La Poste. Mail preparation firms engaged in these activities may be regarded as independent "intermediaries" between the senders and La Poste. They alone are liable for the prepayment of postage to the latter. The performance of these services on behalf mail originators gives rise to two types of remuneration, which are usually combined:

- Direct remuneration for the making up of mail items, the supply of address lists, etc and

- Remuneration for the intermediary function and access to favourable postal charges. The mail preparation firms pay La Poste the postal charges at the favourable rates applicable and charge the mail originators a price which is higher than the total postal charges actually paid to La Poste.

ii.) Services performed on behalf of La Poste. These services include inter alia the making-up and the placing in mailbags of postal items, sorting by destination and the delivery to pre-designated offices of La Poste. By outsourcing certain preparatory tasks in this way, La Poste reduces handling costs and increases efficiency. La Poste has - since 1990 - remunerated mail preparation firms "per thousand", i.e. according to volumes posted, for preparatory tasks performed on its behalf under so-called technical contracts. The level of remuneration varies depending on the preparation quality of the items and on the degree of sorting performed.

In all cases, at least when the mail items fall within the scope of the reserved area, the activities of the mail preparation firms includes a relationship with La Poste, which can be likened to an "unavoidable" partner. The performance of the end-to-end service promised to the mail originator requires that the mail items, after being handled by the mail preparation firm, pass through the transport and delivery network of La Poste to the addressees.

Mail preparation firms may therefore be regarded as

i.) Users of La Poste's network, in so far as they act as a proxy for the mail originators who entrust the delivery of their items to La Poste, and

ii.) Suppliers to La Poste, in so far as they provide certain "upstream" services on behalf of the PPO which fall within the scope of the reserved area.

By using the commercial freedom that the French legislator awarded to it when it was set up as a fully-fledged operator in 1990, La Poste itself determined the terms of access to its network. Due to its monopoly position, La Poste was in a position to unilaterally impose on mail preparation firms the contractual terms under which these firms had to operate (e.g. price conditions and technical standards).

Competition concerns arise from the fact that La Poste itself - along with a number of its subsidiaries – is active in this market alongside the private firms described above. The turnover of the La Poste Group in this sector accounts for more than 10% of the whole mail preparation market. La Poste therefore had a clear conflict-of-interest, in so far as it was tempted to discriminate against competitors, e.g. by modifying the level of the charges, by defining technical standards excluding certain mail preparation firms or by applying these standards in a discriminatory manner.

The mere fact that a Member State has allowed such a conflict-of-interest to arise is per se an infringement of Article 86(2) in conjunction with Article 82 of the Treaty, irrespective of whether any abuse of the dominant position by the postal operator actually occurs. The Court of Justice has previously held - in particular in its Judgement of 13 December 1991 in the Case C-18/88 *GB-Inno BM* - that a conflict-of-interest constitutes an abuse in itself. The Court stated that "a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators [...]"<sup>15</sup>

In the "SNELPD" case the Commission concluded that the French Government should have laid down the correct regulatory framework to avoid the occurrence of such a conflict-of-interest. In theory relatively straightforward, the case was further complicated by the fact that the French Government claimed that the endowment to La Poste of a possibility to determine the conditions applicable to its commercial partners was limited by the regulatory control exercised by the French administration.

The French Ministry of Finance monitors the activities of La Poste and its contractual arrangements with commercial partners. However, French legislation only provided for a limited scrutiny of the conditions applied by La Poste. The regulatory control neither includes the contractual relationships pertaining to the tasks performed by mail preparation firms on behalf of La Poste, nor the technical conditions set by La Poste.

Another objection of the Commission concerning the French regulatory scheme was the fact that the supervisory control was carried out by the Ministry of Finance itself, whose remit also encompasses the supervision of the French State's financial interests in relation to La Poste. The Commission concluded that this situation may have affected the impartiality of the Ministry while exercising regulatory control over La Poste. Despite the fact that the supervision was spread across a number of distinct services within the Ministry (e.g. the "service des postes", the "Trésor", the competition directorate and the budget directorate), the Commission concluded that all these services are accountable to the same Minister and that their respective

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<sup>15</sup> [1991] ECR I-5941, para. 25.

pursuits and concerns may interact, thereby causing a bias in the manner in which the supervision of La Poste is carried out.

In fact, there was even a risk of a “double” conflict-of-interest; i.) within La Poste itself since it functioned both as a competitor and as an “unavoidable” partner of the mail preparation firms and ii.) within the Finance Ministry because it functioned as the competitive “watchdog” of La Poste at the same time as it was La Poste’s sole shareholder.

The French authorities subsequently announced to the Commission their intention to establish an ombudsman for the universal postal service, to be endowed with the power to make reasoned opinions public and to intervene in the relationship between La Poste and its customers or commercial partners.

In its decision, the Commission considered that, if correctly implemented, this scheme would increase the impartiality of the regulatory supervision of La Poste and would in all likelihood solve the difficulties in the relationship between La Poste and the mail preparation firms. However, the Commission took the view that the draft text prepared by the French administration had a number of shortcomings, in particular the failure to expand the scope of the regulatory intervention to La Poste’s contracts. The Commission insisted that these shortcomings be addressed so that the effectiveness of the regulatory control over La Poste would be increased.

#### **4.2. Predatory Pricing, Cross-subsidisation and Tying – The “Deutsche Post I” and “Hays” Cases**

##### *“Deutsche Post I”*

On 20 March 2001, the Commission issued a decision holding that Deutsche Post AG was distorting competition in non-universal parcel delivery services by “cross-subsidising” a strategy of prices below incremental cost in parcel deliveries with revenue generated in the reserved area.<sup>16</sup>

The decision stems from a complaint by United Parcel Service (UPS), a private operator in the business parcel sector active in Germany and other European States. In its complaint UPS alleged that Deutsche Post was using revenues from its profitable letter-mail monopoly to finance a strategy of below-cost selling in business parcel services, which are open to competition. Without cross-subsidies from the monopoly, UPS alleged, Deutsche Post would not have been able to finance and persist with these below-cost prices for a very long time. UPS therefore called on the Commission to prohibit Deutsche Post's below-cost selling in the business parcel sector and impose a structural separation of the reserved area and commercial parcel services.

The decision of 20 March 2001 is notable in several respects. For the first time the Commission defined the standard of cost that an undertaking benefiting from a statutory monopoly has to meet in order not to commit the abuse of “predatory pricing”. It was also the first time the Commission imposed a fine sanctioning the

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<sup>16</sup> Commission Decision 2001/354/EC *Deutsche Post AG*, OJ [2001] L 125, p. 27. Decision not yet published.

abuse of a dominant position in the postal sector, *in casu* fidelity rebates and it was the first decision adopted under Article 82 of the Treaty which led to a structural remedy, *in casu* the separation of two branches of a formerly integrated undertaking.

#### **The incremental cost test**

In the main part of the decision, the Commission concluded that Deutsche Post had abused its dominant position by engaging in predatory pricing in the market for mail-order parcel services. In Germany, all parcel services, including mail-order parcel services, are open to competition.

The decision sets forth for the first time a standard for measuring those cross-subsidies between the monopoly area and competitive activities that result in predatory prices in the latter. Any service provided by the beneficiary of a monopoly in open competition has to cover at least the additional or incremental cost incurred in branching out into the competitive sector. The Commission considers that any cost coverage below this level is predatory pricing which falls foul of Article 82 of the Treaty.

The investigation revealed that Deutsche Post, for a period of five years, did not cover the costs incremental to providing the mail-order delivery service. No fine was imposed for this infringement because the economic cost concepts used to identify the predatory pricing behaviour were not sufficiently developed at the time the abuse occurred. Furthermore, with its structural undertaking Deutsche Post has now addressed the issue in a satisfactory way.

With the introduction of the incremental cost test the Commission aimed to establish a clear rule as regards the suitable “floor” for prices that postal monopolists must charge in branching out into fields open to competition. The Commission condemns pricing below incremental cost because it forecloses market entry by efficient competitors and therefore prevents a wider offer at better prices and service conditions.

An analysis of the “multi-product” postal incumbents cost structure must address the issue of common or shared network costs that arise jointly out of the provision of several distinct lines of products, i.) general letter mail protected by the statutory monopoly, ii.) several postal services under the statutory obligation to provide services in the general economic interest and iii.) non-universal postal services open to competition. In order to determine the product-specific or incremental cost of any one of these different services, the Commission had to find the appropriate way of allocating the significant share of common fixed costs that is not incremental to any individual line of services.

When allocating incremental cost to a particular service it must be borne in mind that Deutsche Post is required by law to maintain a capacity reserve large enough to cover any peak demands that may arise in over-the-counter parcel services while meeting statutory quality-of-service standards for those services.<sup>17</sup> Even if Deutsche

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<sup>17</sup> Pursuant to point 2 of Section 1(1) of the Postal Universal Service Ordinance, Deutsche Post is obliged by reason of its universal service obligation to deliver parcels within a certain time-limit (Section 3(2) of the Ordinance: at least 80% must be delivered within two working days). Before the Ordinance entered into force retroactively as of 1 January 1988, the universal service obligation flowed from

Post were no longer to offer mail-order parcel services, it would still be obliged vis-à-vis every mail-order customer to provide catalogues and parcels over the counter within a specified delivery target. This follows from the universal service obligation whereby every potential postal user is entitled to receive from Deutsche Post over-the-counter parcel services of the prescribed quality at uniform prices. In economic terms, this obligation to maintain a reserve capacity is known as the carrier of last resort.

To take into account Deutsche Post's obligation to provide universal postal services, the Decision distinguishes between costs for network capacity and network usage. The Commission considers the costs incurred for providing network capacity to give everyone an option to ship parcels at a uniform rate as part of Deutsche Post's obligation to provide a universal service. Obliging a firm to serve as a carrier of last resort compels this firm to hold capacity in reserve in order to meet demand at peak load. These costs are appropriately treated as common fixed costs for Deutsche Post. On the other hand, the Commission considers that the costs for actual usage of the network for offering a particular line of services, in addition to the services required by law, are costs that are "incremental" to the additional service. These costs, which dependent on the volumes posted, arise only when offering the particular service at issue. In order not to be deemed predatory, prices for a particular product or service must cover at least the incremental costs of producing that service, i.e. the costs for actual usage of the reserve capacity.

Under these circumstances, if Deutsche Post offers an additional line of products in markets open to competition, it should at least cover the additional cost that this choice entails. Prices for particular competitive services that are below the incremental costs for providing these services cannot be justified as necessary in order to fulfil Deutsche Post's universal service obligation, because the additional sales at this price make no contribution to maintaining the network capacity necessary for Deutsche Post to perform its universal service obligation. On the contrary, such prices actually endanger the financial equilibrium necessary in order to fulfil the universal service.

#### **Fidelity rebates**

In light of the foreclosure that resulted from a long-standing scheme of fidelity rebates granted by Deutsche Post to all major customers in the mail-order business, the Commission imposed a fine of € 24 million. As mentioned above, in Germany all parcel services including mail-order parcel services are open to competition.

The Commission's investigation revealed that from 1974 through October 2000, Deutsche Post gave substantial discounts to its large mail order customers on the condition that the customer send its entire mail-order parcel business - or at least a sizeable proportion thereof - via Deutsche Post. Such a system of fidelity rebates forecloses competition. The fidelity rebate scheme did in fact preclude any private

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Section 8 of the Postal Services Act of 28 June 1969. Under that Act, every person had the right to use the Post Office's facilities. The conditions governing the use of the Post Office's facilities were laid down by regulation. Before the Postal Universal Service Ordinance entered into force, the time-limit was set by Section 20(3) of the Customer Protection Regulations (BGBl. 1995 I, p. 2016) -80% on the second working day after the working day of posting.

competitor from obtaining the "critical mass" (estimated at an annual volume of 100 million parcels) necessary to successfully enter the German mail-order delivery market. The fact that - between 1990 through 1999 Deutsche Post had a stable volume-based share of the mail-order parcel market which exceeded 85% - illustrates this point.

Due to the fact that fidelity rebates given by an undertaking in a dominant position have repeatedly been condemned by the Community courts and given the long duration of the scheme in the case at issue, the Commission considered that a fine of EUR 24 million was appropriate for the abusive behaviour.

### **Structural separation**

The most significant outcome of the "Deutsche Post I" decision is probably the structural separation of certain competitive postal services from services covered by the postal monopoly. To take into account the Commission's concerns with respect to cross-subsidisation and predatory pricing, Deutsche Post undertook to create a separate legal entity for the provision of its non-universal parcel services.

To make it clear that revenues from the reserved area are not being used to finance the activities of this separate entity, the relationship between the new entity and the network infrastructure shall be conducted at "arms-length" and be governed by non-preferential commercial conditions. Should the new entity procure logistical assistance from Deutsche Post (the universal service counter and parcel network will remain with Deutsche Post), these services must be paid for at prices that other operators - not benefiting from a reserved area - would get for the provision of such goods or services.

The present Decision reflects the Commission's concern that transparency of financial relations between the postal monopoly and postal services which are open to competition, is indispensable to guarantee that revenue of the postal monopoly is not used to cross-subsidise competitive services.

This "arms-length" standard governing the relationship between the incumbent and its subsidiary active in postal services open to competition reflects the jurisprudence concerning the relationship between the beneficiary of a postal monopoly and its subsidiaries active in areas open to competition.

In a Judgement of 14 December 2000, the Court of First Instance held that commercial and logistical assistance rendered by the beneficiary of an exclusive right to a subsidiary active in non-universal services at a price not reflecting a price to be obtained under "normal market conditions" would indicate a distortion of competition.<sup>18</sup> Should the incumbent, by virtue of its position as the sole public undertaking in the reserved sector, have been able to provide some of the logistical and commercial assistance at a cost lower than a private undertaking not enjoying the same rights, the difference between the incumbent's cost and that of a private operator operating without a statutory monopoly may distort competition.<sup>19</sup>

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<sup>18</sup> Case T-613/97 *Union Française de l'Express (Ufex)*. Not yet published.

<sup>19</sup> *Ufex*, op.cit., at para. 74.

In the *SFEI* Judgement, the Court ruled that “the provision of logistical and commercial assistance by public undertakings to its subsidiaries, which are governed by private law and carry on an activity open to competition, is capable of constituting state aid [...] if the remuneration received in return is less than that which would have been demanded under normal market conditions.”<sup>20</sup>

In accordance with this jurisprudence Newco will remain free to procure logistical assistance (such logistical assistance includes, inter alia, sorting, transport and delivery services) either from Deutsche Post or from third parties. Newco is also free to self-provide these logistical services. However, should Newco choose to purchase the logistical assistance from Deutsche Post, the latter will have to provide to Newco all logistical assistance services at market prices.

In order to avoid any ambiguity about the genuine “arms-length” relationship, Deutsche Post has undertaken that all logistical assistance it supplies to Newco will be supplied to Newco's competitors at the same price and under the same conditions. In the future, Deutsche Post will therefore have no incentive to charge prices below market prices when providing logistical assistance to its own subsidiary.

#### *The “Hays” case*

With its most recent Decision in the postal field, adopted on 5 December 2001, the Commission aimed to protect a small but competitive postal service - the so-called document exchange - from being incorporated into a postal monopoly.

The Commission concluded that the Belgian postal operator De Post –La Poste (La Poste) abused its dominant position by offering a preferential tariff in the general letter mail service subject to the acceptance of a supplementary contract covering a new business-to-business (“B2B”) mail service that La Poste intended to provide. The new service competes with the B2B document exchange service provided by Hays plc, a private undertaking established in the United Kingdom and active in several Member States, including Belgium. Due to the fact that La Poste exploited the financial resources of the monopoly it enjoys in general letter mail in order to leverage its dominant position there into the separate and distinct market for B2B services, the Commission intends to impose a fine on La Poste. At the time of writing, the amount of the fine has yet to be determined by the Commission.

The aim of the decision is to make it clear that there is an infringement of Article 82 of the EC Treaty if a postal incumbent exploits the resources of its statutory monopoly in order to eliminate competitors providing services in areas which are open to competition. In the period ahead, which will be marked by the co-existence of services covered by the postal monopolies and services which are open to competition, the Commission will remain extremely vigilant that the beneficiaries of the monopoly do not extend their dominance into markets open to private operators.<sup>21</sup>

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<sup>20</sup> Case C-39/94 *SFEI and others v La Poste and Others* [1996] ECR I-3547 at para. 57.

<sup>21</sup> See, Jean-François Pons and Tilman Lüder, *La politique européenne de la concurrence dans les services postaux hors monopole*, Competition Policy Newsletter, Number 3 October 2001.



In its complaint of April 2000, Hays alleged that La Poste was trying to eliminate the document exchange network which Hays had been operating in Belgium since 1982. Hays could not compete with the tariff reduction offered by La Poste in the monopoly area and which La Poste was tying to its new B2B service. Accordingly, Hays was losing most of its core clients in Belgium - the insurance companies.

B2B mail services are offered only to a closed group of subscribers for the mutual exchange of business-related documents. B2B mail services offer overnight delivery and special pre-arranged hours for pick-up and delivery. B2B mail therefore differs significantly from the general letter mail services covered by the monopoly. La Poste and Hays compete in providing B2B services to insurance companies in Belgium.

In the course of the Commission's investigation, the following facts emerged. After Hays' customers in the insurance sector indicated that they were not interested in the new B2B mail service offered by La Poste, it immediately terminated the preferential tariffs that the insurance companies enjoyed previously when sending their general letter mail. The Belgian Federation of Insurance Companies was notified of the unilateral termination on 30 October 1998. La Poste refused to grant the previous discounts, until the Federation subscribed to La Poste's new B2B service on 27 January 2000. La Poste subsequently abolished the tying practice by discontinuing the B2B mail service on 27 June 2001.

By tying the tariff reduction in the monopoly area to the subscription to its B2B service, La Poste made it impossible for Hays to compete on a level playing field because the latter could not offer a similar advantage. The effects of this tying practice, although it has been terminated in the meantime, still risk to eliminate Hays, a company that has established a cross-border network for the exchange of documents, from the Belgian market. The overnight cross-border exchange of documents between Belgium and the United Kingdom and France that is presently offered by Hays, would cease to exist if Hays disappeared from the Belgian market. The infringement therefore had a negative impact on trade between Member States and sent a strong negative signal to foreign competitors who wish to do business in Belgium.

Article 82(d) of the EC Treaty provides that an abuse of a dominant position may consist of "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

The Commission is fully aware of the fact that the opening of postal markets is likely to develop gradually over a number of years. Under these circumstances, protecting alternative postal services open to competition is an important means of safeguarding the interests of consumers and European industry that require a variety of high performance and competitive postal services. The Hays Decision demonstrates that the Commission will remain vigilant in order to prevent beneficiaries of monopolies from exploiting their monopoly resources in order to leverage their dominance into markets open to competition.

### 4.3. Remuneration for International Mail Traffic – The “Deutsche Post II” Case

#### *International mail and remail*

PPOs compensate each other for the delivery of cross-border mail on each other's behalf by paying terminal dues. The receiving PPO is remunerated for the delivery of cross-border mail by the sending PPO.<sup>22</sup> In all Member States practically all incoming cross-border letter mail is handled by the incumbent PPOs.<sup>23</sup> The Postal Directive opened only a fraction of this market to competition.<sup>24</sup>

However, the collection and forwarding of outgoing cross-border letter mail has been de jure or de facto liberalised in most EU Member States. Although competitors have entered this market in a number of Member States, the PPOs still dominate their home markets.<sup>25</sup> The liberalisation of outgoing cross-border letter mail has facilitated the provision of remail services. Remailing can be described as the practice of re-routing mail between countries utilising a combination of conventional transport services, express services and other postal services. Specialist remailing firms tender international bulk mailings to postal operators on behalf of clients in other countries (commercial remailing). Although remail services were initially provided by private firms, PPOs themselves have become increasingly involved in remailing activities.

Remailing becomes economically viable when postal tariffs vary significantly between different countries, as is the case within the Community. The greater the

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<sup>22</sup> Under the so-called REIMS II-agreement – to which the PPOs of all Member States except TPG of the Netherlands are signatories – terminal dues are expressed as a percentage of domestic tariffs in the receiving country. Since previous terminal dues (under UPU and/or CEPT rules) did not cover costs, the REIMS II parties agreed to increase terminal dues annually, provided that the receiving PPO met certain specified quality-of-service standards. In 2001, REIMS II terminal dues were set at 70% of the domestic tariff. The Commission regarded the REIMS II as an agreement indirectly fixing selling prices falling under Article 81 (1) of the Treaty. However, the Commission considered that a cost-based system for terminal dues would allow the postal operators to improve the quality of their cross-border mail services. The Commission obliged the REIMS II-parties to accept that full terminal dues would only be paid if the quality-of-service targets were met. Due to the lack of transparent cost accounting, the Commission only allowed the parties to increase the percentage to 70 % and not to 80% as previously agreed. The Commission also required the parties to introduce proper cost accounting systems before the end of 1999. Bearing this in mind, the Commission adopted – on 15 September 1999 – a decision under Article 81(3) of the EC Treaty exempting the REIMS II agreement until 31 December 2001. See Commission Decision 1999/695/EC - *REIMS II*, OJ [1999] L-275/17. On 18 June 2001, the REIMS II parties notified to the Commission an amended REIMS II agreement requesting a renewal of the current exemption which expires at the end of 2001. The notification is presently being examined by the Commission. Ref. case no COMP/38.170 – *REIMS II Re-notification*.

<sup>23</sup> *Liberalisation of Incoming and Outgoing Intra-Community Cross-border Mail*, pp. 22 and 38. Seven Community PPOs estimated that their market shares for incoming cross-border letter mail in 1996 varied between 95 and 100%.

<sup>24</sup> The Postal Directive opened some 3% of PPOs' total mail turnover to competition. In practice, PPOs have retained everything but a very small share of the business theoretically open to competition.

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

difference between a given country's high domestic tariffs and the low terminal dues which its PPO receives for delivering incoming cross-border mail, the greater becomes the possibility for profitable remailing. In other words, if terminal dues in the receiving country are low compared to the domestic tariffs in that country, the sending PPO is able to charge a cross-border tariff which is significantly lower than the normal domestic tariff in the receiving country. It thus becomes profitable to transport mail emanating from country A to country B and have it posted back to country A or to a third country (country C). There are thus two main categories of remail: A-B-A remail where the mail items come from State A but are posted in State B for delivery in State A and A-B-C remail where the mail items come from State A but are posted in State B for delivery in State C.

### *Interception of Cross-border Mail*

In 1998, the public postal operator of the UK – Consignia plc – filed a complaint with the Commission which alleged that Deutsche Post AG had frequently intercepted, surcharged and delayed international mail from the UK arriving in Germany.<sup>26</sup>

The dispute between Consignia and Deutsche Post stemmed from a fundamental disagreement how to identify the sender of international mailings. Deutsche Post argued that any incoming international mail containing a reference to Germany – usually in the form of a German reply address – should be considered as having a German sender, regardless of where the mail was produced or posted. Under the allegation that mailings of this type were in fact circumvented domestic mail (so-called A-B-A remail), Deutsche Post intercepted the mailings and refused to deliver the letters to its addressees unless the full domestic tariff applicable in Germany was paid. This refusal of Deutsche Post resulted in long delays, up to several weeks.

The Commission's investigation revealed that the disputed mailings did not have German senders. The mailings were produced and posted in the UK, or alternatively, produced in Sweden or in the Netherlands and posted to Germany via the UK. The mail was not circumvented domestic mail - as Deutsche Post maintained - and should therefore have been treated as normal international mail when entering Germany from the UK.

It is becoming increasingly common for multinational companies to centralise their mail distribution. Bulk mailings are often distributed to addressees in a number of countries from one distribution point. Experience shows that response rates to commercial mailings are much higher if customers can send their replies to an address in their own country. It is therefore crucial to have a "local" reply address in each country of distribution.

In order to qualify as remail - according to Deutsche Post - there did not have to be any transfer of information at all (neither physical, nor non-physical) from country A to country B. The only link to Germany was the inclusion of a reference in the contents of the mailings to an entity residing in that country. This link was entirely

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<sup>26</sup> Commission Decision 2001/1934/EC - *Deutsche Post AG – Interception of Cross-border Mail*, case no COMP/36.915. Decision not yet published.

virtual and led to the erroneous classification by Deutsche Post of normal cross-border mail as virtual A-B-A remail.

In the Commission's view it is not for Deutsche Post - or any other postal operator - to determine how postal customers should organise their activities, how they should present themselves to the addressees or how they should prepare their mailings. The Commission found that the behaviour of Deutsche Post impeded the free flow of mail between Member States and impeded the development of centralised mailing solutions within the European Union. Therefore, the Commission concluded that Deutsche Post's treatment of international mail of this type as "circumvented" domestic mail was incompatible with EC law.

The Commission found that Deutsche Post abused its dominant position in the German market for the delivery of international mail - thereby infringing Article 82 of the EC Treaty - in four ways. Deutsche Post discriminated between different customers and refused to supply its delivery service unless an unjustified surcharge was paid. The price charged for the service was excessive and the behaviour of Deutsche Post limited the development of the German market for the delivery of international mail and of the UK market for international mail bound for Germany. The four ways in which Deutsche Post abused its dominant market position are outlined below.

i.) Discrimination: Deutsche Post treated differently incoming international mail which it considered "genuine" on the one hand and international mail which it incorrectly considered to be "circumvented" domestic mail. In both cases Deutsche Post performed exactly the same delivery service but charged customers differently.

ii.) Refusal to supply: In order to have their mailings delivered, the customers of Deutsche Post had no choice but to pay the claimed surcharges. The refusal of Deutsche Post to deliver the mailings on terms that were acceptable to the sender and the sending postal operator amounted to a so-called constructive refusal to supply its delivery service. The anti-competitive effects of Deutsche Post's refusal were reinforced when it resulted in lengthy delays.

iii.) Excessive pricing: For incoming international mail which Deutsche Post incorrectly classified as circumvented domestic mail, Deutsche Post charged the full domestic tariff. The Commission investigation showed that the price charged by Deutsche Post for delivering the disputed mailings exceeded the average delivery cost by at least 25 %, a price which - bearing in mind Deutsche Post's status as a monopolist as well as the particular characteristics of the postal industry - had no reasonable relationship to real costs or to the real value of the service provided. The price charged was therefore considered as excessive.

iv.) Limitation of markets: In the short run, the interceptions, surcharges and delays limited directly the output on the German market for delivery of international mail. The surcharges imposed by Deutsche Post resulted in unjustified cost increases. The behaviour of Deutsche Post affected negatively the senders, the sending postal operator and eventually the consumers. In the long run, dissatisfied customers were discouraged from

using postal operators in the UK for mail addressed to final destinations in Germany. As a consequence, the production in the UK market for outgoing international mail bound for Germany was limited.

Towards the end of the legal proceedings, Deutsche Post gave an undertaking to no longer intercept, surcharge or delay international mail of the type concerned by the case (i.e. virtual A-B-A remail).

On 25 July 2001 the Commission adopted a formal prohibition decision which ordered Deutsche Post to bring the infringement described above to an immediate end.

In the past, the behaviour of Deutsche Post had been condoned by German courts. Furthermore, at the time when the majority of the interceptions took place there was no Community case law that concerned international mail services. The legal situation was therefore unclear. The Commission considered that the undertaking by Deutsche Post would avoid future delays of mailings and facilitate the detection of further infringements, should they occur. Bearing these considerations in mind, the Commission decided to impose only a symbolic fine of EUR 1,000 on Deutsche Post.

The Decision adopted by the Commission emphasises the importance of swift and efficient postal services within the European Union. It is made clear that dominant postal operators such as Deutsche Post may not impede the free flow of mail between Member States. Companies that have been awarded wide-ranging monopoly rights have a special responsibility not to abuse their dominant market positions by behaving anti-competitively. The symbolic fine may be interpreted as a clear signal from the Commission that – since the legal situation has been clarified – future abuses of a similar nature may result in severe penalties.

## **5. CONCLUSIONS**

In the light of the above, the following points - important from an economic point-of-view- emerge.

i.) Delayed market opening: The postal sector has lagged behind in the process towards market opening compared to other regulated network industries. The main objectives of opening markets to competition are to induce price competition, create incentives to reduce production costs and stimulate product innovation. Consumers and users of postal services will be the first to benefit from the process of innovation. However, the concern that the opening of previously reserved postal activities would undermine the performance of universal service obligation is the reason behind the fact that these services to a very large extent remain reserved for the PPOs. It should be emphasised that the Postal Directive states that this applies only "to the extent necessary to ensure the maintenance of universal service".

This constraint raises the crucial issue of measuring the cost of the universal service obligation. It is particularly difficult for competition authorities or national regulatory authorities to accurately and consistently measure the cost of the universal service, due to the complexity of the cost accounting methods and the widely different methodologies applied by the PPOs in this field. The Commission's decisional practice has not yet

addressed the issue of costing the net burden caused by the universal service obligation. However, it is equally important that certain limits have been set as to the category of services that can be reserved for the PPOs. In the "Hybrid mail" case, the Commission decided that the extension of the general mail monopoly to include guaranteed day- or time-certain delivery was not justified since it would not jeopardise the financial equilibrium of the PPO in question. The incumbent did not offer this new service himself and the Commission's investigation revealed that the demand for day- or time-certain delivery services was limited. Therefore, the provision by private operators of these value-added services would not detract demand from the general letter service.

ii.) Large, vertically integrated incumbents: Most postal services are provided by large, vertically integrated operators, in most cases wholly or partially state-owned. Postal services contain a number of complementary activities within the value-added chain, e.g. collection, transport, sorting and delivery. Economic studies show that delivery account for approximately 65% of total letter handling costs. Economies of scale are significant only in collection and delivery. The development of effective competition in certain elements of the value-added chain will require regulated access to the incumbents' facilities.

In the "SNELPD" case, La Poste itself determined all the conditions for access to its network (e.g. prices and technical specifications) by mail preparation firms. These firms are active in the collecting, sorting and delivery to La Poste of direct mail items. Due to its monopoly position La Poste is an "unavoidable" partner of the mail preparation firms. La Poste could therefore unilaterally impose access conditions on the mail preparation firms. Moreover, La Poste itself was active in the market for mail preparation. La Poste's conflict-of-interest made it tempting to discriminate against its competitors by giving them less favourable access conditions. The Commission requested that effective regulatory control of the access conditions applied by La Poste must be put into place by the French authorities.

iii.) Incumbents' expansion into competitive markets: Most incumbent postal operators also operate in markets open to competition. One of the main competition concerns raised by private competitors is the fact that the PPOs are in such dominant position that they have the ability to squeeze out their competitors from these markets. This is even more true when PPOs adopt pricing policies in competitive markets that prevent efficient private firms from entering.

Predatory pricing - as in the "Deutsche Post I" case in which Deutsche Post offered parcel deliveries at a price well below the incremental cost of producing the service - is a good example. The Commission Decision clearly states that if DPAG offers services in markets open to competition, the prices charged should at least cover the additional cost incurred by providing these services.

In the "Hays" case, the Belgian PPO was exploiting the resources of its letter mail monopoly to eliminate a competitor providing an alternative service in an area open to competition. The incumbent was tying a tariff reduction in the monopoly area (letter mail) to the subscription of its service in the area open to competition. The economic consequence was that it was impossible for Hays to compete on a "level playing field", since Hays was not in a position to offer similar price reductions.

The "Deutsche Post II" case is a further example of this type of behaviour. By making an extensive interpretation of what constitutes a domestic mail item, i.e. by defining normal

cross-border mail as “circumvented” domestic mail, Deutsche Post sought to leverage its monopoly position in the market for domestic delivery of incoming cross-border mail in order to gain competitive advantages in another market which is open to competition – the UK market for outgoing cross-border mail. It is worth noting that Deutsche Post is active in the latter market and that it operates its own office-of-exchange in the UK. Deutsche Post is thus a direct competitor of Consignia for this type of mail.

In summation, competition law is applicable in the postal sector and the ensuing competitive problems often concern potentially anti-competitive behaviour by incumbent postal operators which generally benefit from wide-ranging monopolies intended to finance the universal service obligation. The competitive concerns particularly relate to behaviour such as discrimination, predatory pricing, fidelity rebates and tying. Moreover, the Member States - often the sole shareholders of the PPOs - often have clear conflicts-of-interest which may tempt them to engage in anti-competitive behaviour such as extending the scope of the postal monopoly to new services or discriminating against competitors of the PPOs.