

COMMISSION

COMMISSION DECISION

of 5 December 2001

relating to a proceeding under Article 82 of the EC Treaty

(COMP/37.859 — De Post-La Poste)

(notified under document number C(2001) 3644 CORR.)

(Only the Dutch and French texts are authentic)

(Text with EEA relevance)

(2002/180/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, the first Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by Regulation (EC) No 1216/1999 ⁽²⁾, and in particular Article 15(2) thereof,

Having regard to the complaint lodged by Hays Information Management SA on 7 April 2000 alleging infringement of Article 82 of the EC Treaty by La Poste and requesting the Commission to put an end to this infringement,

Having regard to the Commission decision of 1 June 2001 to initiate proceedings in this case,

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

Having regard to the final report of the Hearing Officer,

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

Whereas:

I. FACTS

A. The complainant

- (1) The complainant, Hays Information Management SA (hereinafter called 'Hays'), is the Belgian subsidiary of Hays plc, a private company incorporated under English law active in the United Kingdom, continental Europe and the United States of America. In 1975 Hays plc launched Document Exchange ('DX') ⁽⁴⁾ in the United Kingdom, a closed-user-group mail delivery service offering express, business-to-business professional courier services (before-9 a.m. next-day delivery).

⁽¹⁾ OJ L 13, 21.2.1962, p. 204/62.

⁽²⁾ OJ L 148, 15.6.1999, p. 5.

⁽³⁾ OJ L 354, 30.12.1998, p. 18.

⁽⁴⁾ DX is the generic name of the document exchange service provided by Hays DX.

The DX service has since expanded throughout the United Kingdom (more than 38 000 subscribers and 4 000 document exchanges), and into Ireland (starting in 1980, with over 3 000 subscribers and 153 document exchanges), France (starting in 1991, with over 300 subscribers and 51 document exchanges) and Belgium (starting in 1982, with 1 840 subscribers and 200 document exchanges). The document exchange network in Belgium consists mainly of insurance companies. In the financial year 1999/2000, Hays's DX business in Belgium achieved a turnover of BEF 105 million. ⁽⁵⁾

B. The undertakings concerned

- (2) De Post-La Poste (hereinafter called 'La Poste') is an independent public undertaking incorporated under Belgian law subject to the Act of 21 March 1991 on the reform of certain public economic undertakings. It holds the statutory postal monopoly (reserved services) as defined in Article 144 *octies* (1) and (2), of the Act of 21 March 1991, as amended by Article 21 of the Royal Decree of 9 June 1999 ⁽⁶⁾. In 1999 La Poste's turnover came to BEF 71 billion. The turnover of the mail business unit in 1999 was BEF 51,9 billion ⁽⁷⁾.
- (3) The other undertaking against which the complaint is directed, Key Mail, was founded under the name Air Business Belgium ('ABB') in 1984. In 1992 it changed its name to Key Mail. At the time of the complaint, Key Mail was a public limited liability company incorporated under Belgian law providing mail services to the financial and insurance sectors and international courier services to exporters. In 1998 Key Mail achieved a turnover of approximately BEF 240 million. At the end of 2000 it sold its entire mail business to the La Poste subsidiary eXbo Services International SA ('eXbo').
- (4) Since May 1998 the business-to-business service in question has been offered to the insurance industry jointly by La Poste and ABB. On 24 January 2000 ABB concluded, together with La Poste, an agreement concerning the business-to-business service with the Union Professionnelle des Compagnies d'Assurance ('UPEA') ⁽⁸⁾. La Poste and ABB are defined in the agreement as joint 'Operator' of the service to which the agreement relates. La Poste and ABB both helped to actually set up the integrated network that was needed in order to provide the business-to-business service. ABB's contribution included helping to develop a mail-addressing software package, and input on the liaison and item sorting/counting activities provided for in Article 5(4) of the business-to-business service agreement. For this, ABB was granted entitlement to [...] ^(*) of the amount that La Poste would charge under the agreement ⁽⁹⁾.
- (5) Nevertheless, despite having helped to work out the practical arrangements for providing the service to the insurance industry and to negotiate, conclude and implement the resulting agreements, ABB is not a beneficiary of the postal monopoly. Consequently, it does not have the power to link the tariff advantages enjoyed by mail covered by the monopoly to signature of the new agreement on business-to-business mail, the postal monopoly holder alone being able to grant such advantages.

C. Subject matter of the case

- (6) This Decision concerns the cancellation by La Poste of the preferential tariff previously granted to the UPEA for business-to-private mail ⁽¹⁰⁾ covered by the monopoly and the withdrawal of that act of cancellation only once the UPEA had signed a new business-to-business agreement proposed by La Poste. La Poste thus obliged the UPEA, which wished to retain the benefit of the preferential tariff agreement, to purchase from it the new business-to-business service also. The investigation into this case was commenced following receipt of an application from Hays made under Article 3 of Regulation No 17 on 7 April 2000.

⁽⁵⁾ See Hays's comments of 25 January 2001, p. 2.

⁽⁶⁾ Moniteur Belge ed. 2 of 18 August 1999, 30697(30713).

⁽⁷⁾ See profit and loss account in La Poste's Annual Report, 1999.

⁽⁸⁾ Agreement between La Poste and Key Mail of 24 January 2000, Annex 11 to La Poste's comments of 21 November 2000.

^(*) Business secrets.

⁽⁹⁾ See Article 7 of the agreement between La Poste and Key Mail, Annex 11 to La Poste's comments of 21 November 2000.

⁽¹⁰⁾ The term 'business-to-private mail' is used in this Decision to designate the general letter post service market as defined in recital 37.

D. Background

- (7) The insurance sector in Belgium comprises 240 insurance companies, 105 of which, including the largest companies in Belgium, are members of the UPEA.
- (8) In 1982 Hays, through its Hays DX division, set up in Belgium a network dedicated to the exchange of documents between insurance companies and between insurance companies and insurance brokers ⁽¹¹⁾. A subscription agreement was signed between the UPEA and Hays on 14 June 1982 ⁽¹²⁾. This subscription agreement with the UPEA was renewed each year before being concluded for a period of one year, renewable by tacit agreement each year from 1998 ⁽¹³⁾. The service is subscribed to mainly for consignments between insurance companies in Belgium, France, Ireland and the United Kingdom ⁽¹⁴⁾. The Hays DX system consists of a closed network ensuring the transport of mail between users subscribing to the service via personalised boxes located at exchange points (document exchanges). Only members subscribing to the network may exchange, through the network, their business-to-business mail ⁽¹⁵⁾. Mail is deposited at document exchanges by network members themselves, in their capacity as senders of mail items, and is collected daily from them by Hays messengers before being sorted at a Hays sorting centre. The mail is then distributed by Hays among the document exchanges of destination, where it is collected by other network members in their capacity as addressees of the items.
- (9) The services provided by Hays DX guarantee the insurance industry fixed, predetermined mail deposit and delivery times corresponding to the customer's office hours. Hays thus states that any letter or small parcel deposited before 17.30 at the document exchange of departure ⁽¹⁶⁾ is at the disposal of the correspondent at the document exchange of destination generally before 09.00 the following working day ⁽¹⁷⁾. Members of the network form part of closed groups of users: the list of members of the system, who alone can exchange documents via the DX, is exhaustive, and their relationship with other DX network members is a business one. Moreover, with the mail service being specific to a closed user group, the risk of losing items is greatly reduced.
- (10) A network dedicated to the exchange of documents allows considerable efficiency gains over the general letter post service which are passed on in the form of lower charges compared with the letter post service. The Hays DX system thus offers prices (less VAT) 40 % lower than the letter post service provided by La Poste ⁽¹⁸⁾.
- (11) Starting in 1996 La Poste granted the UPEA price reductions on business-to-private mail in return for a commitment covering [...] letters a year (the '2026 agreement'). The 2026 agreement granting this preferential tariff was concluded with the UPEA on 6 April 1996 for a period of two years. The tariff advantages are of the order of [...] compared with ordinary postal tariffs ⁽¹⁹⁾.

⁽¹¹⁾ This fact is not contested by La Poste and ABB; see, for example, the agreement between La Poste and Key Mail under 'Rétroactes'.

⁽¹²⁾ See Annex 2 to Hays's comments of 4 April 2001 (agreement of 14 June 1982).

⁽¹³⁾ See Annexes 3 and 4 to Hays's comments of 4 April 2001.

⁽¹⁴⁾ The Hays DX service is the successor to a network set up by the UPEA for the mutual exchange of documents between large insurance companies in Belgium; hence the leading part played by large insurance companies in the maintenance of the Hays DX system: according to Hays's comments of 25 January 2001, point 54, the large insurance companies are the DX system's main customers, the 11 largest accounting for 40 % of the total turnover achieved with the 167 companies subscribing to the system.

⁽¹⁵⁾ See in Annex 2 to the complaint of 7 April 2000 the 1997/1998 and 2000 directories of the DX service in Belgium.

⁽¹⁶⁾ As stated in Article 1(7) of the membership rules, the exact timetable is forwarded once the DX account is opened (this concerns the 17.30 limit, which may be extended to, say, 18.00 depending on the exchange). Friday's mail is collected on Saturday and distributed on Monday.

⁽¹⁷⁾ See Article 3(1) of the DX membership and use rules in Annex 2 to the complaint of 7.4.2000. According to Hays, 99 % of items deposited between 17.30 and 18.00 arrive before 09.00 the next day and are therefore delivered within 12 to 15 hours of deposit. Again according to Hays, this speed of service is regularly tested by users of the network.

⁽¹⁸⁾ See the complaint of 7 April 2000, p. 3.

⁽¹⁹⁾ A reduction in the universal postal service tariff is authorised under Article 12 of Directive 97/67/EC of the European Parliament and of the Council provided it is transparent and non-discriminatory.

- (12) It is clear from documents submitted by La Poste that contact was first established with the UPEA over a new business-to-business mail service through a letter from La Poste to the UPEA dated 24 March 1997 ⁽²⁰⁾. In its reply of 18 April 1997 the UPEA first of all expressed interest in the renewal of the preferential tariff contained in the agreement of 4 April 1996.
- (13) In March and August 1997 the UPEA sent La Poste volume estimates concerning business-to-business mail based on estimates by its members Groupe Josi, GAN, AG (Fortis), AXA Belgium, Winterthur and Commercial Union. These estimates yielded a total volume of some seven million items a year ⁽²¹⁾.
- (14) On 11 August 1997 La Poste sent the UPEA a preliminary proposal concerning a network for handling UPEA members' business-to-business mail with 'collection daily, from Monday to Friday, between 15.00 and 17.00 at each contact point ([...])' and 'distribution of mail the next day, between 07.00 and 08.00, at each contact point'. Billing would be 'individual and monthly'. The prices applicable to mail items 'in the Assurmail network' (emphasis added by the Commission) were those as at 1 July 1997 ⁽²²⁾.
- (15) On 19 November 1997 the UPEA informed Hays, which was already a document exchange provider, of some of the main features required for a network for the mutual exchange of mail between users ⁽²³⁾. By this stage, apart from Hays DX, two companies had shown an interest in providing the UPEA with such a network: La Poste and ABB, each of these companies having put in a separate bid ⁽²⁴⁾.
- (16) On 9 February 1998 La Poste offered a further price reduction of [...] % 'on La Poste's best proposals currently in your possession' ⁽²⁵⁾. On the same day the UPEA's managing board asked its members to consider the business-to-business mail issue in greater detail. An ad hoc working group composed of representatives of the UPEA's Productivity Committee was then set up ⁽²⁶⁾.
- (17) On the expiry of the 2026 agreement granting a preferential tariff for mail covered by the monopoly, La Poste and the UPEA prolonged the agreement on 8 April 1998 for a period of two years ⁽²⁷⁾. The benefits accruing to UPEA members under the agreement are considerable, the cost savings to companies being put by the UPEA at BEF 140 million a year ⁽²⁸⁾.

⁽²⁰⁾ Annex 1 to La Poste's comments of 21 November 2000. According to La Poste the letter of 19 April 1997 from the UPEA to La Poste was the first document in which the UPEA made this request; see La Poste's comments of 17 August 2001, point 5.

⁽²¹⁾ Item 2 of La Poste's reply of 12 July 2001 to the statement of objections; see also Annex 8 to La Poste's comments of 21 November 2000.

⁽²²⁾ See the annexes to the UPEA's fax message to Hays dated 19 November 1997, Annex 2 to Hays's comments of 16 October 2000.

⁽²³⁾ See the description of the 'main elements' of a 'business mail exchange network' in the UPEA's fax message to Hays of 19 November 1997, Annex 2 to Hays's comments of 16 November 2000 and Annex 3 to Hays's comments of 24 July 2001. In its comments of 9 August 2001, at point 4, La Poste disputes the claim that the document entitled 'Main elements of the business mail exchange network' emanated from La Poste. According to La Poste, it 'would appear that this page has been taken from the original proposal which Key Mail presented on its own'. However, La Poste does not deny that the UPEA, be it the author of this document or not, used the document in order to clarify its expectations and the requirements of the insurance companies vis-à-vis Hays.

⁽²⁴⁾ See the agreement between La Poste and ABB under 'Rétroactes': Key Mail, a company specialising in the reposting and delivery of small parcels within 24 hours, became interested in the sector and made proposals to the insurers and brokers concerned. At the same time La Poste also proposed to take over this business for its own account. See also separate offer by La Poste of 11 August 1997, Annex 1 to La Poste's comments of 21 November 2000.

⁽²⁵⁾ Letter of 9 February 1998 from La Poste to the UPEA, Annex 4 to Hays's comments of 24 July 2001. This document was submitted by La Poste as an annex to its comments of 14 February 2001.

⁽²⁶⁾ See document in Annex 7 to Hays's comments of 16 October 2000.

⁽²⁷⁾ See Article 9 of the 2026 agreement: 'The agreement shall be concluded for an initial period of two years. It shall enter into force on 9 April 1998 and shall be renewed tacitly each year starting from the expiry date, 8 April 2000.'

⁽²⁸⁾ Source: UPEA newsletter *Assurinfo* No 7 of 24 February 2000, p. 4 of Annex to Hays's fax of 13 October 2000.

- (18) On 28 May 1998, in response to a request from the UPEA ⁽²⁹⁾, La Poste and ABB submitted a joint proposal concerning business-to-business mail ⁽³⁰⁾. This offer provided for 'the setting-up of a network for the collection and distribution of business mail coming from the insurance industry in the broad sense', which included companies, brokers and such like. According to the offer, the added value to be gained from a partnership between La Poste and ABB aimed at 'setting up an integrated network meeting the expectations of the insurance industry' resided in 'the suppleness and flexibility of the structure created' ⁽³¹⁾. Moreover, La Poste declared: 'The strength and size of La Poste combined with the adaptability of Key Mail enables us to envisage an almost limitless expansion, within a period to be determined, of our services and of our network'.
- (19) According to paragraph 3 of the offer of 28 May 1998, La Poste is to effect 'distribution and withdrawals from the customer's address and the operators' (UPEA, brokers). Each operator undertakes, in agreement with La Poste, to establish in advance a timetable of frequencies, days and times of passing of the postal services. Distribution will be effected every morning from Monday to Friday, between 07.00 and 09.00, and collection from Monday to Friday between 15.00 and 18.00, at the customer's address and the operators'. The times of passing being fixed in agreement with La Poste. According to paragraph 6 of the offer, 'collection and distribution of business items will be performed by La Poste. Transport and sorting will be carried out by Key Mail.'
- (20) By letter dated 15 July 1998 La Poste and ABB clarified certain aspects of their proposal of 28 May 1998. They stressed the opportunities for expanding the network once it was established 'at a few weeks' notice, allowing us to set up the necessary structures'. For the first time, the offer of 15 July 1998 required a minimum volume of [...] items a year: 'To enable us to install infrastructure which allows mail to be picked up and deposited each day, a minimum commitment of [...] items a year strikes us as a reasonable basis for discussion'.
- (21) However, in October 1998 the UPEA concluded that the network dedicated to the exchange of business-to-business mail already provided by Hays to its members since 1982 was more advantageous than the new network outlined by La Poste/ABB. An internal UPEA memo ⁽³²⁾ states that:

'... the business mail exchange dossier has been examined in greater depth these last few months following the favourable outcome of talks with La Poste about preferential tariffs (April 1998). To this end, an ad hoc working group composed of representatives of the Productivity Committee (PC) and of various brokers' federations has studied in minute detail the offers of Hays (BDE) and of La Poste/Key Mail.

The PC has come to the conclusion that Hays's offer is financially more attractive to insurers.

⁽²⁹⁾ UPEA letter of 19 May 1998, Annex to La Poste's comments of 14 February 2001.

⁽³⁰⁾ By its letter of 28 May 1998 La Poste communicated a 'joint reply from La Poste and Key Mail' containing 'our best tariff offer'. The offer related to business-to-business mail 'from the insurance industry in the broad sense (companies, brokers and such like)' and did not yet talk of a minimum volume of items (Annex 6 to Hays's comments of 16 October 2000). See also Annex 2 to La Poste's comments of 21 November 2000.

⁽³¹⁾ Letter from La Poste dated 28 May 1998, p. 2.

⁽³²⁾ Annex 7 to Hays's comments of 16 October 2000.

The PC proposes to consolidate the current position and, in the short term, to continue working with Hays pending a liberalisation of postal services in 2003 (1 January).'

- (22) By circular dated 21 October 1998 'to managers of companies members or non-members of the UPEA' ⁽³³⁾, the UPEA recommended that companies should continue to work with Hays in 1999. The circular describes the Productivity Committee's conclusions in the following terms:

'Business mail exchange system: maintenance of the status quo

Following the renewal on 8 April 1998 of the 2026 preferential tariff agreement for a period of three years, the Productivity Committee has submitted the current business mail exchange system (Hays-BDE) to a critical examination. Applying the same criteria, it has also studied a system which La Poste, in collaboration with Key Mail, has proposed as an alternative to this exchange.

The Productivity Committee has come to the conclusion that the solution proposed by Hays-BDE is financially more attractive to insurers. This position was endorsed by the Managing Board on 12 October.

As a result, the UPEA recommends that companies should continue to work with Hays-BDE in 1999.'

- (23) Consequently, by letter dated 21 October 1998 ⁽³⁴⁾, the UPEA explained to La Poste that Hays's offer was 'the more attractive' and that the choice stemmed from the application of 11 criteria. The UPEA accordingly rejected the latest offer from La Poste and Key Mail concerning business-to-business mail and informed La Poste of its decision to continue 'for the time being' with the Hays DX system. In the last paragraph of its letter, the UPEA stated that it 'appreciated La Poste's having dealt with the business (business-to-business) ⁽³⁵⁾ mail issue independently of the existing agreement on preferential tariffs'. On the preferential tariff agreement itself, the UPEA confirmed its willingness to continue, and develop further, its collaboration with La Poste within the Committee.

⁽³³⁾ Document submitted by La Poste on 14 February 2001. The French version was submitted by Hays in Annex 8 to its comments of 16 October 2000.

⁽³⁴⁾ The letter of 21 October 1998 was submitted by La Poste as an annex to its comments of 14 February 2001.

⁽³⁵⁾ The UPEA calls the business-to-business network "business mail".

- (24) Then, on 30 October 1998, La Poste sent the UPEA a letter stating that it was terminating the 2026 (preferential tariff) agreement, which had been concluded shortly before, on 8 April 1998 ⁽³⁶⁾. In this letter, La Poste gave no reason for its sudden change of attitude regarding the preferential tariff, simply terminating the 2026 agreement 'in accordance with the provisions of Article 10(2) thereof'. Article 10(2) of the 2026 agreement stipulates that: 'The signatories may terminate the agreement on 12 months' notice at the end of the initial period (two years) and thereafter on each annual expiry date'. The termination did not therefore take immediate effect: pursuant to Article 10(2) of the 2026 agreement, the termination of 30 October 1998 did not take effect until 12 months after the initial two-year period, i.e. until 8 April 2001.
- (25) The UPEA's reaction, which was forthcoming on 12 November 1998 ⁽³⁷⁾, mentions a meeting allegedly held between it and La Poste in the wake of the termination letter of 30 October 1998 at which La Poste is said to have explained that the termination of 30 October 1998 should be interpreted as a 'precautionary measure' 'in good time' which would allow the UPEA to reconsider its rejection of the business mail offer. In the light of the clear wording of the letter of 12 November 1998 the UPEA realised it would have to accept this 'additional partnership' if it wished to retain the benefit of the preferential tariff:

'By your letter dated 30 October 1998 you terminate the preferential tariffs agreement of 8 April 1998 with effect within the time limits set out in Article 10(2).

I understand, from the meeting devoted to it, that the termination is to be interpreted as a "precautionary" measure in that the UPEA is being warned in good time that it is impossible to revise the existing agreement in the absence of an additional partnership' (emphasis added by the Commission).

- (26) Following the unilateral termination by La Poste of the 2026 agreement on 30 October 1998 and the UPEA's reply, the negotiations between La Poste and the UPEA were suspended for several months. They were resumed in May 1999. By letter dated 19 May 1999 La Poste resumed direct contact with Commercial Union, an insurance company, with a view to 'envisaging once more collaboration with the insurance industry in relation to both business and non-business mail' ⁽³⁸⁾.
- (27) In reply to a letter from the UPEA dated 22 December 1999 stating that the UPEA did not wish there to be any 'direct link' between the two dossiers, La Poste confirmed on 5 January 2000 that there was no link between the business-to-business dossier and the renewal of the business-to-private agreement, while agreeing to the agreement signature formalities taking place at the same time: 'for the rest, as we have stated on many occasions, we have at no time linked the present dossier and the renewal of the 2026 agreement.

Of course, with a view to adding extra lustre to our future relationship, we do not see any difficulty in agreeing to your request that the two contracts be signed simultaneously' ⁽³⁹⁾.

⁽³⁶⁾ The letter of 30 October 1998 was submitted by La Poste as an annex to its comments of 14 February 2001.

⁽³⁷⁾ The letter of 12 November 1998 was submitted by La Poste as an annex to its comments of 14 February 2001.

⁽³⁸⁾ Document submitted by La Poste in Annex 1 to its comments of 14 February 2001.

⁽³⁹⁾ Document submitted by La Poste in Annex 1 to its comments of 14 February 2001.

- (28) However, this letter of 5 January 2000 did not reverse La Poste's unilateral termination of 30 October 1998, which remained in force and could still take effect at the latest 12 months after the expiry of the initial term of the business-to-private agreement, i.e. on 8 April 2001.
- (29) It was only on 27 January 2000 that the 2026 agreement, signed on 8 April 1998 and terminated by La Poste on 30 October 1998, was renewed for a period of three years. The business-to-business agreement (the '10 000-1 agreement') between La Poste and ABB, on the one hand, and the UPEA, on the other, was signed on the same day. The agreement on the Hays DX service was then terminated by the UPEA by registered letter dated 21 March 2000 with effect from 30 June 2000 ⁽⁴⁰⁾.
- (30) The new business-to-business mail handling service run by La Poste in collaboration with ABB ⁽⁴¹⁾ was provided to a closed group of approximately 1 400 users (insurance companies and brokers), known as 'operators', who exchange documents of a strictly business nature among themselves ⁽⁴²⁾. In order to meet the standards of reliability demanded by the insurance industry for the mutual exchange of documents, La Poste and ABB set up the 'specific network' promised in their commercial offers dedicated to exchanges within the insurance industry.
- (31) As promised in the commercial offers, the new business-to-business network offered 'the suppleness and flexibility' of a deposit and delivery of business-to-business mail arranged with the customer in advance. Pursuant to Article 5(2) of the 10 000-1 agreement, 'Each operator undertakes, in agreement with the manager of the office concerned, to establish in advance a timetable of frequencies, days and times of passing of the postal services'. Article 5(3) of the business-to-business agreement stipulates that 'Distribution will be effected every morning from Monday to Friday, between 07.00 and 09.00, and collection from Monday to Friday, between 16.00 and 18.00, at the customer's address and the operators'. The times of passing being fixed in agreement with the manager of the post office concerned'.
- (32) The 10 000-1 agreement governing business-to-business mail concluded by the UPEA was a framework agreement not directly binding on the insurance companies which were members of the UPEA. The members of the UPEA remained free to use if they wished the service provided by the agreement, the UPEA having no mandate to act directly on behalf of its members. It is clear from the commitment of [...] letters a year (see Article 17 of the 10 000-1 agreement), a quantity which the UPEA's business-to-business mail could not achieve on its own, that, despite the lack of a specific mandate, the UPEA concluded the 10 000-1 agreement in the interests of and for use by its members. This is confirmed by Article 7 of the 10 000-1 agreement, which establishes a system of individual invoicing for each member: 'Invoices shall indicate the total volume of items posted and the volumes broken down by operator'. In addition, as indicated above, pursuant to Article 5(1) of the 10 000-1 agreement, La Poste effects withdrawals at the premises not only of the UPEA, but also of the insurance companies. Lastly, pursuant to Article 5(2) of the 10 000-1 agreement, La Poste's times of passing are agreed between La Poste and the insurance companies themselves.
- (33) After receiving the Commission's statement of objections on 6 June 2001, La Poste terminated, on receipt of a registered letter dated 20 June 2001, the business-to-business agreement vis-à-vis the UPEA. La Poste transmitted to the Commission internal instructions to all its post offices with a view to the immediate cessation of the business-to-business service as of 26 June 2001 ⁽⁴³⁾. According to these instructions, the service covered by the preferential tariff agreements was to continue normally.

⁽⁴⁰⁾ See Annex 5 to Hays's comments of 4 April 2001.

⁽⁴¹⁾ With La Poste acting as prime contractor; see La Poste's comments of 21 November 2000, point 15.

⁽⁴²⁾ See Article 17 of, and Annex 1 to, the 10 000-1 agreement between the UPEA and La Poste.

⁽⁴³⁾ Annex 5 to La Poste's comments of 9 August 2001: 'The Assurmail service will therefore cease to exist on 27 June 2001. Consequently, the 2026 and 3026 agreements will continue normally.'

According to La Poste, its business-to-business service came to an end on 27 June 2001. La Poste informed the Commission that it had nevertheless acceded exceptionally to a request by the companies AXA and Fortis to carry out a final collection on 27 June 2001. As from 28 June 2001, according to La Poste, no more collections were made under the business-to-business agreement ⁽⁴⁴⁾.

- (34) As of 3 July 2001, La Poste transferred the management of the new business-to-business mail services to one of its private-law subsidiaries, eXbo ⁽⁴⁵⁾. As a distinct legal entity, eXbo will keep separate accounts. When the transfer takes effect, La Poste itself will no longer provide any business-to-business mail services. By electronic mail dated 28 June 2001, eXbo sent the UPEA an offer concerning a mutual exchange of documents within a closed user group, without any home collections or deliveries, reserved for insurance professionals ⁽⁴⁶⁾.

II. LEGAL ASSESSMENT

A. Applicability of Article 82 of the Treaty

- (35) La Poste is an undertaking which provides services for a consideration on various postal markets. It is therefore an undertaking within the meaning of the competition rules of the Treaty, irrespective of the way in which it is organised and of whether it operates as a public or private enterprise ⁽⁴⁷⁾.

B. The relevant markets

- (36) There are two relevant markets in this case. Firstly, the market for the general letter post service intended for correspondence with the general public, on which La Poste has abused its dominant position. And secondly, the market for the provision of business-to-business mail services to a closed group of users for the exchange of their business mail, on which the effects of the abuse have made themselves felt.
- (37) The general letter post service ⁽⁴⁸⁾ is protected by the postal monopoly provided items weigh less than 350 grams. In Belgium, La Poste holds the postal monopoly defined in Article 144 *octies* (1) and (2), of the Act of 21 March 1991, as amended by the Royal Decree of 9 June 1999. Moreover, the Commission's investigation established that in Belgium there are no private enterprises operating in the general letter post service sphere handling letters weighing more than 350 grams. La Poste is therefore the only enterprise active in the general letter post service sphere. The business-to-private service forms part of the general letter post service market.
- (38) A business-to-business mail service provided to a closed user group for the exchange of their business mail can therefore be distinguished from other basic postal services by virtue of specific characteristics ⁽⁴⁹⁾ as a result of which it is scarcely interchangeable with them and is affected only to an insignificant degree by competition from them ⁽⁵⁰⁾. Against this background, the degree of interchangeability between products or services must be assessed by reference to their objective characteristics, the structure of supply and demand on the market and competitive conditions ⁽⁵¹⁾. In the present case the substitutability analysis shows that the provision of business-to-business and business-to-private services constitute two distinct markets.

⁽⁴⁴⁾ La Poste's comments of 9 August 2001, point 33.

⁽⁴⁵⁾ Letter from La Poste dated 14 June 2001.

⁽⁴⁶⁾ La Poste's reply of 12 July 2001 to the statement of objections, point 58. However, the structural separation of the reserved area and the new business-to-business service offered by eXbo, though creating total transparency in financial relations between the reserved area and the services open to competition, cannot ensure in the long run that La Poste will in future refrain from any tying between monopoly services and services open to competition.

⁽⁴⁷⁾ Judgment of the Court of Justice of 23 April 1991 in Case C-41/90 *Höfnier and Elser v Macrotron* [1991] ECR I-1979, paragraphs 21 et seq.

⁽⁴⁸⁾ The general letter post service concerns the delivery of items of correspondence to the addresses shown on the items; see the 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, at point 2.3).

⁽⁴⁹⁾ According to the 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, at point 2.4), a document exchange does not include the collection and the delivery to the addressee of the postal items transported.

⁽⁵⁰⁾ Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803, paragraphs 39 and 40, Case 27/76 *United Brands* [1978] ECR 207, paragraphs 11 and 12, and Case T-30/89 *Hilti* [1991] ECR II-1439, paragraph 64.

⁽⁵¹⁾ Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraph 37, and Case T-83/91 *Tetra Pak v Commission* [1994] ECR II 755, paragraph 63.

(a) *Demand substitutability*

- (39) The demand substitutability between the two services is weak. Consequently, there is no cross-elasticity of demand as a function of price. From the point of view of users, business-to-business services are distinct from business-to-private services and are not interchangeable with the latter because, by setting up an integrated network allowing efficiency gains, business-to-business services can offer much cheaper rates than the general letter post service. The tariff is – 40 % (less VAT) for the Hays DX service⁽⁵²⁾ and [...] for the business-to-business service of La Poste⁽⁵³⁾.
- (40) In contrast to business-to-business services, the general letter post service offers neither the withdrawal nor the distribution of mail at predetermined times delimited and defined in terms of 'subscribers' desiderata'⁽⁵⁴⁾ and hence does not guarantee a handing-in of early-morning incoming mail between 07.00 and 09.00, but no later than the time offices open, and a withdrawal of outgoing mail as late as possible, that is, between 16.00 and 18.00 when offices close, allowing an immediate processing of mail by the customer⁽⁵⁵⁾. La Poste itself considers its business-to-business service to be 'an adaptation of the existing postal service'⁽⁵⁶⁾. In contrast to the general letter post service, in order to ensure the required reliability, the business-to-business service is provided through a specific network dedicated to the addresses of subscribers to the service, thus making it possible to avoid any source of failure in the general postal network and thus to minimise the risks of items being lost. Furthermore, the business-to-business service, unlike the general letter post service, provides a back-up, affording additional security in the event of a postal strike.
- (41) The distinction between the general letter post service and the business-to-business service is moreover confirmed by La Poste itself⁽⁵⁷⁾ on several occasions:
- under the terms of the agreement between ABB and La Poste of 24 January 2000, La Poste and ABB must combine their offers 'in order to meet certain specific demands of the insurance industry'⁽⁵⁸⁾ (emphasis added by the Commission). This agreement of 24 January 2000 between La Poste and ABB, which was concluded specially in order that the parties might satisfy demand from insurance companies, indicates that La Poste considers that the general letter post service is not suited to satisfying the specific demand emanating from insurance companies,
 - in its comments of 9 August 2001 La Poste described the service provided under the business-to-business agreement as 'a specific category of mail, that which insurance companies and brokers send to each other. This mail is known as business mail and has been the subject of an offer of a further reduction under the 10 000 agreements'⁽⁵⁹⁾ (emphasis added by the Commission). La Poste therefore considers the mail which insurance companies and brokers send to each other to be a 'specific category of mail',
 - in its first reply to the Commission's requests for information, La Poste described its business-to-business service as being more than just a 'basic postal service'⁽⁶⁰⁾,

⁽⁵²⁾ See the complaint of 7 April 2000, p. 3.

⁽⁵³⁾ For the first weight tranche of up to 20 g the formula produces a tariff that is [...] % lower than the ordinary postal tariff: BEF 17 — [...] % = BEF [...] + [VAT] = BEF [...] — [...] % = BEF [...].

⁽⁵⁴⁾ See the description of the 'main elements' of such a network in the UPEA's fax to Hays dated 19 November 1997, Annex 2 to Hays's comments of 16 October 2000.

⁽⁵⁵⁾ On the other hand, pursuant to Article 5(3) of the 10 000-1 agreement, La Poste committed itself contractually vis-à-vis the UPEA to comply with certain predetermined times for the distribution and withdrawal of mail covered by the business-to-business agreement. La Poste has therefore made a contractual commitment concerning two additional services within the meaning of the judgment in Case C-320/91 *Corbeau* [1993] ECR I-2533, at paragraph 19, namely collection from the sender's address and more reliable distribution.

⁽⁵⁶⁾ La Poste's reply of 12 July 2001 to the statement of objections, point 79. See also La Poste's comments of 14 February 2001, p. 3.

⁽⁵⁷⁾ La Poste's reply of 12 July 2001 to the statement of objections, point 79. See also La Poste's comments of 17 May 2000, point 20, La Poste's comments of 9 August 2001, point 67, the comments of 21 November 2000, points 25, 35 and 150; see also the agreement between La Poste and Key Mail of 24 January 2000, Annex 11 to La Poste's comments of 21 November 2000.

⁽⁵⁸⁾ The agreement between La Poste and Key Mail of 24 January 2000, under 'Rétroactes', Annex 11 to La Poste's comments of 21 November 2000.

⁽⁵⁹⁾ La Poste's comments of 9 August 2001, point 67.

⁽⁶⁰⁾ La Poste's reply of 17 May 2000, point 20.

- moreover, in its comments of 21 November 2000 La Poste described its business-to-business service as having been developed in order to provide 'a new system for handling mail in the insurance sector' ⁽⁶¹⁾ the introduction of which was 'prayed for by the industry' and therefore met insurance companies' and brokers' expectations better than did the general letter post service ⁽⁶²⁾,
- according to La Poste, the development by La Poste/ABB of a 'new business mail handling service better meets the expectations of insurance companies and brokers and permits the entry of a new operator in the area of the handling of those enterprises' business mail, an area in which Hays has been established for the past 20 years or so without having to face any competition' ⁽⁶³⁾ (emphasis added by the Commission),
- according to La Poste, the introduction of the new business-to-business mail handling service therefore signified 'the entry of a new operator, whether dominant or not on neighbouring markets, in a sector where there used to be no competition...' ⁽⁶⁴⁾ (emphasis added by the Commission),
- according to the terms of Article 5(3) of the business-to-business agreement, La Poste entered into a contractual commitment vis-à-vis the UPEA to comply with certain predetermined times of distribution and withdrawal of mail covered by the agreement, these being fixed by common accord between the operator and the manager of the post office concerned. This commitment meets precisely the needs of insurance companies for an immediate processing of their incoming mail as soon as their offices open and for the depositing of outgoing mail when their office is closed ⁽⁶⁵⁾.

(42) In view of the very clear terms previously used by La Poste itself to describe its business-to-business service provided to a closed group of users, La Poste cannot credibly argue, in its reply to the statement of objections, that the depositing and delivery of postal items at predetermined times is not an additional characteristic or part of the business-to-business service but simply an 'organisational measure' taken in respect of all customers of La Poste who generate a substantial volume of mail that cannot be posted in public letterboxes ⁽⁶⁶⁾. Even if La Poste has since the early 1980s applied a system for the advanced distribution of 'direct bundles' ⁽⁶⁷⁾, the integrated business-to-business service provided by La Poste under the business-to-business agreement was clearly more than just an 'advance distribution' in several respects ⁽⁶⁸⁾:

- the 'integrated network' of the business-to-business service does not, like the advance distribution of 'direct bundles', confine itself to providing distribution between 07.00 and 09.00 without any contractual commitment as to the exact time of that distribution,
- the perfect concordance between customers' needs and the commitment entered into by La Poste under Article 5(3) of the business-to-business agreement show that the fixing of predetermined times is much more than an 'internal organisational measure',

⁽⁶¹⁾ La Poste's comments of 21 November 2000, point 25.

⁽⁶²⁾ La Poste's comments of 21 November 2000, point 25.

⁽⁶³⁾ La Poste's comments of 21 November 2000, point 35.

⁽⁶⁴⁾ La Poste's comments of 21 November 2000, point 150.

⁽⁶⁵⁾ See the UPEA's list of 19 November 1997, Annex 2 to Hays's comments of 16 October 2000; 'Pick-up and delivery schedules will be delimited and defined in the light of the desiderata of the parties concerned'.

⁽⁶⁶⁾ La Poste's reply of 12 July 2001 to the statement of objections, point 76, and its comments of 17 August 2001, point 19.

⁽⁶⁷⁾ According to La Poste, 80 000 addresses in Belgium which receive on average 15 mail items or more a day in rural areas and 25 mail items or more a day in urban areas benefit daily from an 'advance delivery' between 07.00 and 09.00; La Poste's comments of 9 August 2001 in reply to letters from the Commission dated 17 and 31 July 2001 (hereinafter called 'La Poste's comments of 9 August 2001'), points 60 and 61.

⁽⁶⁸⁾ As indicated clearly by La Poste itself in its reply of 17 May 2000 to the Commission's request for information of 17 April 2000, point 20.

- La Poste does not dispute the fact that the times predetermined with each customer for morning distribution and for withdrawal between 16.00 and 18.00, as stipulated in Article 5(3) of the 10 000-1 agreement, were always complied with from the time the business-to-business service began until the time it ended ⁽⁶⁹⁾.

(b) *Supply substitutability*

- (43) From a supply point of view the market for the provision of business-to-business services and that for the provision of business-to-private services differ appreciably. The provision of the business-to-business service calls for a high degree of reliability. The reliability required by the insurance industry for the mutual exchange of documents as referred to above has pointed up the need to create infrastructure separate from the public postal network. Moreover, the setting-up of a specific, dedicated network makes it possible to handle the mail of a closed group within shorter deadlines than those of the standard service. The limitation to the addresses of subscribers to the service makes it possible also to minimise the risk of items being lost. Only a mail service specific to a closed group of users can effectively reduce that risk. Lastly, unlike the general letter post service, the business-to-business service incorporates a system of safeguards and hence a guarantee that is not provided by the general letter post service ⁽⁷⁰⁾.
- (44) As La Poste has rightly pointed out, the reason for the non-substitutability is that, in these commercial offers, from the time of the first offer of 11 August 1997 ⁽⁷¹⁾, La Poste promised a 'daily collection, from Monday to Friday, between 15.00 and 18.00 (rural or urban areas) at each contact point ([...])' (emphasis added by the Commission).
- (45) This non-substitutability from a supply standpoint can be seen even more clearly from the joint offer made by La Poste and ABB to the UPEA on 28 May 1998, which promised to 'ensure the setting-up of a network for the collection and distribution of business mail coming from the insurance industry in the broad sense (companies, brokers and such like)' (emphasis added by the Commission).
- (46) In the offer of 28 May 1998, La Poste and ABB explain that 'the added value' to be gained from a partnership with La Poste/ABB 'aimed at setting up an integrated network meeting the expectations of the insurance industry' was 'the suppleness and flexibility of the structure created' and that this network was 'flexible and adaptable to each partner's needs' (emphasis added by the Commission).
- (47) Moreover, in point VIII of its offer of 15 July 1998 La Poste explained that 'To enable us to install infrastructure which allows mail to be picked up and deposited each day, a minimum commitment of [...] items a year strikes us as a reasonable basis for discussion'; it would be possible to expand the network 'at a few weeks' notice, allowing us to set up the necessary structures' (emphasis added by the Commission).
- (48) As Article 5(4) of the 10 000-1 business-to-business agreement rightly pointed out, a further reason for the non-substitutability is that, unlike the general letter post service, the private company Key Mail, which does not hold the postal monopoly, 'carries on the liaison and item sorting/counting activities referred to in this agreement'; and pursuant to Article 19 of the business-to-business agreement, 'In case of need, La Poste and Key Mail undertake reciprocally to perform the tasks entrusted to each of them'. Pursuant to Article 6(5) of the business-to-business agreement, 'To underline the urgent nature of consignments, a bar code shall feature prominently on the front of each item'. Lastly, pursuant to Article 18, 'In order to ensure that items are handled urgently, they must bear the distinctive signs provided for in Articles 6(3) and 6(5)'.

⁽⁶⁹⁾ See Hays's comments of 5 March 2001, p. 9, under 'schedules compatible with the organisation of the mail'.

⁽⁷⁰⁾ See Article 19 of the 10 000-1 agreement of 27 January 2000 and the description of the back-up under point 6 of the offer by La Poste and Key Mail of 28 May 1998. See also Article 6 of the agreement between La Poste and ABB: 'Should La Poste be unable to perform the tasks it has undertaken to perform under the attached agreement (the 10 000-1 agreement), Key Mail shall take its place in accordance with the following procedures:...'.
⁽⁷¹⁾ Annex 1 to La Poste's comments of 21 November 2000.

- (49) In these circumstances, La Poste cannot claim that the business-to-business service is not provided through a 'specific network' ⁽⁷²⁾. Moreover, contrary to what La Poste maintains, the fact that deliveries under the business-to-business agreements are made by the usual postmen or by those responsible for distributing 'direct bundles' ⁽⁷³⁾ does not alter the fact that La Poste set up a network for the collection and distribution of business-to-business mail connecting some 1 400 users (insurance companies and brokers), called 'operators' in the 10 000-1 agreement, who are served every working day via this specific, dedicated network. These users are served daily at specific times, and hence outside La Poste's normal deliveries.
- (50) Furthermore, contrary to what La Poste maintains, the creation of a 'specific network' does not prevent staff working for La Poste in the provision of universal services from also being used to provide a specific service such as the business-to-business one. The postal network is not a fixed infrastructure usable only for certain specific services. The staff of a public postal operator are not assigned once and for all to a particular service, but on the contrary can perform many functions either in the reserved sector or in sectors open to competition.
- (51) The relevant geographic market in the case of the general letter post service is Belgium, owing mainly to the exclusive rights La Poste enjoys in that country. The relevant geographic market in the case of the business-to-business mail service provided to a closed group of users for the exchange of their business mail is also Belgium owing to the fact that, at present, providers generally work at the national level, most of the subscribers to the services in question being established in Belgium. However, the Hays DX example shows that the service, which is not covered by special or exclusive rights vested in operators within the meaning of Article 86(1) of the Treaty, is capable of extending beyond national boundaries. Thus subscribers to the business-to-business service provided by Hays already have, and have had since May 1995, the opportunity to exchange documents with insurance companies connected to the British, French and Irish networks.

C. Dominant position

- (52) La Poste holds the postal monopoly defined in Article 144 *octies* (1) and (2), of the Act of 21 March 1991, as amended by the Royal Decree of 9 June 1999. It thus has a dominant position on the Belgian market for the general letter post service for items weighing less than 350 grams. Furthermore, in the absence of other private enterprises providing basic postal delivery services for items weighing more than 350 grams, the dominant position of La Poste covers basic postal delivery services as a whole, irrespective of the weight/price limit applying to the reserved area defined by Belgian legislation. According to the case-law of the Court of Justice of the European Communities, the territory of a Member State constitutes a substantial part of the common market ⁽⁷⁴⁾.

D. Abuse of a dominant position

- (53) Point (d) of the second paragraph of Article 82 of the Treaty stipulates that an abuse of a dominant position may consist in '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'.
- (54) The case-law of the Court of Justice is quite clear regarding tying as referred to in point (d) of the second paragraph of Article 82. It is already evident from the *Michelin* case ⁽⁷⁵⁾ that an undertaking which has a dominant position on a market and which supplies different groups of products may not, in principle, make a tariff advantage granted on sales on one market dependent on the attainment of a target for sales on another market.

⁽⁷²⁾ La Poste's reply of 12 July 2001 to the statement of objections, point 76.

⁽⁷³⁾ La Poste's reply of 12 July 2001 to the statement of objections, point 76.

⁽⁷⁴⁾ *Michelin* (see footnote 51), paragraphs 102 to 104.

⁽⁷⁵⁾ *Michelin* (see footnote 51), paragraphs 92 et seq.

- (55) Since the business-to-private postal service covered by the monopoly and the business-to-business service provided to a closed group of users are separate services ⁽⁷⁶⁾ and since La Poste let stand the termination, notified on 30 October 1998, of the business-to-private agreement granting the preferential tariff to the UPEA until the UPEA had signed the agreement relating to business-to-business mail on 27 January 2000, La Poste made the granting of the preferential tariff for business-to-private mail covered by the monopoly (the 2006 agreement) subject to the UPEA's acceptance of the additional business-to-business mail service (the 10 000-1 agreement). La Poste thus committed an abuse within the meaning of point (d) of the second paragraph of Article 82 of the Treaty.
- (56) In these circumstances, La Poste cannot claim that any link which might have resulted from the termination of 30 October 1998 would at all events have been only of very short duration, the UPEA having been informed on 5 January 2000, before the signature of the 2026 and 10 000-1 agreements, that there was no link between the two matters ⁽⁷⁷⁾. Since the termination would have taken effect only as from 8 April 2001 ⁽⁷⁸⁾, it had a long-term effect. So long as La Poste did not withdraw its termination, it was clear that the preferential tariff provided for in the business-to-private agreement would no longer have any effect after 8 April 2001. The negotiations on business-to-business mail between La Poste/ABB and the UPEA were carried out under the permanent threat that neither the UPEA nor its members would benefit from the preferential rate after 8 April 2001. In simply stating on 5 January 2000 that there was no link between the two agreements, La Poste did not in any way withdraw the threat stemming from the termination notified on 30 October 1998. The practice of tying can thus also be established after 5 January 2000 ⁽⁷⁹⁾. The termination notified on 30 October 1998 is not an 'isolated act' which could not have had any influence on the UPEA's opting for the business-to-business agreement ⁽⁸⁰⁾, but a measure which, through the withdrawal of a significant financial benefit as regards business-to-private mail, represented a powerful incentive to enter into the business-to-business agreement offered by La Poste/ABB. The termination was therefore such as to impose on the UPEA, on 27 January 2000, the agreement relating to the business-to-business service so as to obtain an extension of the preferential tariff on the same day.
- (57) Only the signature of the two agreements simultaneously thus brought about a change in La Poste's position as regards the extension of the business-to-private agreement. Since La Poste changed its position with regard to an extension of the business-to-private agreement only on 27 January 2000, the date on which the UPEA agreed to sign the business-to-business agreement, it cannot claim that the signing of the two agreements was arranged simultaneously for simple reasons of 'practical organisation' and at the UPEA's request ⁽⁸¹⁾. In point of fact, since the threat that the preferential tariff would expire at the latest on 8 April 2001 was withdrawn only on 27 January 2000 when the business-to-business agreement was signed by the UPEA, the simultaneous signing was the only absolute guarantee for the UPEA that, by signing the business-to-business agreement which it had rejected in 1998, it would ensure that the preferential tariff would be extended ⁽⁸²⁾. The UPEA's request that the business-to-private and business-to-business agreements be 'finalised jointly' proves that the business-to-business agreement was imposed on it as a result of the permanent threat that it would no longer benefit from the preferential tariff after 8 April 2001.

⁽⁷⁶⁾ See the definition of the relevant market.

⁽⁷⁷⁾ La Poste's reply of 12 July 2001 to the statement of objections, points 43 and 110.

⁽⁷⁸⁾ La Poste's reply of 12 July 2001 to the statement of objections, point 110: 'under the terms of Article 10(2) of the 2026 Agreement, the termination would have taken effect only on 8 April 2001, i.e. two and a half years later, 12 months' notice being applicable as from the end of the initial period' (emphasis added by the Commission).

⁽⁷⁹⁾ La Poste's reply of 12 July 2001 to the statement of objections, point 164: 'However, the Commission has not established any "practice" of linkage on the occasion of resumption of the negotiations between La Poste and the UPEA in 1999 or, at least, after La Poste's letter to the UPEA of 5 January 2000...'. In its comments of 17 August 2001, point 47, La Poste simply states that 'after the letter of 30 October 1998, the lack of any link between the agreements [business-to-business and business-to-private] was stated by La Poste on several occasions, both to the insurance companies and to the brokers' (emphasis added by the Commission). The Commission would emphasise that, since this Decision relates to La Poste's conduct vis-à-vis the UPEA, any clarifications vis-à-vis the companies are not relevant.

⁽⁸⁰⁾ La Poste's reply of 12 July 2001 to the statement of objections, point 100.

⁽⁸¹⁾ La Poste's reply of 12 July 2001 to the statement of objections, point 117.

⁽⁸²⁾ UPEA letter to La Poste of 22 December 1999.

- (58) Furthermore, the terms of the UPEA letter of 12 November 1998, which have not been contested, show that, on the basis of a meeting held on this subject with La Poste, the UPEA understood the termination to be a 'warning', 'in good time', and that it should accept the additional business-to-business mail offer if it wished to keep the preferential tariff after the ending of the 2026 agreement. The UPEA was thus clearly aware of the powerful incentive to conclude the business-to-business agreement provided by the persistent threat of the ending of the preferential tariff for mail covered by the monopoly.
- (59) La Poste has not contested the validity of the UPEA's perception, expressed in its letter of 12 November 1998, that it was 'impossible' to revise the agreement granting the preferential tariff in the absence of an 'additional partnership' ⁽⁸³⁾. Neither at the hearing nor at any other time during the Commission's proceedings did La Poste dispute the holding of the meeting to which the UPEA refers in its letter of 12 November 1998 or the content or subject of that meeting as described by the UPEA. La Poste did not therefore challenge the existence of such a meeting or the validity of the UPEA's perception as expressed in its letter of 12 November 1998. Furthermore, at the hearing held on 24 July 2001, La Poste was not able to provide any explanation why the business-to-private agreement was terminated on 30 October 1998, a few days after the UPEA's refusal of the last offer by La Poste/ABB regarding business-to-business mail, only six months after its renewal on 8 April 1998 and 29 months before its expiry on 8 April 2001 ⁽⁸⁴⁾. Lastly, throughout the entire Commission proceedings, La Poste did not put forward any other reason for the termination involving any considerations other than the desire to link the preferential tariff to the conclusion of the business-to-business agreement, such as, for example, the inadequate commercial viability of the agreement. In the light of the UPEA's letter of 12 November 1998, the credibility of which is not disputed by La Poste, there is sufficiently clear and consistent evidence of the commission by La Poste of the infringement referred to in point (d) of the second paragraph of Article 82 of the Treaty.
- (60) In the absence of any alternative explanation by La Poste as regards the date of the letter of termination a few days after the UPEA's refusal to subscribe to the business-to-business agreement offered by La Poste/ABB and as regards the reason why the business-to-private agreement was terminated six months after its renewal on 8 April 1998 and 29 months before it was due to end on 8 April 2001, the explanation set out in the UPEA's letter of 12 November 1998 is unchallenged and remains the only explanation for such unilateral termination.
- (61) Since the unilateral termination was not withdrawn until the simultaneous signing of the business-to-business and business-to-private agreements on 27 January 2000, it was that which prompted the UPEA to reverse its initial decision to reject the offer made by La Poste and ABB as regards business-to-business mail. La Poste's behaviour between 30 October 1998 and 27 January 2000 thus made continuation of the preferential tariff conditional upon the signing of the business-to-business agreement.
- (62) Since the explanation set out in the UPEA's letter of 12 November 1998 is undisputed and remains the only explanation for La Poste's conduct between 30 October 1998 and 27 January 2000, La Poste cannot claim that, for proof to exist that the preferential tariff for business-to-private mail (the 2026 Agreement) was 'subordinated' to the UPEA's acceptance of the supplementary business-to-business mail service (the 10 000-1 agreement), the documents exchanged when the 2026 and 10 000-1 agreements were concluded or the agreements themselves ⁽⁸⁵⁾ would have had to stipulate a 'contractual subordination' ⁽⁸⁶⁾.

⁽⁸³⁾ UPEA letter of 12 November 1998, annexed to La Poste's comments of 14 February 2001.

⁽⁸⁴⁾ In reply to clear and direct questions put by the Commission in this respect, La Poste confined itself to stating that it did not wish to enter into speculation as to the motives of the staff responsible at La Poste at the material time.

⁽⁸⁵⁾ La Poste's reply of 12 July 2001 to the statement of objections, point 163, and La Poste's comments of 17 August 2001, point 41.

⁽⁸⁶⁾ La Poste's reply of 12 July 2001 to the statement of objections, point 163; see also La Poste's additional comments of 17 August 2001, point 37.

E. The effects on competition

1. *The competition link between the two closed-user-group mail exchange systems*

- (63) La Poste disputes the competition link between its business-to-business network and the Hays closed-user-group mail exchange network⁽⁸⁷⁾. However, La Poste's argument that its business-to-business service operates on a different market than the Hays DX service is contradicted by: (1) the business offers of La Poste itself; (2) the facts of the case; and (3) the point of view of the users of closed-user-group mail exchange systems.
- (64) In the first place, La Poste itself initially regarded its proposed business-to-business mail service as being similar to a document-exchange service. La Poste introduced its new business-to-business service as a proposal similar to a document-exchange system⁽⁸⁸⁾.
- (65) Similarly, following the UPEA's invitation to tender for an infrastructure dedicated to business-to-business mail in the insurance sector, three companies showed interest: Hays, La Poste and Key Mail⁽⁸⁹⁾. This shows that the three companies, which responded to the same invitation to tender, were competing with one another and considered themselves to be competitors for the business-to-business service covered by the UPEA's invitation to tender⁽⁹⁰⁾.
- (66) Furthermore, from the point of view of most of the users of closed-user-group mail exchange systems, there is a substitutability link between the business-to-business service offered by La Poste and the Hays DX system. The link stems from the almost identical features of the two services and is confirmed by the ease with which all the major customers were able to switch from one service to the other within the space of only a few weeks. The business-to-business mail services offer almost identical services:
- deposit and delivery at times determined in advance with the customer: the Hays DX system and La Poste's business-to-business mail system both offer longer time spans between the withdrawal of income mail and the depositing of outgoing mail, so that incoming mail can be processed throughout office hours. The two services thus offer very early delivery/distribution (between 07.00 and 09.00), but no later than the time offices open, and the depositing of mail with the operator as late as possible, i.e. when offices close (after 17.00), allowing mail to be processed immediately. The universal service, by contrast, which does not set deposit or delivery times, meets general public demand, since for the general public the precise day or time at which the item is delivered is less important,
 - a high degree of reliability: the Hays DX system and La Poste's business-to-business mail are both intended for a closed group of users served by a specific network that provides the necessary reliability. The establishment of a specific dedicated network makes it possible to process the mail of a closed group within shorter deadlines than the traditional service. Restricting the service to subscribers also makes it possible to minimise the risk of items being lost. Furthermore, so as to be competitive with Hays's private system, La Poste established a back-up for its business-to-business mail that would provide additional security in the event of a postal strike⁽⁹¹⁾. By contrast, there is no back-up system to cover cases where La Poste was unable to provide the general letter post service,

⁽⁸⁷⁾ La Poste's reply of 12 July 2001 to the statement of objections, points 68 to 71, and La Poste's comments of 3 July 2000, points 28 and 29.

⁽⁸⁸⁾ Item 12 in La Poste's reply of 12 July 2001 to the statement of objections.

⁽⁸⁹⁾ See Hays's complaint of 7 April 2000, p. 4.

⁽⁹⁰⁾ See the description of the 'principal elements' of a business mail exchange network in the UPEA's fax to Hays of 19 November 1997, Annex 2 to Hays's comments of 16 October 2000.

⁽⁹¹⁾ Article 6 of the agreement between La Poste and Key Mail, Annex 11 to La Poste's comments of 11 November 2000.

- cheaper prices than the basic postal service: the Hays DX system and La Poste's business-to-business mail both offer cheaper prices than conventional mail. Furthermore, both offer ex post invoicing, monthly in the case of La Poste and yearly in the case of Hays DX. By contrast, ex post invoicing is not available with the traditional service.

- (67) In conclusion, it is evident from its characteristics, the needs it meets and its cheaper prices than the traditional service that the business-to-business mail service provided by La Poste to a closed group of users in the insurance sector in Belgium is aimed at the same clientele and meets the same needs as the Hays DX service. Furthermore, in setting up a specific network dedicated to such clientele, La Poste's business-to-business mail service was organised in the same way as the Hays DX service on the basis of a network dedicated to its subscribers.
- (68) Even if the agreement relating to the business-to-business mail service provided by La Poste formed part of the reserved sector and, for that reason, constituted a separate market for the exchange of documents ⁽⁹²⁾, the business-to-business services provided by La Poste and by Hays DX to insurance companies remain, from the user's point of view, closely linked adjacent markets. This is evident from the fact that all of the major customers of the Hays DX system, the UPEA and the 11 largest insurance companies which are members of the UPEA, left Hays DX to join the competing business-to-business service of La Poste within a period of a few months, between March and July 2000. The ease with which the switch can be made from one service to another within a period of only a few weeks shows that, if the two services do not form part of the same market, they do form part of closely linked adjacent markets.
- (69) In conclusion, the abuse which La Poste is considered to have committed has thus had repercussions on competition on the same market for closed-user-group mail exchange systems, or, if La Poste's system were not to form part of that market, on a closely linked adjacent market which is open to competition.

2. The lack of any equivalence between the volume handled by La Poste and the volume which Hays said it has lost is not relevant.

- (70) An economic analysis shows that, contrary to what La Poste maintains, the effect on competition cannot be challenged on the grounds that there is no equivalence between the volume handled by La Poste and that which Hays claims to have lost ⁽⁹³⁾. Because of the 'network effect' inherent in closed-user-group service systems, the impact on the system losing customers is inevitably greater than the number of consignments actually handled in the business-to-business network established by La Poste. The total turnover of a closed-network mail service depends on the number of transactions between members ⁽⁹⁴⁾. When an undertaking leaves Hays's network to join the network established by La Poste, Hays loses a volume of mail which is equivalent to the number of transactions lost between such undertaking and the other members of the DX system. By contrast, the volume gained by La Poste depends on the number of transactions between members of the network established by La Poste. During the initial phase of the switch between the two networks, the number of members of the DX system will not correspond to the number of members of La Poste's network. Nor, however, will the number of transactions between undertakings which are members of the DX network correspond to the number of transactions which will exist in La Poste's network. This shows that the impact on the Hays DX system will be very great precisely at the start of the switchover of customers to La Poste's system: if the number of undertakings using the DX system is greater than the number of undertakings belonging to La Poste's network, the transactions lost by Hays's DX will exceed the transactions initially gained by La Poste ⁽⁹⁵⁾.

⁽⁹²⁾ La Poste's comments of 14 February 2001, p. 3, La Poste's reply of 12 July 2001 to the statement of objections, point 81, and La Poste's comments of 17 August 2001, point 23.

⁽⁹³⁾ La Poste's reply of 12 July 2001 to the statement of objections, points 81, 173 and 178.

⁽⁹⁴⁾ Economic report submitted by Hays on 24 July 2001, Annex 11 to Hays's comments of 24 July 2001, p. 15.

⁽⁹⁵⁾ See footnote 14 in the economic report submitted by Hays as Annex 11 to the comments of 24 July 2001.

3. *If it lacks 'critical mass', a closed-user-group mail exchange infrastructure cannot be maintained*

- (71) Lastly, contrary to what La Poste maintains, La Poste's tying of the agreements relating to business-to-private and business-to-business mail prevents the establishment of alternative systems for the handling of business-to-business mail ⁽⁹⁶⁾. Since, in a closed mutual mail exchange system such as DX, the attractiveness of belonging to the system depends on the number of participants, as each undertaking wishes to be able to correspond with the largest possible number of other undertakings, the loss of customers as a result of tying by La Poste may result in the DX system's losing customers not directly concerned by the tying: the loss of certain large subscribers may trigger a 'chain reaction' that makes the DX system less attractive ⁽⁹⁷⁾. In particular, following the initial defections, the network becomes less attractive to the remaining subscribers because they have fewer correspondents accessible through the closed system. If members who are important senders and receivers of items leave the network, the network necessarily becomes much less attractive to the remaining members ⁽⁹⁸⁾. Their departure brings in its wake the departure of small and medium-sized accounts. La Poste's tying thus had a very considerable impact on competition. Following the UPEA's termination on 21 March 2000 of its subscription to the Hays network, the 11 largest insurance companies, representing some 40 % of the turnover achieved with the 167 insurance companies subscribing to the system ⁽⁹⁹⁾, left the network between July and December 2000. The departure of the 11 largest insurance companies prompted the immediate departure of more than 100 brokers ⁽¹⁰⁰⁾. These included the 122 leading brokers in Belgium, who similarly accounted for 40 % of the turnover achieved with insurance brokers ⁽¹⁰¹⁾.
- (72) In such circumstances, if it lacks critical mass, the DX system cannot be maintained in Belgium. In its offer of 15 July 1998, La Poste itself indicated that a minimum commitment of [...] items a year was the basis required to justify the establishment of an additional infrastructure for a dedicated business-to-business mail service ⁽¹⁰²⁾. Lastly, if the insurance sector, which represents 85 % in volume and turnover terms of the Hays DX system in Belgium, no longer uses the system, the system can no longer be maintained with only 15 % of the customers outside the insurance sector.

4. *Tying between services covered by a monopoly and services open to competition always has repercussions on competition*

- (73) La Poste used its monopoly resources as regards the business-to-service to 'impose' the additional business-to-private service on the UPEA. Since, by virtue of the postal monopoly, Hays was not in a position to offer the same tariff advantages or indeed the business-to-private service, La Poste, thanks to its statutory monopoly, was able to exert a powerful incentive which eventually persuaded the UPEA that accepting the business-to-business agreement was economically preferable to losing the preferential tariff on business-to-private mail. It should be noted in this respect that, in its Decision in the *Atlas* case ⁽¹⁰³⁾, the Commission identified the harmful effects on competition, where undertakings holding a statutory monopoly exploit the monopoly resources in order to gain advantages in activities open to competition. The Commission stated that such companies 'could eliminate competition by using discounts on reserved services... to attract their clients to use Atlas' non-reserved services' ⁽¹⁰⁴⁾. It is precisely this scenario which is evident in this case.

⁽⁹⁶⁾ See La Poste's comments of 21 November 2000, pp. 7 and 8.

⁽⁹⁷⁾ Hays notes that, since the departure of the large accounts, i.e. the 11 largest insurance companies, the 'chain reaction' accelerated since there was less and less incentive to remain in a system which has fewer and fewer correspondents to whom documents may be sent and who are likely to send documents back.

⁽⁹⁸⁾ See Hays's comments of 25 January 2001, point 55.

⁽⁹⁹⁾ See Hays's comments of 25 January 2001, point 54.

⁽¹⁰⁰⁾ See Hays's comments of 25 January 2001, point 54.

⁽¹⁰¹⁾ See Hays's comments of 25 January 2001, point 54.

⁽¹⁰²⁾ See La Poste's letter to the UPEA of 15 July 1998, Annex 2 to La Poste's comments of 21 November 2000. See also Article 17 of the 10 000-1 and 10 000-2 agreements.

⁽¹⁰³⁾ Commission Decision 96/546/EC of 17 July 1996 (Case IV/35.337 — *Atlas*), OJ L 239, 19.9.1996, p. 23, recital 60.

⁽¹⁰⁴⁾ See Decision 96/546/EC (see footnote 103), paragraph 60.

F. Effect on trade between Member States

- (74) Article 82 does not require it to be proved that abusive conduct has in fact appreciably affected trade between Member States, but that it is capable of having that effect ⁽¹⁰⁵⁾.
- (75) It should first be noted that, since it was set up in 1982, the Hays DX document exchange network has expanded beyond Belgium and links Belgium with other Member States such as France, the United Kingdom and Ireland. Secondly, as is evident from the above economic analysis, a cross-frontier document exchange system that did not have the volume that was essential to its operation could not be maintained solely for DX subscribers abroad. Following the elimination of the Hays system from the Belgian market, DX subscribers abroad will no longer have access to their usual correspondents in Belgium. Consequently, even if La Poste's business-to-business service is aimed only at consignments whose sole destination is within Belgium ⁽¹⁰⁶⁾, La Poste's tying prevents exchange flows of documents through a specific cross-frontier document exchange network ⁽¹⁰⁷⁾.
- (76) Furthermore, document exchange flows from Belgium to other Member States and consignments from such countries to Belgium using the Hays DX network will cease and will be replaced by La Poste's general international letter post service. 'Patterns of trade' are thus liable to be affected and indeed deflected from their normal course if La Poste's tying has the ultimate effect of eliminating this document exchange network from Belgian territory.
- (77) In addition, trade between Member States is affected by conduct which eliminates or is liable to eliminate the establishment of a competitor from another Member State within Belgium. Such conduct leads to market sharing between Member States. Consequently, contrary to what La Poste maintains, the 'patterns of trade' criterion is not decisive.
- (78) The provision of certain services such as the business-to-business mail service requires the establishment of a branch on national territory. However, contrary to what La Poste maintains, the requirement that the provider of a business-to-business service which has its head office in another Member State but which seeks to pursue its business on Belgian territory must set up an establishment in Belgium does not have the effect of excluding the existence of trade between Member States. The fact that the branch would be eliminated from the Belgian market affects the financial relationship between the branch and the parent company ⁽¹⁰⁸⁾. Furthermore, La Poste's tying is capable of affecting the position of foreign companies wishing to establish themselves in Belgium and thus tends to make access to the Belgian market more difficult ⁽¹⁰⁹⁾.
- (79) In conclusion, La Poste's conduct was such as to compartmentalise the relevant market and thus impede the economic interpenetration which the Treaty seeks to bring about.

G. Article 86(2) of the Treaty

- (80) La Poste is not relying on the derogation provided for in Article 86(2) of the Treaty to justify its policy of tying within the meaning of point (d) of the second paragraph of Article 82 of the Treaty. Furthermore, there is no reason why the tying of agreements within the meaning of point (d) of the second paragraph of Article 82 of the Treaty in the insurance sector in Belgium might contribute to performing the task of general economic interest assigned to La Poste.

⁽¹⁰⁵⁾ *Michelin* (see footnote 51), paragraph 104.

⁽¹⁰⁶⁾ La Poste's reply of 12 July 2001 to the statement of objections, point 86.

⁽¹⁰⁷⁾ La Poste's reply of 12 July 2001 to the statement of objections, point 85.

⁽¹⁰⁸⁾ Case 45/85 *Verband der Sachversicherer e.V. v Commission* [1987] ECR 405, paragraph 48.

⁽¹⁰⁹⁾ *Verband der Sachversicherer* (see footnote 108), paragraph 50.

- (81) At all events, the Commission takes the view that tying within the meaning of point (d) of the second paragraph of Article 82 of the Treaty impedes trade to an extent contrary to the Community interest. As already stated, such conduct results in the sealing-off of the Belgian market for business-to-business services. This sealing-off of a national market impedes the exchange of business-to-business mail, to an extent contrary to the Community interest.

H. Article 15 of Regulation No 17

- (82) Under Article 15 of Regulation No 17, an infringement of Article 82 of the Treaty which has been committed either intentionally or negligently may be sanctioned by the imposition of a fine of up to EUR 1 million or alternatively of up to 10 % of the turnover of the undertaking in the preceding business year, whichever is the greater. The chronology of events in the negotiations between the UPEA and La Poste/ABB, and in particular the fact that La Poste let stand the termination of 30 October 1998 of the business-to-private agreement granting the preferential tariff to the UPEA until the UPEA had signed the agreement relating to business-to-business mail on 27 January 2000, point to the conclusion that the tying of the two agreements by La Poste was intentional. In this context, it should be noted that, on several occasions, Hays expressly drew La Poste's attention to the fact that tying by an undertaking in a monopoly position was contrary to the Community competition rules.
- (83) In determining the amount of the fine, the Commission must take account, in particular, of the gravity and the duration of the infringement.

Gravity of the infringement

- (84) In assessing the gravity of the infringement, account must be taken of its nature, its specific impact on the market and the size of the relevant geographic market.

1. The nature of the infringement

- (85) Tying by undertakings in a dominant position has already been ruled against on several occasions by the Court of Justice.
- (86) Furthermore, La Poste made use of the privileges and resources of its statutory postal monopoly in committing the abuse. Through such conduct, it sought specifically to seriously impede the access of non-monopoly postal service providers to the Belgian market. The infringements of Article 82 of the Treaty committed by La Poste had the specific effect of impeding the access of competing producers to the Belgian market for postal services not covered by the statutory monopoly. A policy of tying applied by an undertaking in a monopoly position in order to exclude an active competitor in a neighbouring market not covered by the monopoly must be regarded as a very serious infringement. Postal services in Europe generally feature the coexistence of a monopoly sector (for the general letter post service) and a sector open to competition, in particular for added value services. The Commission must therefore be vigilant in its effort to protect competition in markets which are distinct and different from the general service covered by the monopoly. All attempts to eliminate competition in non-monopoly postal services which involve a series of added-value services in relation to the general letter post service must be regarded as a very serious restriction of competition.

2. The specific impact on the market

- (87) In assessing the specific impact of the infringement on the market, account must be taken of the specific impact which the infringement had on the complainant's activities and the economic scale of such activities. In the present case, La Poste committed the abuse with the intention, which may have been achieved, firstly of eliminating from the Belgian market a private competitor of La Poste and, secondly, of eliminating the infrastructure of the competitor, already established in Belgium since 1982. In the financial year 1999/2000, Hays's document exchange business in Belgium accounted for a turnover of BEF 105 million. The tying practised by La Poste has had a negative impact on competition in this very specific document-exchange business which meets very particular requirements of a closed group of users as regards the exchange of their business mail. During the period in which the infringement was committed, the market shares of Hays DX in such business fell steadily and very appreciably.

3. The size of the relevant geographic market

- (88) Account must be taken of the fact that the anti-competitive effects of the relevant conduct are confined to a single Member State, Belgium.

4. Conclusion regarding the gravity of the infringement

- (89) On the basis of the above, it is apparent that the relevant conduct, on the one hand, involved infringements which were particularly anti-competitive in their nature and object and, on the other, had an impact on a very specific activity meeting the very particular requirements of a closed group of users in a single Member State. In view of these various factors, it must be concluded that the conduct constitutes a serious infringement.
- (90) Given the need to set the amount of the fine, in the light of its gravity, at a sufficiently dissuasive level to ensure that the infringement is not repeated, it is appropriate to set the amount at EUR 2 million.

Duration of the infringement

- (91) The infringements stem from La Poste's unilateral termination, on 30 October 1998, of the agreement with the UPEA granting the preferential tariff for monopoly mail until 27 June 2001, the date on which La Poste states that it ended the business-to-business service.
- (92) It follows from the above that the infringement was of medium duration, and it is therefore appropriate to apply an increase of 25 % to the amount set on the basis of its gravity.
- (93) Accordingly, the basic amount of the fine must be set at EUR 2,5 million.

Aggravating and attenuating circumstances

- (94) There are no aggravating or attenuating circumstances to be taken into consideration for the purposes of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

From 30 October 1998 to 27 June 2001 De Post-La Poste committed an infringement of Article 82 of the EC Treaty by making the agreement granting the preferential tariff for business-to-private mail covered by the monopoly subject to the acceptance, by the recipients of that benefit, of supplementary obligations as regards business-to-business mail.

Article 2

In view of the infringement referred to in Article 1, a fine of EUR 2,5 million is hereby imposed on La Poste.

The fine shall be paid in euro, within three months of the date of notification of this Decision, into bank account No 642-0029000-95 (IBAN code: BE 76 6420 0290 0095; SWIFT code: BBVABEBB) held by the European Commission at the Banco Bilbao Vizcaya Argentaria BBVA, Avenue des Arts 43, B-1040 Brussels.

After the expiry of that period, interest shall automatically be payable at the rate applied by the European Central Bank to its repo operations on the first day of the month in which this Decision is adopted, plus 3,5 percentage points, namely 6,77 %.

Article 3

This Decision is addressed to De Post-La Poste, Centre Monnaie, B-1000 Brussels.

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

Done at Brussels, 5 December 2001.

For the Commission

Mario MONTI

Member of the Commission
