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(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 9 February 2000

declaring a concentration to be compatible with the common market and the EEA Agreement

(Case COMP/M.1641 — Linde/AGA)

(notified under number C(2000) 352)

(Only the German version is authentic)

(Text with EEA relevance)

(2002/343/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas:

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57(2)(a) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings⁽¹⁾ as last amended by Regulation (EC) No 1310/97⁽²⁾ and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 30 September 1999 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,

After consulting the Advisory Committee on Concentrations⁽³⁾

(1) On 1 September 1999 the Commission received notification of a proposed concentration under Article 4 of Council Regulation (EEC) No 4064/89 (the Merger Regulation). By this transaction Linde AG (Linde) was to purchase shares in AGA AB (AGA), thereby acquiring control of the whole of AGA within the meaning of Article 3(1)(b) of the Merger Regulation.

(2) On 30 September 1999 the Commission decided to initiate proceedings in the case under Article 6(1)(c) of the Merger Regulation and Article 57 of the EEA Agreement.

(3) The Advisory Committee discussed a draft of this Decision on 24 January 2000.

I. THE PARTIES AND THE PROPOSED TRANSACTION

⁽¹⁾ OJ L 395, 30.12.1989, p. 1; Corrigendum: OJ L 257, 21.9.1990, p. 13.

⁽²⁾ OJ L 180, 9.7.1997, p. 1.

⁽³⁾ OJ C 110, 7.5.2002.

(4) Linde's areas of business are process engineering, materials handling, refrigeration and the production and distribution of industrial gases. AGA also produces and distributes industrial gases.

- (5) Linde already holds shares in AGA which account for 21,76 % of the capital and 14,45 % of the voting rights. On 15 August 1999 Linde concluded conditional contracts with six large AGA shareholders under which Linde was to buy a total of 66 891 874 A shares and 41 974 157 B shares in AGA. This would bring Linde's stake in AGA to over 66 % altogether.
- (6) Linde has since then acquired the remaining A and B shares in AGA by means of a public bid.

II. CONCENTRATION

- (7) The proposed transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation, because Linde would acquire sole control of AGA.

III. COMMUNITY DIMENSION

- (8) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 billion⁽⁴⁾. Linde and AGA have an aggregate Community-wide turnover of more than EUR 250 million each. The parties do not achieve more than two thirds of their Community-wide turnover in any one Member State. The notified transaction accordingly has a Community dimension. It also requires cooperation under Article 57 of the EEA Agreement in conjunction with Article 2(1)(c) of Protocol 24 to that Agreement.

IV. APPRAISAL UNDER ARTICLE 2 OF THE MERGER REGULATION

A. THE RELEVANT PRODUCT MARKET

- (9) Both Linde and AGA produce and distribute industrial gases, medical gases and high-purity gases.
- (10) 'Industrial gases' comprise all the gases and mixtures of gases provided by gas suppliers for applications in industry and research, applications of which there is a very wide variety. The most commonly used industrial gases are oxygen, nitrogen, argon, carbon dioxide, acetylene and hydrogen, and mixtures including them. Strictly speaking industrial gases do not include medical gases and gases which possess a purity above the standard degree or which are mixed to a precision greater than that of industrial gases.

⁽⁴⁾ Turnover has been calculated in accordance with Article 5(1) of the Merger Regulation and with the Commission notice on calculation of turnover (OJ C 66, 2.3.1998, p. 25). Turnover before 1 January 1999 has been calculated by applying the average ecu exchange rates and converting into euro on a one-for-one basis.

- (11) Industrial gases can be obtained from the air, from synthetic processes, or from natural sources. Atmospheric gases are extracted from the air by liquefaction and separation of the air into its component parts. Air is composed of 20,95 % oxygen, 78,09 % nitrogen, 0,93 % argon and 0,03 % other noble gases such as neon, krypton, xenon and helium. Acetylene and hydrogen are produced by chemical processes. Carbon dioxide comes from natural sources or occurs as a by-product of other chemical processes. Helium is extracted from natural sources.

- (12) According to the notifying party, about 75 % of turnover in industrial gases is accounted for by atmospheric gases, and about 25 % by gases produced by synthetic processes or extracted from natural sources.

- (13) The following table summarises the main uses of oxygen, nitrogen, argon, hydrogen, carbon dioxide, acetylene and helium.

Gas	Main industries where used
Oxygen	Metallurgy (steel production), chemicals, metalworking (cutting and welding), paper (bleaching), glass (melting), electronics, waste water purification, fish farming
Nitrogen	Electronics, chemicals, food (improving shelf life by protecting from oxygen and cryogenic freezing), metalworking (pressing of aluminium parts), building (soil freezing, cooling for the setting of concrete, shielding of prestressing steels against oxidation)
Argon	Metallurgy (steel production), metalworking (shielding of weld seams against oxidation), electronics (shielding of semiconductors against impurities), inflation of air bags
Hydrogen	Chemicals (purification), food (edible oil production), glass (grinding)
Carbon dioxide	Metalworking (shielding of weld seams against oxidation), steel production, chemicals, drinks manufacturing, food (cryogenic freezing), dry ice, waste water purification (neutralisation of alkaline wastes)
Acetylene	Metalworking (cutting and welding), glass (lubrication of moulds)
Helium	Aerospace, lifting gas for balloons, healthcare

- (14) The notifying party submits that industrial gases can be classed in groups with similar uses and capabilities. In almost all applications one gas can be replaced by another with suitable physical and chemical characteristics. Mixtures can almost always be replaced by pure gases. Nitrogen, argon and carbon dioxide can be used where an inert gas is needed, and liquefied nitrogen, liquefied argon, liquefied helium and liquefied or solid carbon dioxide can be used for cooling. Gases which can be used to shield weld seams, such as carbon dioxide, argon and certain mixtures, form one group; air and oxygen might also be considered to form a single group.
- (15) The notifying party also submits that in 60 % of applications industrial gases can be replaced by alternative non-gas-based processes. It claims that this is so in heat treatment in metallurgy; oxygen enrichment, including glass melting processes; joining, binding and cutting; inert gas protection in chemistry; cooling processes for foodstuffs; drinks manufacture; water treatment; etching and doping for semiconductors, electronics and lighting; cooling and pressure applications in the plastics and rubber industry; and assisted respiration and anaesthesia. In these areas of use users can employ non-gas-based processes as well as gas-based processes, and the relevant market should accordingly be taken to include such alternative technologies. The notifying party therefore suggests that each of the ten main areas of use should be taken to constitute a relevant market.
- (16) On the basis of its investigations in this case and in the parallel Case M.1630 — Air Liquide/BOC, the Commission takes the view that because of the different chemical and physical properties of the individual industrial gases they are not generally interchangeable. Industrial gases are used in production processes on the basis of their particular chemical and physical properties in order to produce a desired result in that particular application. The requirements of customers are very different from one application to another, and there is no general interchangeability. It may be that in a particular application there are several gases which possess the properties fundamentally required; thus nitrogen and argon may both be used for protection with an inert gas, and nitrogen and carbon dioxide can both be used for the deep freezing of foodstuffs. But even in cases of that kind it can be assumed that one of these gases is technically superior in the user's particular application. This means that from the customer's point of view there is no real interchangeability, because using a replacement would impair the process and reduce quality. And in fact the users consulted in the course of the investigation in this proceeding, and in the parallel Case M.1630 — Air Liquide/BOC, have almost without exception denied that the industrial gases they use could be replaced by others.
- (17) On the basis of its investigations in this case and in the parallel Case M.1630 — Air Liquide/BOC the Commission likewise takes the view that there is no general interchangeability between industrial gases and non-gas-based processes. The users questioned by the Commission in the present case have almost without exception stated that for their purposes industrial gases cannot be replaced by non-gas-based processes, such as mechanical or chemical processes for example.
- (18) It may happen that replacement is possible in a particular application: thus compression refrigerators may be used instead of carbon dioxide and nitrogen for chilling and freezing foodstuffs, and air may be used instead of oxygen in steel production. But in the latter case the energy expended is greater, quality suffers and the process consequently works less well, so that there is no real interchangeability. In the first case mentioned it should be pointed out that a changeover from carbon dioxide and nitrogen to compression refrigerators for chilling and freezing foodstuffs would require a decision to convert from one system to another. Given the investment needed for such a conversion, there is no reason to suppose that in the event of any lasting increase in the prices charged for industrial gases the user will be able to convert production rapidly to a non-gas-based process.
- (19) The Commission is satisfied, therefore, that because of their specific chemical and physical properties the individual gases constitute separate product markets.
- (20) Industrial gases are delivered to purchasers who need continuous supply, either from a pipeline forming part of a pipeline network belonging to the supplier, or from a plant on the user's own site which is tailored to the user's needs and production volumes. Large purchasers whose requirements are not so great that an on-site plant would be economically justified are supplied using tanks. The gases are usually delivered by tanker in liquefied form. Industrial gases can also be supplied in cylinders. Mixtures of gases for industrial and scientific purposes, high-purity gases, noble gases and reactive gases for the semiconductor industry are likewise bottled in cylinders and marketed in that form.

- (21) On the basis of the information supplied by the notifying party, and the information which the Commission has assembled in the parallel Case M.1630 — Air Liquide/BOC, the Commission takes the view that each of the relevant product markets should be subdivided in terms of the three distribution channels, namely on-site plants and pipelines; tankers; and cylinders. The facilities on the customer's premises differ greatly from one distribution channel to another, depending on the manner of supply and the prices of the individual gases, as the notifying party has itself submitted. The Commission's investigations in this and the parallel Case M.1630 — Air Liquide/BOC have confirmed that competitors and purchasers from the three distribution channels regard them as separate product markets.
- (26) As far as the distribution of cylinder gas is concerned, the notifying party has itself stated that there is very little cross-border delivery. Thus the relevant geographic markets for cylinder gas are to be defined in local terms. The areas in which deliveries can be made from the various filling plants overlap, and as a rule a large number of local markets cover an entire Member State seamlessly. At least between the large suppliers, then, competition is not merely local or regional but extends over the whole of a Member State. As the basis for its assessment, therefore, the Commission has taken the relevant geographic markets for cylinder gases each to comprise the entire territory of a particular Member State.

B. THE RELEVANT GEOGRAPHIC MARKETS

C. ASSESSMENT

- (22) The notifying party submits that the relevant geographic market is the Community. It argues that the gas manufacturers who operate Community-wide are present in almost all Member States and supply gas there through all the customary distribution channels, though their market shares vary. Sales of cylinder gas across the borders of Member States are comparatively limited, but this does not change the fact that the geographic market is Community-wide. All competitors supply customers in the Member States by means of on-site plants and pipelines, and are in competition with one another, thus determining the limits of the market.
- (23) The Commission's investigations in this case and the parallel Case M.1630 — Air Liquide/BOC have established that the extent of the relevant geographic market depends on the properties of the particular gas and the particular form of distribution.
- (24) To take supply from a plant on the customer's own site first, all the main suppliers of industrial gases clearly have the know-how and resources necessary to build and operate such units anywhere in the EEA. Thus they can all tender throughout the EEA for contracts to build and operate on-site plants of this kind. Here, therefore, the relevant geographic markets are EEA-wide.
- (25) Turning to delivery by tanker, the high cost of transport means that delivery by tanker will be economical only within a radius of about 200 km from the filling plant, at least in the case of the atmospheric gases oxygen and nitrogen. Even though the areas covered by the existing filling plants may intersect, the Commission takes the view that here the relevant geographic markets are smaller than the EEA as a whole, and generally consist of one country only. This conclusion is supported by the price differences that the Commission has observed between Member States.
- (27) The transaction would create dominant positions: it would give Linde/AGA dominant positions on the markets in cylinder gases in the Netherlands and in liquefied and cylinder gases in Austria.
1. GERMANY
- (aa) ***In Germany Linde and Messer both hold large market shares***
- (28) Germany is by far the largest market for industrial gases in the EEA, and has the greatest number of competitors. The main suppliers of industrial gases in Germany are Linde and Messer Griesheim GmbH (Messer), in which Hoechst AG has a two-thirds holding and the Messer family a one-third holding. In 1997 Linde and Messer both had a [25-30] %* (*) share of the market in industrial gases⁽⁵⁾. Other major suppliers in Germany are the AGA subsidiary AGA Gas GmbH & Co., KG ('AGA') and Air Liquide GmbH ('Air Liquide'), a subsidiary of L'Air Liquide SA. In 1997 AGA had a [10-15] %* share of the market in all industrial gases together, and Air Liquide had [10-15] %*⁽⁶⁾. The international gas suppliers Air Products and Chemicals Inc., (Air Products) and Praxair Inc., (Praxair) also do business in Germany, though their shares are smaller. In 1997 Air Products had [less than 5] %* of the market in all industrial gases,
- (*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.
- (5) Salomon Smith Barney, Industrial Gases: Industry Report, July 1998, p. 178.
- (6) Salomon Smith Barney, Industrial Gases: Industry Report, July 1998, p. 178.

and Praxair had [less than 5] %* (7). In 1997 the BOC Group plc (BOC) was still operating in Germany, and had a share of [less than 5] %* of the market in all industrial gases (8). Since then BOC's German operations have been taken over by Air Liquide.

- (29) In 1997 other suppliers of industrial gases in Germany had a combined market share of [10-15] %* (9). These included Westfalen AG, which operates throughout the country, and other suppliers with largely regional

operations, such as Sauerstoffwerk Friedrichshafen GmbH, Sauerstoffwerk Friedrich Guttroff GmbH, and basi Schöberl GmbH & Co. The Norwegian company Hydrogas AS (Hydrogas) also supplies carbon dioxide in Germany. The total number of smaller suppliers active in Germany is about 30.

- (30) According to the investigations carried out by the Commission, market shares for liquefied gases in Germany break down as follows:

Liquefied gases	Oxygen		Nitrogen		Argon		Hydrogen		CO ₂	
	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)
Linde	[20-25]* %	[30-35]* %	[25-30]* %	[25-30]* %	[20-25]* %	[30-35]* %	[20-25]* %	[20-25]* %	[10-15]* %	[10-15]* %
Messer	25-30 %	35-40 %	30-35 %	35-40 %	45-50 %	40-45 %	40-45 %	45-50 %	15-20 %	20-25 %
AGA	10-15 %	5-10 %	5-10 %	5-10 %	<5 %	5-10 %	<5 %	<5 %	25-30 %	30-35 %
Air Liquide	10-15 %	5-10 %	10-15 %	5-10 %	<5 %	<5 %	<5 %	5-10 %	25-30 %	25-30 %
Air Products	10-15 %	5-10 %	5-10 %	5-10 %	5-10 %	5-10 %	25-30 %	20-25 %	<5 %	<5 %
Praxair	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %
Other	5-10 %	<5 %	5-10 %	5-10 %	5-10 %	5-10 %	<5 %	<5 %	10-15 %	10-15 %

- (31) According to the investigations carried out by the Commission, market shares for cylinder gases in Germany break down as follows:

Cylinders	Oxygen		Nitrogen		Argon and argon mixtures		CO ₂		Hydrogen		Acetylene	
	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)
Linde	[25-30]* %	[25-30]* %	[20-25]* %	[25-30]* %	[25-30]* %	[25-30]* %	[10-15]* %	[10-15]* %	[5-10]* %	[15-20]* %	[40-45]* %	[40-45]* %
Messer	30-35 %	30-35 %	20-25 %	20-25 %	30-35 %	30-35 %	15-20 %	15-20 %	15-20 %	25-30 %	25-30 %	25-30 %
AGA	10-15 %	10-15 %	5-10 %	10-15 %	10-15 %	10-15 %	25-30 %	25-30 %	45-50 %	25-30 %	15-20 %	15-20 %
Air Liquide	10-15 %	10-15 %	5-10 %	5-10 %	5-10 %	5-10 %	25-30 %	25-30 %	5-10 %	5-10 %	10-15 %	10-15 %
Air Products	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %
Praxair	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %	<5 %
Other	<5 %	5-10 %	30-35 %	30-35 %	10-15 %	10-15 %	15-20 %	10-15 %	10-15 %	15-20 %	<5 %	<5 %

(7) Salomon Smith Barney, Industrial Gases: Industry Report, July 1998, p. 178.

(8) Salomon Smith Barney, Industrial Gases: Industry Report, July 1998, p. 178.

(9) Salomon Smith Barney, Industrial Gases: Industry Report, July 1998, p. 178.

- (32) In 1998 the atmospheric gases oxygen and nitrogen accounted for some 60 % of turnover from the distribution of liquefied gases in Germany, and the atmospheric gases oxygen, nitrogen and argon for some 78 % of all German turnover. Messer's share of the liquefied oxygen market, by value, is 35-40 %, while Linde has a share of [30-35]* %. Messer's share of the market in liquefied nitrogen, by value, is 35-40 %, while Linde has a share of [25-30]* %. Messer's share of the market in liquefied argon, by value, is 40-45 %, while Linde has a share of [30-35]* %.
- (33) In 1998 more than 69 % of turnover from the distribution of cylinder gases in Germany was accounted for by oxygen, nitrogen, and argon and argon mixtures. Messer's share of the market in cylinder oxygen, by value, is 30-35 %, while Linde has a share of [25-30]* %. Linde's share of the market in cylinder nitrogen, by value, is [25-30]* %, while Messer has a share of 20-25 %. Messer's share of the market in cylinder argon and argon mixtures, by value, is 30-35 %, while Linde has a share of [25-30]* %.
- (bb) **Both market leaders have countrywide infrastructures, a countrywide distribution network and an extensive clientele**
- (34) In air separation plants the individual atmospheric gases are extracted in liquid form. They may be vaporised and bottled in filling units on the same premises, and then supplied direct to large users of cylinder gas. But atmospheric gases are also delivered in liquid form by tanker direct to the final user, or to filling plants which are not directly connected to an air separator. There they are bottled and sold. Both liquefied and cylinder gas are bought not only by final users but also by dealers. For the most part these are small gas manufacturers or dealers who buy in liquefied gas for bottling in their own filling plants, or cylinder gas for sale to final consumers through their own distribution outlets.
- (35) Transport costs are very important in the liquefied and cylinder gas business. Transport accounts for about 40 % of costs in the case of liquefied oxygen and nitrogen, and for 10 % even in the case of the very expensive liquefied argon. Transport costs are usually integrated into the price and passed on to customers. The denser a supplier's production and distribution network, the easier it is to minimise costs by supplying over only short distances. As the notification points out, production costs have a smaller impact on price competition today than the costs of distribution and administration.
- (36) Linde and Messer have much denser production and distribution networks in Germany than their competitors. Messer also has a traditionally very strong position in the west (North Rhine-Westphalia, Hesse, Rhineland-Palatinate and Saarland), and Linde in the south (Baden-Württemberg and Bavaria); these are the two regions with the highest gross value added in manufacturing. The north (Lower Saxony, Hamburg, Bremen and Schleswig-Holstein) and the east (Mecklenburg-Western Pomerania, Brandenburg, Berlin, Saxony-Anhalt, Thuringia and Saxony) account for only 14 % and 15 % respectively of gross value added.
- (37) Production and filling plants are distributed between the German regions as follows.

Air separation plant, or air separation plant and pipeline	North	East	South	West	All Germany
Linde	3	3	1	4	11
Messer	0	0	1	8	9
AGA	1	1	1	1	4
Air Liquide	1	1	0	1	3
Air Products	1	0	0	1	2
Other	0	0	1	2	3
Total	6	5	4	17	32

Filling plant or acetylene works	North	East	South	West	All Germany
Linde	7	5	11	8	31
Messer	1	9	3	8	21
AGA	2	3	2	3	10
Air Liquide	2	6	3	6	17
Air Products	1	0	0	1	2
Other	0	2	10	5	17
Total	13	25	29	31	98

- (38) Manufacturers can also reduce their transport costs by agreeing to exchange volumes. Linde and Messer have such an agreement, under which Linde supplies Messer with liquefied oxygen and nitrogen from its air separation plants in Worms (in the western region) and Leuna (in the eastern region), and Messer supplies Linde with liquefied oxygen from its air separation plant in Hürth

(in the western region). The volume contracted for is 7 million m³ of oxygen a year.

- (39) Linde and Messer also have the densest network of distributors.

Outlets and distributors	North	East	South	West	All Germany
Linde	107	251	254	186	798
Messer	226	258	163	202	849
AGA	143	155	151	141	590
Air Liquide	36	244	57	102	439
Air Products	47	41	0	73	161
Total	576	949	625	704	2 837

- (40) According to the notifying party, there are about 450 000 customers for industrial gases in Germany. Linde has [less than 200 000]* customers in the country. [Of these, ...]* are large customers manufacturing at more than one site who are supplied by pipeline or from on-site plants. Another [...] or so are customers who require gas in tanks but also in cylinders, or who use relatively high volumes of cylinder gases. These customers are dealt with direct by Linde's sales staff. The remaining [...] or so are small customers with a requirement of one to 10 cylinders, accounting for a turnover of less than DEM [...] a year. These are dealt with by Linde distributors, of whom there are just under 800. The distributors sell only Linde cylinder gas, for Linde's account ⁽¹⁰⁾.

- (41) Messer has a clientele of 150 000 to 200 000 customers in Germany. It has 850 distributors to deal with small customers.

- (42) Linde's and Messer's dense networks of production plants and sales outlets ensure high product availability and security of supply over short distances, and give them decisive cost advantages over their competitors.

cc) ***Despite the market structure, in which both Linde and Messer have high market shares, the movement of market shares and prices over time indicates that there is real competition between them***

- (43) As has already been explained, the structure of the markets in liquefied and cylinder gases in Germany is characterised by the high market shares held by the two leading suppliers, Linde and Messer, who also enjoy considerable advantages over their competitors in terms of infrastructure and distribution networks. That high market shares should be held by only two undertakings can be strong evidence for the existence of a dominant duopoly. But a market structure of this kind is not

⁽¹⁰⁾ Linde, Kompetenz vor Ort (Responsibility on the Ground), p. 32.

enough to prove that there is in fact joint dominance, at least where it can be shown that there is real competition between the two leaders.

- (44) In the present case there is also the fact that industrial gases are homogeneous products, which usually facilitates oligopolistic parallel conduct. But it has to be borne in mind that on the markets in industrial gases there is some differentiation of the products on offer on the basis of the applications technology to be used. The development of new applications technologies by the gas manufacturers and the provision of assistance specific to the particular application stand alongside price as major parameters of action on these markets. Linde states that there are currently between 500 and 1 000 different uses for industrial gases. This figure is constantly growing. According to Linde, something approaching one third of the gas sold in recent years was used for purposes which even 10 years ago were not regarded as suitable applications for industrial gases.
- (45) Nevertheless, the market structure described here and the fundamental homogeneity of the gases being sold does suggest the existence of a dominant duopoly. Against this conclusion, however, there is the movement of market shares over time, and the pricing of the different gases.
- (46) In the course of the proceedings Linde has submitted extensive data showing the movement of market shares and average revenue from the separate gases from 1986 onward, or in the case of liquefied gases from 1989 onward; from 1994 these data are based on figures supplied by the German Chemical Industry Federation, the VCI. They show that Linde's and Messer's market shares have fluctuated in different directions for different gases. Average revenues on individual gases have also differed widely between Linde and Messer. Both of these things indicate that there is significant competition between Linde and Messer.
- (47) For liquefied oxygen and argon, Linde's market share has fallen slightly over the last 10 years, oxygen by 1,6 percentage points and argon by 0,3 percentage points. For liquefied nitrogen its market share has risen slightly over the same period, by 1,6 percentage points. But there is no steady trend. In some years Linde's market shares were above those of 1989, and in other years they were lower. Messer's share of the markets in all three liquefied gases has fallen substantially: oxygen by 6,1 percentage points, nitrogen by 4,5, and argon by 8,5. But there is no steady trend here either. Nor did Linde's and Messer's shares of the markets in particular gases move in the same way. In some years Linde's share of the market in a particular gas would rise substantially, while Messer's share fell. In other years the reverse happened.
- (48) On the market in liquefied oxygen, for example, Linde's share fell slightly between 1989 and 1992; Messer's rose substantially, by five percentage points. Between 1993 and 1995 Linde's market share rose a little, while Messer's fell. Between 1996 and 1999 Linde's market share fell slightly, and Messer's fell by eight percentage points. On the market in liquefied argon, Messer's share fluctuated widely between 1989 and 1999. Between 1989 and 1994 it fell by 11 percentage points; between 1995 and 1997 it rose by almost seven percentage points; and by 1999 had fallen back by four percentage points. Linde's share of the liquefied argon market, by contrast, stayed more or less constant over the whole period 1989 to 1999, with only minor variations. On the market in liquefied nitrogen, Linde's share grew by three percentage points between 1989 and 1995, with small variations from year to year, but between 1996 and 1999 it fell slightly. Messer's share of the liquefied nitrogen market fell by seven percentage points between 1989 and 1993, but since then, though with some fluctuations, it has risen by three percentage points overall.
- (49) In the last 13 years, Linde's share of the cylinder gas market has fallen quite significantly overall, by 11 to 17 percentage points depending on the gas. This fall has been relatively steady. Messer's share, on the other hand, has remained roughly stable or fallen slightly, with the exception of acetylene, where Messer's market share has risen by nine percentage points.
- (50) Turning to the outside competition, Air Liquide's shares of the markets in almost all types of industrial gas, both liquefied and in cylinder, have been growing strongly. This has meant that in the last 10 years Air Liquide has established a firm foothold in the German liquefied and cylinder gas markets. All of the other suppliers listed in recital 29, who are not among the seven largest gas manufacturers, have also had substantial gains in market share.
- (51) In the course of the proceedings Linde has submitted a number of examples of prices which have been substantially reduced because of competition for existing customers. Given the large number of customers served by Linde, these examples can obviously involve only a relatively small proportion of the existing clientele. But the trend reflected in these examples and in the 'reviews of competition' (Wettbewerbsbilanzen) submitted with the notification is confirmed by shifts in average revenues (DEM per m³).
- (52) Like the movement of market shares, the movement of average revenues also presents a different picture in the two companies. For liquefied oxygen, Linde's average revenue fell by [...] %* in the period from 1994 to 1999,

and Messer's by [...] %*. In 1999, as in most years before, both suppliers' average revenues were above the average revenue on the market as a whole. For liquefied nitrogen, Linde's average revenue fell by [...] %* and Messer's by [...] %*. In both 1994 and 1999 Linde's average revenues were in line with those of the market as a whole, while Messer's were lower in 1994 and higher in 1999. For liquefied argon Linde's average revenue fell by [...] %* and Messer's by [...] %*. Despite that, over the same period Linde's average revenues were very far above the market average, and Messer's were well below. For cylinder gases there were similar variations. For cylinder oxygen, for example, Linde's average revenue was always well above the market average over the whole of the period 1994 to 1999; Messer's was sometimes roughly equal to the market average, depending on the year, and sometimes substantially below. For cylinder acetylene Linde's average revenue was well below the market average, and Messer's was substantially above. For cylinder argon both suppliers had average revenues below the market average, but the gap varied from year to year.

- (53) Even with homogeneous goods, average revenues do not allow firm conclusions to be drawn regarding competitors' pricing. It is true that where the goods are homogeneous there are none of the difficulties which arise with differentiated goods offered as part of different product mixes by different suppliers. But even in the case of homogeneous goods there may be different customer structures, with correspondingly different delivery volumes, and this can affect the relationship between average revenues and actual prices. Nevertheless, where the goods are homogeneous the average revenues do provide important indications of the pricing practised by the individual suppliers. This is especially true here, where Linde and Messer have market shares of comparable size. It can safely be assumed, therefore, that their clienteles are also similar in structure. The different movement of Linde's and Messer's average revenues which has been outlined in recital 52 is therefore clear evidence of price competition between them.

- (54) Taking all things together, then, it can be concluded that Linde and Messer are competing actively with one another. Despite the duopolistic market structure, the competitive relationship between Linde and Messer is too marked to allow it to be supposed that there is no real competition between them.

Finding

- (55) It cannot be concluded that Linde and Messer currently form a dominant duopoly in Germany.

After the transaction

- (56) As a result of the transaction Linde's share of most of the relevant markets would increase by 5-10 %. On a number of markets Linde would replace Messer as market leader. The gap between the two leading suppliers and their competitors would widen. But there is no reason to believe that the increase in Linde's market share would appreciably alter the competitive relationship between Linde and Messer, and would in the future lead to a position where the competition which currently exists between Linde and Messer would be decisively weakened. It is true that Linde's takeover of AGA would remove one undertaking currently competing with Linde and Messer. This would reduce the pressure for competition between the leaders which is exerted by outside competition. It has to be borne in mind here, though, that alongside AGA the other large suppliers of industrial gases are also active on the markets in liquefied and cylinder gases in Germany, and that among the outsiders competing would be Air Liquide, the competitor which has increased its market share by easily the largest proportion over the last 10 years. In so far as outside competition has in the past helped to ensure that there was active competition between Linde and Messer too, the situation would not change so drastically that there would in future be no real competition between the two leaders.

Finding

- (57) The Commission is satisfied, therefore, that the transaction would not create a dominant duopoly formed by Linde/AGA and Messer on the markets in liquefied and cylinder gases in Germany.

2. THE NETHERLANDS

- (aa) *On the markets in liquefied and cylinder gases in the Netherlands there are four main suppliers*

- (58) The main suppliers on the markets in liquefied and cylinder gases in the Netherlands are Linde, through a company it controls, NV Hoek's Machine en Zuurstoffabriek; AGA, through AGA Gas BV; Air Products, through Air Products Nederland BV; and Air Liquide, through Air Liquide BV. There are smaller operations run by

Messer, through Messer Nederland BV, and Praxair, through Praxair BV. BOC's Dutch operations have now been taken over by Air Liquide.

- (59) Other, smaller suppliers are Westfalen Gassen Nederland BV, a subsidiary of Westfalen AG; Nederlandse Technische Gasmaatschappij BV, which is controlled by the Italian gas supplier SOL SpA; and Hydrogas Holland BV, a subsidiary of Norsk Hydro ASA in Oslo. Hydrogas Holland, however, essentially supplies carbon dioxide only.
- (60) Linde operates two air separation plants and five filling plants for all kinds of gas in the Netherlands. AGA operates one filling plant for all kinds of gas, one filling plant for carbon dioxide, and one acetylene works in the Netherlands. AGA has no air separation plant of its own in the Netherlands, and therefore cooperates with Air

Products in the production of liquefied atmospheric gases. Air Products has an air separation plant in Rotterdam, which is the largest in the world, and another in Terneuzen. Air Products also has a filling plant for all gases and another for hydrogen only. Air Liquide likewise has a filling plant for all gases and another for hydrogen. Since it took over BOC's Dutch operations, Air Liquide also operates an air separation plant in Terneuzen. Messer has a filling plant for all gases and an acetylene works. The smaller suppliers listed in recital 59 all operate one filling plant each.

(bb) ***The merged Linde/AGA would be the only large supplier of cylinder gases; the rest of the market is fragmented***

- (61) According to the investigations carried out by the Commission, market shares for cylinder gases in the Netherlands break down as follows:

Cylinders	Oxygen		Nitrogen		Argon and argon mixtures		CO ₂		Hydrogen		Acetylene	
	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)
Linde	[40-45]* %	[45-50]* %	[45-50]* %	[50-55]* %	[25-30]* %	[25-30]* %	[25-30]* %	[30-35]* %	[55-60]* %	[55-60]* %	[30-35]* %	[35-40]* %
AGA	25-30 %	25-30 %	15-20 %	15-20 %	35-40 %	35-40 %	50-55 %	45-50 %	<5 %	<5 %	45-50 %	40-45 %
Linde/AGA	[65-75]* %	[70-80]* %	[60-70]* %	[65-75]* %	[60-70]* %	[60-70]* %	[75-85]* %	[75-85]* %	[55-65]* %	[55-65]* %	[75-85]* %	[75-85]* %
Air Liquide	5-10 %	5-10 %	5-10 %	5-10 %	10-15 %	10-15 %	5-10 %	5-10 %	15-20 %	15-20 %	5-10 %	5-10 %
Air Products	5-10 %	5-10 %	10-15 %	10-15 %	5-10 %	5-10 %	<5 %	5-10 %	<5 %	5-10 %	<5 %	<5 %
Messer	5-10 %	<5 %	<5 %	<5 %	5-10 %	10-15 %	<5 %	5-10 %	<5 %	<5 %	5-10 %	5-10 %
Other	5-10 %	5-10 %	10-15 %	5-10 %	5-10 %	10-15 %	5-10 %	5-10 %	15-20 %	15-20 %	5-10 %	5-10 %

- (62) Linde/AGA's joint share of the market in cylinder oxygen is [70-80] %*. The next largest competitor in cylinder oxygen is Air Products, with a market share of 5-10 %. The market share lead over other suppliers is 70 %. Linde/AGA's joint share of the market in cylinder nitrogen is [65-75] %*; the next largest competitor is Air Products, with a market share of 10-15 %. The market share lead over other suppliers is more than 60 %. Linde/AGA's joint share of the market in cylinder argon and argon mixtures is [60-70] %*. The next largest competitors in cylinder argon and argon mixtures are Air Liquide and Messer, both of whom have a market share of 10-15 %. The market share lead over other suppliers is about 50 %.
- (63) Linde/AGA's joint share of the market in cylinder carbon dioxide is [75-85] %*. Air Liquide, Air Products and Messer all have market shares of 5-10 % of this market. Linde/AGA's joint share of the market in cylinder

hydrogen is [55-65] %*. The next largest competitor in cylinder hydrogen is Air Liquide, with a market share of 15-20 %. The market share lead between Linde/AGA and the other suppliers is over 50 %. Linde/AGA's joint share of the market in cylinder acetylene is [75-85] %*. The next largest competitors in acetylene are Messer and Air Liquide, who each have a market share of 5-10 %; Linde/AGA's market share lead over the remaining competitors is over 70 %.

- (64) The remaining small suppliers of cylinder gas are to a great extent dependent on supplies from the main suppliers. The transaction would substantially reduce the number of main suppliers, making aggressive competition appreciably more difficult. There is no reason to suppose, then, that Linde/AGA's freedom of action would be restricted by the remaining small suppliers.

(cc) ***The merged Linde/AGA would be the market leader in a number of liquefied gases in the Netherlands, but the transaction would not create dominant positions on these markets***

(65) According to the investigations carried out by the Commission, market shares for liquefied gases in the Netherlands break down as follows:

Liquefied gases	Oxygen		Nitrogen		Argon		Hydrogen		CO ₂	
	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)
Linde	[15-20]* %	[30-35]* %	[20-25]* %	[25-30]* %	[15-20]* %	[15-20]* %	[40-45]* %	[35-40]* %	[5-10]* %	[5-10]* %
AGA	10-15 %	10-15 %	15-20 %	15-20 %	20-25 %	25-30 %	0 %	0 %	15-20 %	20-25 %
Linde/AGA	[25-35]* %	[40-50]* %	[35-45]* %	[40-50]* %	[35-45]* %	[40-50]* %	[40-50]* %	[35-45]* %	[20-30]* %	[25-35]* %
Air Liquide	45-50 %	20-25 %	30-35 %	25-30 %	25-30 %	25-30 %	35-40 %	35-40 %	15-20 %	20-25 %
Air Products	10-15 %	10-15 %	10-15 %	10-15 %	10-15 %	10-15 %	15-20 %	25-30 %	<5 %	<5 %
Praxair	5-10 %	5-10 %	5-10 %	5-10 %	5-10 %	5-10 %	0 %	0 %	<5 %	<5 %
Messer	<5 %	<5 %	<5 %	<5 %	5-10 %	<5 %	0 %	0 %	5-10 %	5-10 %
Other	<5 %	10-15 %	<5 %	5-10 %	<5 %	<5 %	<5 %	<5 %	50-55 %	35-40 %

(66) The most important liquefied gases in terms of volume and value are the atmospheric gases oxygen, nitrogen and argon. In terms of both volume and value these three account for more than 80 % of gases sold in liquefied form in the Netherlands. On the markets in atmospheric gases Linde and AGA together have shares of [40-50] %* by value of the market in liquefied oxygen, [40-50] %* of the market in liquefied nitrogen, and [40-50] %* of the market in liquefied argon. The next largest competitor is Air Liquide, with shares of 20-25 % by value of the market in liquefied oxygen, 20-25 % of the market in liquefied nitrogen, and 25-30 % of the market in liquefied argon. Air Liquide is followed by Air Products, which has shares of 10-15 % by value of the markets in these three liquefied gases. Praxair has shares of 5-10 % of the same markets. The smaller suppliers account for just under 20 % of the market in liquefied oxygen, just under 15 % of the market in liquefied nitrogen, and less than 10 % of the market in liquefied argon. With this distribution of market shares it cannot be assumed that after the transaction Linde/AGA would enjoy a freedom of action which was no longer subject to the control of their competitors.

(67) In the case of liquefied hydrogen the transaction would not result in any addition of market shares, because AGA does not do business on this market. In the case of liquefied carbon dioxide the merged Linde/AGA would have a combined market share of [25-35] %*, in second place behind the market leader, Hydrogas, which has a share of 35-40 %.

Finding

(68) The Commission is satisfied, therefore, that the transaction would give Linde/AGA dominant positions on the markets in cylinder gases in the Netherlands.

3. AUSTRIA

(aa) ***The markets in liquefied and cylinder gases in Austria are already highly concentrated, with only three main suppliers***

(69) On the Austrian markets in liquefied and cylinder gases Linde, AGA and Messer operate through subsidiaries. Other suppliers in Austria are SIAD Vertrieb technischer Gase GmbH, a subsidiary of SIAD SpA; Sapio Produzione Idrogeno Ossigeno SRL; SOL SpA; and Sauerstoffwerk Friedrich Gutfroth GmbH.

(70) Production and filling plants in Austria break down as follows:

	Linde	AGA	Messer	SIAD
Air separation plants	2	2	2	0
Filling plants, all gases	3	5	5	1
CO ₂ filling plants	4	0	1	0
Acetylene works	2	3	1	0
Hydrogen plants	2	1	1	0

(71) According to the investigations carried out by the Commission, market shares for liquefied gases in Austria break down as follows.

Liquefied gases	Oxygen		Nitrogen		Argon		Hydrogen		CO ₂	
	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)
Linde	[45-50]* %	[40-45]* %	[45-50]* %	[40-45]* %	[70-75]* %	[55-60]* %	[85-90]* %	[80-85]* %	[25-30]* %	[35-40]* %
AGA	25-30 %	35-40 %	20-25 %	20-25 %	15-20 %	25-30 %	<5 %	<5 %	20-25 %	20-25 %
Linde/AGA	[70-80]* %	[75-85]* %	[65-75]* %	[60-70]* %	[85-95]* %	[80-90]* %	[85-95]* %	[80-90]* %	[45-55]* %	[55-65]* %
Messer	10-15 %	10-15 %	20-25 %	25-30 %	5-10 %	5-10 %	<5 %	<5 %	45-50 %	35-40 %
Other	5-10 %	5-10 %	5-10 %	5-10 %	<5 %	<5 %	10-15 %	15-20 %	<5 %	<5 %

(72) According to the investigations carried out by the Commission, market shares for cylinder gases in the Netherlands break down as follows:

Cylinders	Oxygen		Nitrogen		Argon and argon mixtures		CO ₂		Hydrogen		Acetylene	
	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)
Linde	[20-25]* %	[25-30]* %	[20-25]* %	[15-20]* %	[30-35]* %	[25-30]* %	[40-45]* %	[40-45]* %	[0-5]* %	[10-15]* %	[35-40]* %	[30-35]* %
AGA	35-40 %	45-50 %	30-35 %	30-35 %	30-35 %	40-45 %	15-20 %	15-20 %	20-25 %	20-25 %	35-40 %	40-45 %
Linde/AGA	[55-65]* %	[70-80]* %	[50-60]* %	[45-55]* %	[60-70]* %	[65-75]* %	[55-65]* %	[55-65]* %	[20-30]* %	[30-40]* %	[70-80]* %	[65-75]* %
Messer	15-20 %	15-20 %	30-35 %	35-40 %	20-25 %	20-25 %	25-30 %	25-30 %	65-70 %	60-65 %	15-20 %	20-25 %
Other	15-20 %	10-15 %	15-20 %	10-15 %	10-15 %	5-10 %	5-10 %	5-10 %	<5 %	<5 %	<5 %	5-10 %

(bb) **The transaction would give Linde/AGA high joint shares of the markets in liquefied and cylinder gases**

(73) Following the transaction Linde/AGA would have combined shares of [75-85] %* of the market in liquefied oxygen, [60-70] %* of the market in liquefied nitrogen, [80-90] %* of the market in liquefied argon, [80-90] %* of the market in liquefied hydrogen, and [55-65] %* of the market in liquefied carbon dioxide. Linde/AGA's shares of the cylinder gas markets would be [70-80] %* in the case of oxygen, [45-55] %* in the case of nitrogen, [65-75] %* in the case of argon and argon mixtures,

[55-65] %* in the case of carbon dioxide, and [65-75] %* in the case of acetylene. The market share lead between Linde/AGA and the only remaining large competitor, Messer, would be over [...] %* in the case of liquefied oxygen, just under [...] %* in the case of liquefied nitrogen, over [...] %* in the case of liquefied argon and hydrogen, and [...] %* in the case of liquefied carbon dioxide. For cylinder gases Linde/AGA's market share lead would be [...] %* in the case of oxygen, argon and acetylene, [...] %* in the case of carbon dioxide, and [...] %* in the case of nitrogen. The only market where Messer would still be market leader would be that in cylinder hydrogen, where Linde/AGA would have a market share of [30-40] %*.

Finding

- (74) The Commission is satisfied, therefore, that the transaction would give Linde/AGA dominant positions on the markets in liquefied and cylinder gases in Austria.
4. FINLAND, SWEDEN, NORWAY AND ICELAND
- (aa) ***The markets in liquefied and cylinder gases in Finland, Sweden, Norway and Iceland are highly concentrated***
- (75) In Finland the main suppliers of liquefied and cylinder gases are AGA and Air Liquide. Other suppliers are Oy Woikoski AB, which supplies liquid hydrogen and smaller volumes of cylinder gases, and Messer.
- (76) In Sweden the main suppliers of liquefied and cylinder gases are AGA and Air Liquide. Other suppliers are Hydrogas, which supplies carbon dioxide, and Hydrogas-Messer AB, which is a joint venture set up by Messer and Hydrogas.
- (77) In Norway the main suppliers of liquefied and cylinder gases are AGA and Hydrogas. In Iceland there is only one supplier of industrial gases, namely AGA.
- (bb) ***On a number of markets AGA's market share is well over 50 %***
- (78) According to the investigations carried out by the Commission, market shares for liquefied and cylinder gases in Finland break down as follows:

Liquefied gases	AGA		Air Liquide		Other	
	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)
Oxygen	50-55 %	50-55 %	45-50 %	45-50 %		
Nitrogen	70-75 %	65-70 %	25-30 %	30-35 %		
Argon	25-30 %	30-35 %	70-75 %	65-70 %		
Hydrogen	45-50 %	45-50 %	<5 %	<5 %	50-55 %	50-55 %
CO ₂	65-70 %	65-70 %	30-35 %	30-35 %		

Cylinder gases

Oxygen	80-85 %	75-80 %			15-20 %	20-25 %
Nitrogen	65-70 %	75-80 %			30-35 %	20-25 %
Argon/argon mixtures	75-80 %	75-80 %			20-25 %	20-25 %
CO ₂	80-85 %	80-85 %			15-20 %	15-20 %
Hydrogen	75-80 %	65-70 %			20-25 %	30-35 %
Acetylene	65-70 %	60-65 %			30-35 %	35-40 %

- (79) According to the investigations carried out by the Commission, market shares for liquefied and cylinder gases in Sweden break down as follows:

Liquefied gases	AGA		Air Liquide		Other	
	volume (%)	value (%)	volume (%)	value (%)	volume (%)	value (%)
Oxygen	80-85 %	75-80 %	15-20 %	24 %		
Nitrogen	65-70 %	65-70 %	30-35 %	32 %		
Argon	65-70 %	70-75 %	30-35 %	28 %		
Hydrogen	<5 %	<5 %	95-100 %	95-100 %		
CO ₂	40-45 %	60-65 %	10-15 %	10-15 %	45-50 %	20-25 %

Cylinder gases

Oxygen	65-70 %	75-80 %	30-35 %	20-25 %		
Nitrogen	60-65 %	60-65 %	35-40 %	35-40 %		
Argon/argon mixtures	70-75 %	70-75 %	25-30 %	25-30 %		
CO ₂	60-65 %	65-70 %	35-40 %	30-35 %		
Hydrogen	85-90 %	90-95 %	10-15 %			5-10 %
Acetylene	75-80 %	80-85 %			20-25 %	15-20 %

- (80) According to the investigations carried out by the Commission, market shares for liquefied and cylinder gases in Norway break down as follows:

Liquefied gases	AGA		Hydrogas	
	volume (%)	value (%)	volume (%)	value (%)
Oxygen	60-65 %	60-65 %	35-40 %	30-35 %
Nitrogen	65-70 %	60-65 %	30-35 %	30-35 %
Argon	25-30 %	30-35 %	70-75 %	65-70 %
Hydrogen	<5 %	<5 %	<5 %	<5 %
CO ₂	15-20 %	15-20 %	80-85 %	80-85 %

Cylinder gases

Oxygen	65-70 %	85-90 %	30-35 %	10-15 %
Nitrogen	50-55 %	65-70 %	45-50 %	30-35 %
Argon/argon mixtures	95-100 %	95-100 %	<5 %	<5 %
CO ₂	50-55 %	35-40 %	45-50 %	60-65 %
Hydrogen	95-100 %	95-100 %	<5 %	<5 %
Acetylene	65-70 %	65-70 %	30-35 %	30-35 %

- | | | | |
|------|---|---|-------------------|
| (81) | On the markets in liquefied and cylinder gases in Iceland AGA is the only supplier. | Phase II | |
| | | Purchase of site, 5 000 m ³ | DEM 1 500 000 |
| (cc) | <i>The transaction would not strengthen the dominant positions currently held by AGA on a number of markets in liquefied and cylinder gases in Finland, Sweden, Norway and Iceland</i> | Bottling plant, tanks etc. | DEM 2 500 000 |
| | | Total | ± DEM 4-5 million |
| | | Phase III | |
| (82) | The proposed transaction might strengthen AGA's dominant positions on the Scandinavian markets if Linde were a major potential competitor, a competitor which might choose to enter the Scandinavian markets. On the basis of the submissions made by the notifying party in its reply to the statement of objections and at the hearing, however, the Commission has reached the conclusion that this is not so. | 1 air separation plant | DEM 40 million |
| | | 5 filling plants | DEM 25 million |
| | | Stock of 110 000 cylinders, miscellaneous tanks | DEM 30 million |
| (83) | In the Community as a whole Linde operates on the markets in industrial liquefied and cylinder gases in the following Member States: Germany, France, the United Kingdom, Italy, Spain, the Netherlands, Belgium, Austria, Portugal and Greece. But by itself this does not justify the assumption that Linde is also a major potential competitor which might choose to enter the Scandinavian markets. | Vehicles, tankers | DEM 15 million |
| | | Cylinder bundles, pallets, buildings | DEM 10 million |
| | | Total | DEM 120 million |
| (84) | Market entry requires heavy investment. In the notification Linde estimates the total costs of market entry as follows. | | |
| | Phase I | | |
| | Rent of a 4 000 m ³ site for a cylinder depot | DEM 15 000 per month | |
| | Portable buildings or office premises | DEM 40 000 | |
| | Warehouse or roofing of storage area | DEM 40 000 | |
| | DEM 5 000 cylinders, pallets, cylinder bundles | DEM 1 350 000 | |
| | Fork-lift trucks and lifting gear | DEM 100 000 | |
| | Vehicles | DEM 250 000 | |
| | Investment volumes | ± DEM 1 180 000 | |
| | Monthly costs, including staff | ± DEM 100 000 | |
| (85) | The total costs estimated for Phase III are those which Linde actually incurred when it entered the market in Italy. [...] %* In its notification Linde also refers to its activities in France in the period 1989 to 1998, and submits that it had negative results in France over [...] %* years despite a total investment of more than DEM [...] %* million. Given the heavy investment and long period in which losses have to be accepted in order to set up in another Member State, the Commission takes the view that the probability and feasibility of a market entry have to be judged from the point of view of a supplier, in the light of the characteristics of the market under consideration. The size of the market and the degree of concentration obtaining there will be of primary importance. | | |
| (86) | After Germany, France is the biggest market in industrial gases in the EEA. Italy is in fourth place, after the United Kingdom. The Swedish market in industrial gases is the largest in Scandinavia; in size it is the equivalent of 14 % of the German market. The gas markets in Finland and Norway are smaller than the Austrian market, which is the equivalent of 10 % of the German market. In 1998 the markets in liquefied and cylinder gases amounted to EUR 160 million in Sweden, just under EUR 62 million in Finland and EUR 65 million in Norway. For such | | |

small markets it is hardly to be expected that Linde would be prepared to incur investment costs on the scale described, and then to accept a long launch period in which it would be making heavy losses.

- (87) In addition, the markets in the production of industrial gases in these countries are already highly concentrated: in Finland, Sweden and Norway there are only two main suppliers, and in Iceland there is only one. It should be borne in mind, too, that on a number of markets in liquefied and cylinder gases in Finland, Sweden, Norway and Iceland one of the main suppliers, AGA, holds a dominant position. The other main supplier in Finland and Sweden is Air Liquide, which is the European and worldwide leader in the production and distribution of industrial gases.

- (88) Given the small sizes of the markets in liquefied and cylinder gases in Scandinavia, and the stiff barriers to entry, the Commission takes the view that Linde cannot be regarded as a major potential competitor which might choose to enter the Scandinavian markets.

Finding

- (89) The Commission is satisfied that the transaction would not strengthen the dominant positions held by AGA on the markets in liquefied and cylinder gases in Finland, Sweden, Norway and Iceland.

V. COMMITMENTS OFFERED BY THE NOTIFYING PARTY

1. COMMITMENTS

- (90) In order to overcome the Commission's objections to the planned transaction, Linde has entered into the following commitments:
- (91) In the Netherlands, Linde undertakes to dispose of the industrial cylinder gas business (nitrogen, oxygen, argon, carbon dioxide and acetylene) of AGA Gas BV. The commitment to dispose of the business extends to the industrial gas filling plant in Amsterdam, the associated staff (about [...] employees), the current contracts with customers, suppliers and forwarding agents, the list of customers, and the associated gas cylinders (about [...]). The commitment to dispose of the business does not apply to special gases, including Mison®, and gases for medicinal purposes.

- (92) In Austria, Linde undertakes to dispose of the entire gas business operated in Austria by AGA through its subsidiary AGA GmbH. The commitment to dispose of the business extends to all air separation plants with the existing on-site supply agreements, all related liquefaction, filling and acetylene plants, the associated staff (about [...] employees), current contracts with customers and suppliers, the list of customers, the tanks installed on customers' premises, the associated tankers and other transport vehicles, and the associated gas cylinders (about [...]). Linde will not dispose of the shell of the company, with its name, and AGA GmbH's interests outside Austria.

2. ASSESSMENT OF THE COMMITMENTS OFFERED

Netherlands

- (93) Under the commitment proposed, AGA's cylinder gas business in the Netherlands would be offered for sale to competitors. The disposal would ensure that Linde's position on the markets in cylinder gases would not be strengthened. After the commitment had been complied with the purchaser would be in the same position as AGA was beforehand. This would ensure that after the transaction there would still be another large supplier on the markets in cylinder gases in the Netherlands. The Commission is therefore satisfied that the proposed commitment would prevent the creation of dominant positions on the markets in cylinder gases in the Netherlands.

Austria

- (94) Under the commitment proposed, AGA's entire gas business in Austria would be offered for sale to competitors. The disposal would ensure that Linde's position on the markets in liquefied and cylinder gases would not be strengthened. It would also ensure that there would still be three main suppliers in Austria. The disposal of the two air separation plants and the liquefaction plants is necessary in order to ensure that the purchaser is placed in the same competitive position that AGA occupied previously in both liquefied atmospheric gases and atmospheric gases in cylinder. Linde has not proposed that the commitment should be restricted to cylinder oxygen, nitrogen, argon, carbon dioxide and acetylene, thus excluding cylinder hydrogen. A restriction of that kind would in any event be difficult to apply in practice, because all cylinder gases are generally bottled together. The Commission is therefore satisfied that the proposed commitment would prevent the creation of dominant positions on the markets in liquefied and cylinder gases in Austria.

VI. SUMMARY

(95) On the grounds set out above, the Commission is satisfied that the proposed transaction would not create or strengthen any dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market, provided that the commitments entered into by the notifying party are complied with. With that proviso, therefore, the transaction should be declared compatible with the common market in accordance with Article 8(2) of the Merger Regulation and Article 57 of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The notified concentration by which Linde Aktiengesellschaft would acquire sole control of the entire share capital of AGA AB is hereby declared compatible with the common market

and with the EEA Agreement, provided that the commitments entered into by the notifying party and set out in the Annex to this Decision are complied with.

Article 2

This Decision is addressed to:

Linde AG
Abraham-Lincoln-Straße 21
D-65189 Wiesbaden

Done at Brussels, 9 February 2000.

For the Commission

Mario MONTI

Member of the Commission

ANNEX

The full original text of the conditions and obligations referred to in Article 1 may be consulted on the following Commission website:

http://europa.eu.int/comm/competition/index_en.html

COMMISSION DECISION**of 23 October 2001****on the lack of exhaustive and independent scrutiny of the scales of charges and technical conditions applied by La Poste to mail preparation firms for access to its reserved services***(notified under document number C(2001) 3186)***(Text with EEA relevance)****(Only the French text is authentic)**

(2002/344/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having given the French authorities and La Poste the opportunity, by letters of 27 October 1999 and 30 November 1999 respectively, to make known their views on the objections raised by the Commission with regard to French postal legislation relating to mail preparation services,

Whereas:

Mail preparation is in all cases an activity upstream of acceptance of the items by La Poste as part of the services it provides within the reserved area. The very nature of mail preparation involves use of the reserved services. From a conceptual standpoint, and although in practice the various tasks involved are interlinked ⁽¹⁾ in a continuum of services that are often provided by the same firms, the term 'mail preparation' covers two different types of activity ⁽²⁾.

1.1.1. *Services provided on behalf of originators of mail*

1. THE FACTS

1.1. The relevant services

- (1) This Decision relates exclusively to the relations between La Poste (the French postal service) and those of its commercial partners which are mail preparation firms operating in markets upstream of its own main activity, namely basic postal services. These commercial partners can be regarded both as:

- users in so far as they act as a proxy for originators of mail, who entrust them with the delivery of their items to the offices of La Poste, and
- suppliers of La Poste, in so far as they provide certain services in place of the public postal operator, upstream of the operations lying within the scope of its reserved area.

- (2) Mail preparation may firstly cover a service provided for the benefit of a mail originator. In such cases, the activity involves making up items (printing, enveloping or plastic wrapping, labelling, addressing and franking), collecting, bundling and sorting them and delivering them to the offices of La Poste.

⁽¹⁾ In their memo to the Commission dated 4 February 2000, p. 1, the French authorities refer to 'the real interlinking of the different tasks necessary for the swift and cost-effective treatment of bulk mail'.

⁽²⁾ See memo from the French authorities dated 4 February 2000, p. 1, and letter from La Poste dated 18 December 1998, p. 2; see also *L'Analyse des relations contractuelles entre La Poste et les routeurs*, Tera Consultants, 2 February 2000, p. 9, report forwarded to the Commission by La Poste.

(3) Performing this type of activity for customers generating mail items could be likened to operating a mail room on behalf of larger companies⁽³⁾. 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⁽⁴⁾ points out that 'mail rooms of larger companies are now often operated by intermediaries, which prepare and presort mail before handing it over to the postal operator for final distribution'. Mail preparation firms engaged in this activity can be treated as independent 'intermediaries' between senders and La Poste. They alone are liable for the prepayment of postage to the latter.

(4) Performance of these activities on behalf of originators of mail gives rise broadly to two types of remuneration, which are usually combined:

- direct remuneration for services involving the making up of mail items, the supply of address lists, etc.,
- remuneration for the intermediating role played by the mail preparation firms and for the benefit of access to favourable postal charges. Mail preparation firms can enter into 'product contracts' with La Poste (and in particular the contract called Postimpact) which allow access to favourable postal rates (e.g. FRF 1,68 per item for 20 000 items dispatched under the Postimpact contract, instead of FRF 2,7 per item at the Ecoplis bulk rate); broadly, the mail preparation firms pay La Poste the postal charges at the favourable rates applicable and then earn a margin by invoicing originators for more than the total postal charges they have actually paid to La Poste.

1.1.2. Preparatory work performed in place of La Poste

(5) Mail preparation may secondly cover services performed in place of La Poste. This activity involves making up and placing items in mailbags complying with certain standards, sorting to a greater or lesser degree by destination and delivering items to offices of La Poste designated by the latter for the purpose. In such an

arrangement the mail preparation firms act as suppliers of La Poste. By allowing certain preparatory tasks to be externalised in this way, La Poste makes savings in handling operations and efficiency gains⁽⁵⁾.

Since 1990 La Poste has been remunerating mail preparation firms directly by means of remuneration 'per thousand', in other words according to volumes posted, for preparatory tasks performed on its behalf, under 'technical' contracts. The nature of the remuneration varies chiefly according to criteria to do with the quality of preparation of the items and the degree of sorting performed. Among these technical contracts, the 'preparation' contract⁽⁶⁾ plays a strategic role: unlike the other technical contracts, it enables the service provider to bundle items of a different nature and of low volume and thus to qualify for quality-based remuneration (whereas the volume thresholds applied normally reserve the benefit of quality-based remuneration solely for identical items posted in bulk). It should be noted that technical contracts are accessible only to mail preparation firms that have also entered into a product contract with La Poste and attain a given volume threshold in terms of the number of items posted.

1.2. Mail preparation firms

(6) Defined broadly⁽⁷⁾, total turnover achieved on the mail preparation market (measured by aggregating the turnover generated by firms involved in mail preparation) has been estimated⁽⁸⁾ at FRF 6,4 billion in 1998, broken down as follows:

⁽⁵⁾ This type of arrangement cannot, however, be described as a subcontracting relationship: La Poste does not in any way act as a principal, and items are delivered to post offices at the initiative of the mail preparation firms.

⁽⁶⁾ There are also two other types of technical contract: a quality contract, under which the quality of the work is remunerated according to a number of criteria (adherence to specified posting dates, accuracy of sorting, compliance with rules on filling of postbags, etc.) and a presentation contract, which remunerates quality, along the lines of the above, but also the degree of sorting performed.

⁽⁷⁾ Using a narrower definition, the abovementioned report *L'Analyse des relations contractuelles entre La Poste et les routeurs* puts total turnover on the mail preparation market at FRF 4,8 billion in 1998. The disadvantage of this estimate is that it completely disregards the flow of business correspondence, some of which is handled by mail preparation firms (see below).

⁽⁸⁾ Source: *Routeurs ou prestataires de services — Synthèse de l'étude réalisée par le cabinet GBC à la demande de La Poste*, June 2000.

⁽³⁾ On this concept, see the Green Paper on the development of the single market for postal services (COM(91) 476 final, 11.6.1992), Glossary, p. 367, where mail preparation firms are described as 'intermediaries'.

⁽⁴⁾ OJ C 39, 6.2.1998, p. 2, points 1 and 2.5.

- FRF 3,5 billion generated by mail preparation firms proper,
- FRF 2 billion generated by laser printing firms,
- FRF 0,9 billion generated by parcelling specialists.

The services provided by mail preparation firms have to do mainly with the making up of postal items and the performance of preparatory tasks in place of La Poste, as described in sections 1.1.1 and 1.1.2. To a lesser extent, some mail preparation firms also offer desktop publishing services (see below), hire out address lists, supply envelopes, etc. According to their predominant activity, there are three main kinds of mail preparation firms: those that make up postal items, those that bundle different types of item and those that perform sorting.

Laser printing mail preparation firms are for their part more specialised in desktop publishing activities, i.e. the production of business correspondence using computerised data on behalf of high-volume mail originators. These firms offer desktop publishing services in addition to mail preparation proper⁽⁹⁾.

Parcelling is a specific mail preparation activity involving the making up of parcels and often including ancillary services (management of orders, storage, etc.). The present Decision does not relate to this activity or to the firms concerned.

The reality behind this simplified classification is in fact more complex. Many mail preparation firms offer a more or less extensive and sophisticated range of services targeted more or less specifically at certain market segments and are engaged in activities belonging to all three categories outlined above. The analysis can

therefore be refined by assigning mail preparation firms to a large number of subcategories according to the nature of their activity and the profile of their customers⁽¹⁰⁾.

- (7) The following are active on the mail preparation market in France: on the one hand, private, independent mail preparation firms, such as the members of the Syndicat national des entreprises de logistique de Publicité Directe (hereinafter the SNELPD), a trade association, which offer mail preparation services to any originator of large volumes of mail and, on the other hand, La Poste, which offers mail preparation services either directly or indirectly via certain subsidiaries.
- (8) Private mail preparation companies and independent laser printing firms are usually small or medium-sized enterprises. Their average turnover is slightly more than FRF 15 million. The sector is, however, quite concentrated, with the 20 largest businesses accounting for around 55 % of total turnover.
- (9) La Poste and some of its subsidiaries offer their business customers services that compete directly with services offered by the mail preparation companies described.
- (10) La Poste thus offers franking, making up and posting services⁽¹¹⁾, in particular via the 'Carré Pro' facilities at over 400 post offices. The turnover of the 'Carré Pro' service, albeit difficult to isolate, is estimated by La Poste at some FRF 227 million in 1999⁽¹²⁾.
- (11) The subsidiaries of La Poste that are active in the mail preparation sector concerned by this Decision are chiefly Datapost, Mikros and Dynapost. The activity of Datapost, a company set up in 1994 and specialising in desktop publishing services, overlaps with that of the laser printing mail preparation firms. Datapost offers,

⁽⁹⁾ Laser printing mail preparation firms, which have in fact integrated message handling using computerised data into their traditional mail preparation operation, should not be confused with laser printing firms in the strict sense which are not engaged in any mail preparation activity. According to the complainant, laser printing mail preparation firms handle around one third of the total flow of business correspondence entrusted to specialised service providers, with 'pure' laser printing firms accounting for the rest.

⁽¹⁰⁾ In the abovementioned study carried out for La Poste, the IT marketing surveys and advisory consultancy GBC draws the following distinctions between mail preparation firms: bundling firms, which perform exclusively mail sorting and preparation tasks on behalf of La Poste; integrators, which offer a more or less extensive range of services in the direct marketing field, from market surveys to the management of mailings; parcelling firms that are subsidiaries of the large mail-order companies; specialised mail make-up firms that have developed know-how in fields related to mail preparation (binding, finishing, glueing, address-ing, enveloping or plastic wrapping, etc.); generalist mail preparation firms operating at national or local level; laser printing mail preparation firms; mail preparation firms dealing mainly in parcels; etc.

⁽¹¹⁾ Such as the Mailev@ service launched in 2000, which performs tasks ranging from the printing of documents and envelopes to the introduction of the finished items into the postal network.

⁽¹²⁾ Statement made at a meeting between La Poste and the Commission's Directorate-General for Competition held in Brussels on 17 January 2000.

among other things, pure desktop publishing services (computerised sorting and preparation of mail production, printing, etc.) but also the enveloping, making up and delivery of items to the offices of La Poste. The company has around 165 employees and over 250 customers. Its turnover trebled between 1996 and 1999, rising from FRF 32 million to FRF 107 million. Datapost incurred heavy operating losses at least until 1999. In November 2000 La Poste acquired⁽¹³⁾ the company Mikros⁽¹⁴⁾, another major player in the desktop publishing and mail preparation business. That acquisition was followed by the creation of a 'common pole' linking together Mikros and Datapost. The subsidiary Dynapost is for its part involved in the management of companies' internal mail but also provides collection, franking and sorting services⁽¹⁵⁾. It has around 500 employees and generated turnover of FRF 275 million in 1999.

- (12) La Poste has not disputed the fact that it provides mail preparation services, either itself or via the subsidiaries described⁽¹⁶⁾, whether acting as suppliers of La Poste or as users of its monopoly network⁽¹⁷⁾. All in all, La Poste, both through its own products and via Datapost and Mikros, on the one hand, and Dynapost, on the other, is thought to have a share of at least 10 % of the mail preparation and desktop publishing market⁽¹⁸⁾.

⁽¹³⁾ Via its holding company Sofipost (50 % of the shares in Mikros) and jointly with Steria and the Italian company Postel (41 % of the shares).

⁽¹⁴⁾ Mikros employed 250 people and generated turnover of FRF 170 million in 1999. The company offers a number of services ranging from document formatting to the enveloping and making up of postal items.

⁽¹⁵⁾ In 1998 Dynapost was awarded 'top quality mail preparation firm' status by La Poste. This quality label, which was created in 1994 but abandoned in 1999, rewarded mail preparation firms meeting certain quality criteria and gave access to special technical conditions and scales of charges, in particular remuneration paid by La Poste for the provision of security in respect of prepayment.

⁽¹⁶⁾ In particular, in its letter of 18 December 1998 setting out its comments on the content of the complaint, La Poste disputes solely the existence of a 'direct link' between the mail preparation business and, on the one hand, its 'contrat Kiosque' service and, on the other hand, the activities of its subsidiary Médiapost. This Decision does not include those two operations in the description of the presence of the La Poste group on the mail preparation market.

⁽¹⁷⁾ See point 1 of this Decision.

⁽¹⁸⁾ The turnover in the relevant services achieved by La Poste and the subsidiaries concerned totalled nearly FRF 800 million in 1999. This is to be compared with the value of the mail preparation market, estimated in the abovementioned studies at between FRF 4,8 billion and FRF 6,4 billion.

- (13) The services offered by mail preparation firms are therefore supplied to originators of mail in competition with La Poste and its subsidiaries. However, given La Poste's postal monopoly, mail preparation firms, in their dual capacity as users of the postal network and suppliers of services to the public operator, have no alternative but to accept the financial and technical conditions laid down by La Poste for the acceptance of mail processed by them. La Poste is thus an unavoidable partner for the satisfactory performance of the services offered by mail preparation firms to their customers.

1.3. The applicable legislative and regulatory framework

1.3.1. Principles governing relations between La Poste and its users and commercial partners and the monitoring of those relations

- (14) The Law of 2 July 1990 on the organisation of the public postal and telecommunications service⁽¹⁹⁾ (hereinafter the 1990 Law) and the service obligations of La Poste, as approved by Decree No 90-1214 of 29 December 1990⁽²⁰⁾ lay down the conditions in which the services offered by the public operator are to be supplied and the rules governing its relations with both its users and its commercial partners.

- (15) Article 25 of the 1990 Law stipulates generally that the relations between La Poste and its users and suppliers and third parties 'shall be governed by ordinary law'. Article 23 of the service obligations of La Poste confirms that 'relations between La Poste and users shall be governed by contracts under ordinary law'.

- (16) With regard more specifically to relations with users, it is for La Poste, pursuant to Article 23(2) of its service obligations, to determine 'the conditions of supply of its products and services'. Article 23 adds that 'La Poste may enter into contracts the terms of which are stipulated by agreement between the parties on the basis of a specific estimate of costs'. In such cases, La Poste is under the additional obligation to distinguish between the reserved and competitive activities comprising the services offered: 'in such cases, where La Poste provides a service comprising the performance both of activities covered

⁽¹⁹⁾ Law No 90-568 of 2 July 1990 on the organisation of the public postal and telecommunications service (French Official Gazette of 8 July 1990).

⁽²⁰⁾ Decree No 90-1214 of 29 December 1990 on the service obligations of La Poste and the postal and telecommunications services code (French Official Gazette of 30 December 1990, p. 16578), as amended by Decree No 93-775 of 26 March 1993 (French Official Gazette of 30 March 1993, p. 5718), Decree No 96-1022 of 27 November 1996 (French Official Gazette of 29 November 1996, p. 17336) and Decree No 2001-122 of 8 February 2001 (French Official Gazette of 10 February 2001, p. 2203).

by exclusive rights and of activities which are open to competition, the contract shall distinguish between the two categories of service in terms of both their supply and invoicing'.

the general principle of cost orientation applies⁽²²⁾, but the French rules do not spell out the implications of that principle or the arrangements for checking whether it is complied with⁽²³⁾.

(17) Article 22 of the service obligations sets out the possible arrangements for 'opening up the network' to users. La Poste thus may, either within or outside its area of activity: — 'open up access to its network for its subsidiaries, under agreements specifying in particular the conditions in which La Poste is to be remunerated; [and] — enter into agreements with other partners concerning distribution or provision of services. Any such agreements concluded shall be communicated to the minister responsible for postal and telecommunications services.'

(19) On the subject of relations with suppliers, and in particular the conditions in which they are remunerated, the service obligations of La Poste do not contain any detailed rule. Neither does Article 27 of the 1990 Law go any further than to provide that 'the procedures for the conclusion and scrutiny of each public operator's contracts shall be laid down by its board of directors, under the relevant arrangements established by the service obligations (...)'. That Article therefore applies only to contractual relations established in the context of supply contracts concluded by the public operator.

(18) The conditions applied to users are not laid down in the service obligations. The French authorities have nevertheless drawn the Commission's attention⁽²¹⁾ to the provisions of the service obligations which establish general rules concerning the extent of the freedom given to La Poste in setting scales of charges and contractual conditions in its relations with its users. The provisions mentioned by the French authorities allow a distinction to be drawn between two situations:

(20) Having due regard to the above described regulatory framework and the explanations provided by the French authorities, and applying the conceptual distinctions set out in section 1 of this Decision, the extent to which La Poste is monitored in its relations with mail preparation firms is determined as follows.

— Where the services concerned fall within the exclusive area of activity of La Poste, the scales of charges it proposes must, in accordance with Article 33(1)(b) of its service obligations, be submitted to the minister responsible for postal and telecommunications services and the minister for economic affairs and finance for approval. Likewise, under Article 4 of the service obligations, where La Poste enters into standard contracts with users as part of the performance of the services which it has the exclusive right to provide, those standard contracts must be submitted to the minister responsible for postal and telecommunications services for approval;

Where mail preparation firms can be classed as users of the network operated by La Poste, the charges they have to pay for access to that network are either:

— On the other hand, under Article 33(1)(c) and (2)(a) of its service obligations, La Poste is free to set the charges for the services it offers under competitive conditions, whether or not they form part of the universal service. These charges must be simply transmitted to the relevant ministers for information. As regards services open to competition which fall within the scope of the universal service,

— subject to approval by the ministers responsible where the service in question falls within the scope of the monopoly (this is the case with the Postimpact rates⁽²⁴⁾ and the 'letter' and 'Ecopli'⁽²⁵⁾ rates), or

— simply communicated to the ministers for information where the service in question is provided in competition (this is the case with the 'Catalogues' or 'Coliéco' rates, for example).

⁽²¹⁾ Memo from the French authorities dated 4 February 2000, points 2.12 and 2.1.4, and notification dated 23 February 2001 of Decree No 2001-122 of 8 February 2001 amending the service obligations of La Poste.

⁽²²⁾ Under Article 33(1)(a) of the service obligations of La Poste as amended by the Decree of 8 February 2001, 'the charges for services forming part of the universal service provided to users must take account of costs'.

⁽²³⁾ In their letter to the Commission dated 17 July 2001, section 2.1.1, p. 9, the French authorities regard sorting operations as forming part of the universal service: 'sorting is therefore an activity that does form part of the universal service (...)'.
⁽²⁴⁾ The Postimpact rates chiefly concern direct mail items and account for the bulk of the business of mail preparation firms.

⁽²⁵⁾ As far as mail preparation firms are concerned, these rates apply only to flows of business correspondence and are therefore less important than the Postimpact rates.

Where mail preparation firms can be classed as suppliers of La Poste, the rates concerned, for example remuneration 'per thousand', are simply communicated to the ministers for information ⁽²⁶⁾.

It is clear from the explanations given by the French authorities that scrutiny never extends to the technical standards or non-price aspects of relations between La Poste and mail preparation firms.

- (21) The relevant French legislation therefore makes La Poste responsible for determining its own contractual conditions in its relations with its commercial partners by means of legal instruments governed by private law. It circumscribes the freedom thus granted to La Poste only in well defined cases. The scope of supervision by the French State is narrow and furthermore limited strictly to price aspects.
- (22) In these circumstances, La Poste is able itself to lay down, in the absence of any supervision, a whole range of technical standards that have a decisive impact on the access of mail preparation firms to its network. La Poste thus lays down the standards for the presentation of mail and the arrangements for the delivery to post offices of batches of prepared mail (types of mailbag used, minimum volume posted, etc.) that must be complied with in order to qualify for specific conditions. Those conditions are published in the form of 'instructions' in the *Bulletin de La Poste*.
- (23) The fact that the rules adopted by La Poste in exercising this freedom are classed as 'contractual' under French law in no way alters the fact that it is La Poste which takes the initiative and adopts the rules in their final form. Neither does it affect the impact which the measures have on the access of firms independent of La Poste to the postal network and the reserved services, and therefore on the conditions in which mail preparation business can be carried on.

1.3.2. *The official authorities responsible for monitoring La Poste*

- (24) French legislation assigns jointly to the minister responsible for postal and telecommunications services and the Minister for Economic Affairs and Finance the dual task

of framing the policy of La Poste and of monitoring compliance by La Poste with the applicable legislation and with the competition rules. In practice, the Minister responsible for postal and telecommunications services is none other than the Minister for Economic Affairs and Finance (hereinafter 'the Minister') ⁽²⁷⁾.

- (25) As far as postal rates are concerned, the Minister's powers derive from the above described provisions of La Poste's service obligations. The legislative instruments relating to the organisation of the Ministry of Economic Affairs, Finance and Industry supplement the description of the responsibilities of the departments under his authority.
- (26) Article 4 of Decree No 93-1272 of 1 December 1993 ⁽²⁸⁾ provides that the directorates-general for industry, information technology and postal services (DiGITIP) 'shall frame the Government's policy in the postal and telecommunications sectors and ensure that it is implemented'; 'shall ensure, in the postal and telecommunications sectors (...), that fair competition is observed between the different economic agents'; and has the task, in conjunction with the Treasury directorate, of looking after the assets held by the State in La Poste: 'with the Treasury directorate, it shall frame and implement the policy conducted with regard to La Poste and the industrial enterprises within its field of responsibility in which the State holds a stake' ⁽²⁹⁾.

⁽²⁷⁾ Under Article 1 of Decree No 97-710 of 11 June 1997 on the powers of the Minister for Economic Affairs, Finance and Industry, the latter is 'responsible for (...) — the policy on postal and telecommunications services'. The Secretary of State for Industry exercises the powers of the Minister for Economic Affairs, Finance and Industry in the postal sector only by way of a delegation of authority issued by the Minister to whom he reports (see Article 1 of Decree No 2000-306 of 7 April 2000 on the powers delegated to the Secretary of State for Industry). The departments of DiGITIP are furthermore clearly placed under the authority of the Minister for Economic Affairs, Finance and Industry by Article 2(II) of Decree No 97-710.

⁽²⁸⁾ Decree No 93-1272 of 1 December 1993 on the organisation of the central administration of the Ministry of Industry, Postal and Telecommunications Services and External Trade (French Official Gazette of 2 December 1993), as amended by Decree No 98-879 of 2 November 1998 (French Official Gazette No 255 of 3 November 1998, p. 16576).

⁽²⁹⁾ In their memo to the Commission dated 4 February 2000, pp. 5 and 6, the French authorities stress the role played in the Ministry by the Treasury directorate in the management of the State's assets as a shareholder. Article 4 of the Order of 3 November 1998 organising the Treasury directorate into a number of offices (French Official Gazette No 255 of 3 November 1998, p. 16595) makes office D5 of the directorate's holdings department responsible for examining 'issues relating to the financing of other enterprises in which the State has an interest, in particular (...) La Poste' and for 'relations between those enterprises and the State as a shareholder, and transactions affecting their capital'.

⁽²⁶⁾ According to the French authorities (letter to the Commission dated 17 July 2001), 'the sorting dimension of mail preparation can be analysed as an activity forming part of the universal service (...)'. They do not, however, maintain that in the case in point the remuneration of the services concerned is monitored from the standpoint of cost orientation.

(27) Article 6 of Decree No 93-1272 provides that, within DiGITIP, the postal and telecommunications services department 'shall exercise supervision over La Poste'. Article 4 of the Order of 2 November 1998 on the organisation of DiGITIP⁽³⁰⁾ provides that, within the postal and telecommunications services department, the subdirectorates for postal activities 'shall exercise supervision over La Poste'. Among other things, that subdirectorates 'shall be responsible for economic and financial monitoring, in particular preparation of the public service contract, economic analyses, the adaptation of analytical accounting, the supply of services, scales of charges, the quality of service, relations with consumers and partners in the postal services field (...)'. Also within the postal services department, the Order of 2 November 1998 provides that the subdirectorates for legislation and international affairs is to be responsible for 'the preparation, follow-up and implementation of legislation on and the regulation of postal activities'. These provisions make it possible to identify within the Ministry the departments responsible for analysing and examining postal matters. The power to take decisions on such matters lies with the minister and, by virtue of a standing delegation of authority, the director-general for industry, information technology and postal services⁽³¹⁾.

(28) The French authorities have described to the Commission how these regulatory arrangements are implemented in practice. They have stated that, as far as postal rates are concerned, supervision is exercised jointly by the postal services department and the directorate-general for competition⁽³²⁾. With regard to more general aspects of supervision, they have asserted that the State's supervisory powers are not entrusted exclusively to the departments of DiGITIP, but that the budget directorate and the Treasury directorate are also actively involved. In practice, the supervisory powers conferred on the minister are therefore exercised within DiGITIP, the budget directorate, the Treasury directorate and the directorate-general for competition, consumer affairs and trading standards. These departments, placed under the hierarchical authority of a single minister, therefore exercise supervisory powers while at the same time performing economic and financial monitoring functions.

(29) It is therefore clear from the relevant French legislation that the minister responsible for supervising La Poste is

able to influence its policies by virtue of his economic and financial monitoring responsibility⁽³³⁾. On the other hand, the French legislation does not establish any institutional arrangement ensuring, thanks to a proper separation of duties, that the tasks of economic and financial monitoring, on the one hand, and of supervision of La Poste, on the other, are carried out completely independently one of the other.

1.4. The complaint

(30) On 30 June 1998, the Syndicat national des entreprises de logistique de publicité directe lodged a complaint against the French State concerning La Poste's mail preparation activities. The SNELPD is a trade association governed by French law which, according to its statutes, defends the interests of its members, which are mail preparation firms. The SNELPD represents 62 firms, i.e. most of those present on this market.

(31) The complainant alleges that La Poste grants discounts to its direct customers and to its own subsidiaries active in the area of mail preparation services which are not generally offered to mail preparation firms. Moreover, the complaint alleges that La Poste lays down conditions which, although in principle uniformly applicable, are disadvantageous to firms competing with La Poste and its subsidiaries. According to the complainant, conditions such as the quantities of mail required to qualify for advantageous scales of charges are fixed at levels which effectively exclude small mail preparation firms. The complainant alleges, for example, that the threshold of 3 million mail items required to qualify for so-called quantity and presentation⁽³⁴⁾ contracts with La Poste is not based on cost savings for La Poste but is fixed arbitrarily in a manner which limits the number of eligible mail preparation firms.

(32) Moreover, the complainant claims that La Poste is less rigorous in verifying compliance with the conditions for handing over mail by its subsidiaries than by the firms competing with them. In addition, rules which are not intrinsically discriminatory are applied in a discriminatory fashion by La Poste. In this context, the complainant cites numerous examples of cases in which subsidiaries of La Poste had not complied with the rules on the quantities to be delivered to post offices, format, presentation, handover times and places, and content but in which they nevertheless received discounts.

⁽³⁰⁾ French Official Gazette No 255 of 3 November 1998, p. 16583.

⁽³¹⁾ Decree of 18 November 1998 (French Official Gazette No 269 of 20 November 1998, p. 17524). The head of the postal services department, who has authority over the abovementioned two subdirectorates, is authorised to sign on behalf of the minister for economic affairs, finance and industry any instruments, orders, decisions or agreements concerning postal matters, but only in the event of the director-general being absent or prevented from attending to this duties (Decree of 19 April 2000 delegating authority to sign documents, French Official Gazette No 95 of 21 April 2000).

⁽³²⁾ Memo from the French authorities dated 4 February 2000, p. 6, fifth paragraph.

⁽³³⁾ It will be remembered that, on the French authorities' own admission, this supervisory function involves the task of enhancing the value of the State's assets and holdings (memo from the French authorities dated 4 February 2000, p. 6, third paragraph).

⁽³⁴⁾ One of the technical contracts described above, which allows bundling.

- (33) According to the complainant, such practices form part of a strategy aimed at squeezing rivals out of the market or at least restricting competition. It points to a La Poste document entitled 'Challenge Dynatop' ⁽³⁵⁾, according to which 'the development of upstream services ... should make it possible to prevent competitors from emerging in those areas and even to promote the development of our market shares for both franking and strategic products'. On the more specific matter of desktop publishing, it also cites a study on the bulk customers of La Poste conducted shortly before the creation of Datapost ⁽³⁶⁾. According to that study, 'a rapid and massive market penetration should be organised'. According to the complainant, such documents demonstrate that La Poste's objective is to promote its own subsidiaries and its own activities in the areas of mail preparation and desktop publishing.
- (34) Finally, the complainant alleges that, given La Poste's monopoly on the downstream market, it is able unilaterally to impose contract terms on its users and business partners such as mail preparation firms. According to the complainant, La Poste unilaterally lays down rules concerning mail presentation and the handing-over of postal preparations (types of mailbags to be used, minimum volume, etc.), which are published in the form of 'instructions' in the *Bulletin de La Poste*.
- (35) According to the complaint, in view of the imbalance in economic power created by the French legislation, La Poste is able to impose rules on its competitors and to regulate their activities even though it does not have any such statutory power under domestic law. In conclusion, the complainant considers that the French State has infringed Community law, and more particularly:
1. Article 86 read in conjunction with Article 82 of the EC Treaty, by adopting and maintaining in force legislation which authorises La Poste (a public operator with a statutory monopoly in respect of postal services) to determine the conditions of access by mail preparation firms to its reserved services while it is itself active in that sector, and by granting La Poste exclusive rights the mere exercise of which is liable to involve an abuse of a dominant position;
 2. Article 86 read in conjunction with Articles 10 and 82 of the EC Treaty, by not taking action to eliminate the abuses of a dominant position actually committed by La Poste on the mail preparation market.
- (36) The complainant called on the Commission to require the French State:
1. to guarantee access by mail preparation firms to La Poste's network on conditions consistent with the principle of equality between economic operators, and
 2. to confer on an authority independent of La Poste the power to regulate the conditions of access by mail preparation firms to La Poste's network and to confer on that authority the power to apply and monitor compliance with those rules or, failing that, to ensure that La Poste is not able to supply mail preparation services either directly or indirectly.
- (37) On 25 February 1998, the complainant lodged a parallel complaint with the French Competition Board (*Conseil de la concurrence*) against La Poste, alleging that the latter breached Article 8 of French Order No 86-1243 of 1 December 1986 on price freedom and competition as well as Article 82 of the EC Treaty. This complaint accuses La Poste of cross-subsidising its mail preparation subsidiaries, of directing and diverting customers, of offering bundled services and non-market prices, of applying discriminatory prices and conditions, of charging predatory prices and of abusively extending its dominant position. A copy of this complaint was annexed to the complaint lodged with the Commission.
- (38) By letter of 25 September 1998, the Commission sent the French authorities a copy of the complaint received from the SNELPD. By letter of 26 October 1998, it also sent a copy to La Poste.

1.5. The comments of the French Government and the undertaking concerned

- (39) The French authorities replied to the abovementioned letter by letter of 26 November 1998. They first dealt with the applicable regulatory framework. On the question of relations between La Poste and its supervisory authority, they consider that the principle of the structural separation of the functions of regulator and operator has been met since 1 January 1991, the date

⁽³⁵⁾ This booklet addressed to La Poste's commercial agents was concerned with the development of Dynapost.

⁽³⁶⁾ *Étude qualitative des grands émetteurs de courrier et de leur réaction face à l'offre de courrier hybride de La Poste*, 20 January 1993, annexed to the SNELPD complaint lodged with the French Competition Board.

on which La Poste was set up as an autonomous entity. The French authorities state that no statutory power has been conferred by the French State on La Poste and that the complainant cannot invoke La Poste's service obligations as evidence that it has⁽³⁷⁾. The French authorities point out that La Poste merely drew up standard contracts and that the nature of those contracts does not give them any statutory status⁽³⁸⁾.

- (40) In its reply of 18 December 1998, La Poste starts by refuting some of the factual points made in the complaint⁽³⁹⁾. It disputes the allegation that it may be considered to constitute a regulatory authority on the grounds that its scales of charges (and, in this case, the discounts granted) are subject to assessment by its supervisory authority in those areas in which it has a monopoly⁽⁴⁰⁾. La Poste also points out that the partnership contract between La Poste and the mail preparation firms in force when the complaint was lodged provided for a procedure for recognising firms as a 'top quality mail preparation firm for advertising, correspondence and message distribution'. Possessing this status was a pre-condition for obtaining a technical contract⁽⁴¹⁾. La Poste states that it did not itself award this status unilaterally but that this was done by a joint committee made up of three representatives of the mail preparation firms and an independent member, and that La Poste's subsidiaries also had to be assessed by that committee. It also claims that the SNELPD has not produced any documents to substantiate its complaint. Moreover, it suggests that the complainant has confused the grand of its legal monopoly with that of a statutory power⁽⁴²⁾ and that it is in fact this legal monopoly which the complainant is contesting. It also claims that the complainant has confused the existence of a dominant position with the abuse of such a position and that it has not in any way demonstrated that abuse has taken place. Without directly challenging the existence of a conflict of interest on its part, as alleged by the complainant, La Poste nevertheless considers that the mere fact of its supplying services on the mail preparation market does not in itself constitute an abuse of a dominant position⁽⁴³⁾.

- (41) By letter of 27 October 1999, the Commission asked the French authorities to submit their comments on the possibility that the French laws and regulations in this area were incompatible with Community law. In this regard, the Commission expressed reservations concerning the absence of a truly independent regulatory authority with powers to monitor the contractual relations between La Poste and mail preparation firms. According to the Commission, the lack of such a body was liable to be prejudicial to the activities of mail preparation firms. It took the view that La Poste was able to determine freely the conditions of access to its network at the same time as itself being directly or indirectly active in the mail preparation sector. Moreover, the official authority responsible for monitoring La Poste was not separate from the authority which framed its general policy, a fact which cast doubts on its neutrality.

- (42) This letter of formal notice also indicated that, if the Commission's interpretation proved correct, the Commission might adopt a decision under Article 86(3) of the Treaty. A copy of the letter of formal notice was sent to La Poste on 30 November 1999.

- (43) The French authorities submitted their comments by letter of 4 February 2000, in which they disputed some of the points made in the letter of formal notice. They stated that the Commission's interpretation of the requirement for independent regulation of La Poste seemed to go beyond the Community provisions applicable to the postal sector⁽⁴⁴⁾. In their reply, the French authorities also described the role of the minister in supervising La Poste and the nature of monitoring by his departments. In this respect, they indicated that, in their view, the minister's departments did not play any role in the day-to-day management of the institution or in its commercial policy. On the contrary, they asserted that the minister's role is essentially concerned with respect for La Poste's public-service and social tasks, in particular where the same staff is used'. The French authorities also provided details of the consistency between the public service contract and the role of the government commissioner who sits on the public operator's board. They also explained the procedures for

(37) Point 1.4 of the abovementioned reply from the French authorities.

(38) Point 2.1 of the abovementioned reply from the French authorities.

(39) In particular, the complainant's statement that its 'kiosque' service is a mail preparation service and the criticism of its Médiapost subsidiary, which, according to La Poste, develops computer systems for, *inter alia*, addressing and targeting of mail but does not compete with mail preparation firms.

(40) Point I A) of the abovementioned reply from La Poste.

(41) See section 1.1.2.

(42) Page 6 of the abovementioned reply.

(43) Page 8 of the abovementioned letter.

(44) The French authorities claimed that the French legal and institutional balance was consistent with the spirit of Article 22 of the Postal Directive (European Parliament and Council Directive 97/67/EC of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service). This argument is not discussed in this Decision since the Commission took the opportunity to draw the French authorities' attention to the possible incompatibility of France's existing regulatory and institutional set-up with Article 22 of the Postal Directive by letter of 3 August 2000 in separate proceedings.

monitoring La Poste's price decisions, as defined by La Poste's service obligations. The French authorities finally announced statutory measures 'to reassure the Commission', including the creation of an ombudsman responsible for the universal postal service and a stepping-up of the scrutiny of contracts concluded by La Poste.

- (44) By letter of 16 February 2000, La Poste itself replied to the Commission's questions. With its reply, it attached a study by a consultant on relations between La Poste and the mail preparation firms⁽⁴⁵⁾. This study aimed, *inter alia*, to demonstrate that, for economic and financial reasons, La Poste would not have any objective interest in placing mail preparation firms in difficulties. Moreover, it traces the history of relations between La Poste and the firms in the sector, explaining that the apparently stricter nature of some of the clauses in the contracts concluded in 1999 as compared to the previous situation was the result of a desire on La Poste's part to remedy the shortcomings of the arrangements established in 1995, which it felt the mail preparation firms had exploited to their benefit.

- (45) On 9 March 2001, the Commission sent a further letter to the French Government with the dual aim of establishing what progress had been made with the measures announced in February 2000 and of passing on to the French authorities further information supplied by the complainant at the end of 2000, including with regard to the financial weakening of mail preparation firms which had allegedly resulted from changes introduced by La Poste into technical and product contracts.

- (46) The French authorities replied by letter of 17 June 2001. In this letter, they commented on the information passed on by the Commission. They also indicated why it had not been possible to implement the measures planned at the start of 2000, annexing a draft decree establishing a postal ombudsman, which they considered would solve the difficulties highlighted by the Commission. They also informed the Commission that the postal and telecommunications services commission had been consulted regarding this draft on 21 June 2001 and expressed the hope that the ombudsman would be established and his team set up before the beginning of 2002.

⁽⁴⁵⁾ *Analyse des relations contractuelles entre La Poste et les routeurs*, report referred to above.

2. LEGAL ASSESSMENT

- (47) Article 86(1) of the Treaty lays down that, in the case of public undertakings and undertakings to which Member States grant special rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaty, in particular the rules on competition. Under that provision, Member States must not, by laws, regulations or administrative measures, put public undertakings and undertakings to which they grant special or exclusive rights in a position which the said undertakings could not themselves attain by their own conduct without infringing Article 82⁽⁴⁶⁾. Where the Commission identifies state measures which are enacted or maintained in force in violation of Article 86(1), read in conjunction with Article 82, Article 86(3) authorises it to address appropriate decisions to Member States.

2.1. The undertaking concerned

- (48) La Poste is a public undertaking within the meaning of Article 86(1) of the Treaty. This is because it is both a public institution and it has a legal monopoly in respect of some postal services (as determined by Article L(2)(2) of the postal and telecommunications services code, hereinafter referred to as the basic postal service).
- (49) La Poste is a public institution of an industrial and commercial nature established by Law No 90-658 of 9 July 1990⁽⁴⁷⁾. It was accorded the status of independent public operator, a *sui generis* legal category. It has legal personality and is legally independent of the State. Nevertheless, it is monitored by the minister responsible for postal and telecommunications services⁽⁴⁸⁾. The purpose of La Poste is to provide the public domestic and international mail service. Its capital consists entirely of State assets previously held by the Postal and Telecommunications Administration and transferred to it.

⁽⁴⁶⁾ See Case C-18/88 RTT v GB-Inno-BM [1991] ECR I-5941, point 20, and Case C-320/91 Corbeau [1993] ECR I-2533, point 12.

⁽⁴⁷⁾ Law No 90-568 of 2 July 1990 on the organisation of the public postal and telecommunications service (French Official Gazette of 8 July 1990, p. 8069), as last amended by Article 126 of the 1999 Finance Law of 30 December 1998 (French Official Gazette of 31 December 1998, p. 20050).

⁽⁴⁸⁾ Article 1 of the 1990 Law.

- (50) The Law stipulates that La Poste's general policy is framed and conducted by its board of directors 'within the framework of the guidelines determined by the Government' ⁽⁴⁹⁾. The chairman and most of the members of La Poste's board of directors are appointed by decree. Moreover, a government commissioner, appointed to express the Government's view, sits on the board of directors in an advisory capacity and is able to have the board convened. La Poste is thus a public undertaking within the meaning of Article 86(1) of the Treaty.
- (51) Some of La Poste's actions must be approved by the minister responsible for postal and telecommunications services and by the minister for economic affairs: these include the setting of scales of charges for services provided in the context of the postal monopoly and the creation of subsidiaries or the acquisition of holdings by La Poste above a certain threshold.
- (52) It is also the purpose of La Poste to provide the public domestic and international mail service. To that end, it has a postal monopoly pursuant to Article L(2)(2) of the postal and telecommunications services code. This monopoly does not cover mail preparation services. Article L(2)(2) of the postal and telecommunications services code, under which La Poste has a monopoly in respect of the carriage of letters and of packages or documents not exceeding a weight of 350 grams, thus confers exclusive rights on La Poste within the meaning of Article 86(1) of the Treaty.

2.2. The state measures in question

- (53) The applicable regulatory arrangements have been described in detail. This Decision is concerned with Article 25 of the 1990 Law and with Articles 22, 23 and 33 of La Poste's service obligations, which determine the extent to which La Poste is free to determine the conditions of access to its network and its relations with its users, and which lay down the rules governing and limits applicable to intervention by the minister in monitoring La Poste's pricing decisions. It is also concerned with Articles 4 and 6 of Decree No 93-1272, as amended, and Article 4 of the abovementioned Order of 2 November 1998, which indicate the breakdown of powers with regard to regulation, supervision and economic and financial monitoring of postal matters within the ministry of economic affairs, finance and industry.

⁽⁴⁹⁾ Article 10 of the 1990 Law.

2.3. The relevant markets

2.3.1. The mail preparation or 'upstream' services market

- (54) The market to which the state measures in question relate is that in mail preparation services in respect of mail items sent from the territory of France. The mail preparation services described in section 1.2 above are a market which is situated upstream of the services reserved for La Poste. These services are made up of a series of operations which, in the process of handling postal items, take place between the determination of a content by the originator of the mail and the acceptance of mail by La Poste in the context of its reserved services.
- (55) In concrete terms, these are operations which take place upstream of mail clearance, i.e. before the mail enters that part of the postal network concerned with reserved operations ⁽⁵⁰⁾. The collection and sorting activities of mail preparation firms which take place before mail items are handed over at the access points to the postal network do not in any way encroach upon the area of services reserved for La Poste.
- (56) For the sake of simplicity, these services may be collectively described as 'upstream' operations.

2.3.2. The basic postal services market or the market in 'downstream' services, reserved for La Poste

- (57) La Poste has a postal monopoly pursuant to Article L(2)(2) of the postal and telecommunications services code ⁽⁵¹⁾. Its monopoly covers 'domestic and

⁽⁵⁰⁾ Under Article 7(1) of European Parliament and Council Directive 97/67/EC of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, 'clearance' is the first stage of those services which may be reserved for the universal service provider. It is defined in Article 2(4) as 'the operation of collecting postal items deposited at access points'. Access points are defined in Article 2(3) as 'physical facilities, including letter boxes provided for the public either on the public highway or at the premises of the universal service provider, where postal items may be deposited with the public postal network by customers'.

⁽⁵¹⁾ As amended by Article 19(I) of Law No 99-533 of 25 June 1999 laying down guidelines for sustainable regional development and amending Law No 95-115 of 4 February 1995 laying down guidelines for regional development (French Official Gazette of 29 June 1999, p. 9515).

cross-border services in respect of correspondence items, whether by accelerated delivery or not, including direct mail, provided the items weigh less than 350 grams, the price of which is less than five times the public charge for an item of correspondence in the first weight step of the fastest standard category' and 'registered-mail services the use of which is required by law or regulation'.

- (58) This monopoly does not cover the preparation of mail prior to transport and distribution, i.e. the making up, collection and sorting of mail handed over to La Poste. Mail preparation services may therefore be provided by firms other than La Poste, although, in the vast majority of cases⁽⁵²⁾ such provision presupposes access to the relevant services of the postal monopoly so that the mail handled by mail preparation firms can be transported and distributed and the services required by mail originators can be properly completed.
- (59) This basic postal services market, for which La Poste has a monopoly, must therefore be deemed, in the context of this Decision, to constitute a related market situated downstream of the market described.

2.4. Dominant position

- (60) According to consistently confirmed case law, an undertaking holding a statutory monopoly on a substantial part of the common market may be considered to occupy a dominant position within the meaning of Article 82 of the Treaty⁽⁵³⁾. The territory of a Member

State may form a substantial part of the common market⁽⁵⁴⁾.

- (61) Consequently, La Poste holds a dominant position within the meaning of Article 82 of the Treaty⁽⁵⁵⁾ by dint of its statutory monopoly in the area of basic postal services.

2.5. Infringements of the competition rules

2.5.1. The conflict of interest facing La Poste

- (62) Article 86(1) of the Treaty lays down that, in the case of undertakings to which Member States grant special rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaty, in particular to those laid down by Articles 12 and 81 to 89.
- (63) The Court of Justice has acknowledged in this respect that a measure by which a Member State confers on an undertaking present on a market the power to lay down rules with which its competitors must comply results in competition being distorted and the principle of equal opportunities between different economic operators being violated⁽⁵⁶⁾. The economic power which the holder of the exclusive right has over the other undertakings active on the upstream markets gives rise to a conflict of interest. La Poste is led to give preference directly or indirectly to its own subsidiaries to the detriment of its competitors on the upstream market. Such conduct gives rise to abuses within the meaning of Article 82.

⁽⁵²⁾ These are of course cases in which the mail items in question fall below the weight limits and prices laid down by the French rules. According to the abovementioned GBC study carried out on La Poste's behalf, page 3, note 7, '20 to 30 % of items made up by mail preparation firms are not distributed by La Poste' because they are not covered by its monopoly.

⁽⁵³⁾ See, *inter alia*, judgment of 23 April 1991 in Case C-41/90 Höfner v Macrotron [1991] ECR I-1979, point 28; judgment of 18 July 1991 in Case C-260/89 ERT [1991] ECR, I-2925, point 31; judgment of 19 May 1993 in Case C-320/91 Criminal proceedings against Paul Corbeau [1993] ECR I-2538, point 9; judgment of 10 December 1991 in Case C-179/90 Mercati convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA [1991] ECR I-5889, point 14; judgment of 17 July 1997 in Case C-242/95 GT-Link A/S v De Danske Statsbaner (DSB) [1997] ECR I-4453, point 35; judgment of 12 February 1998 in Case C-163/96 Criminal proceedings against Silvano Raso and others [1998] ECR, I-533, point 25.

⁽⁵⁴⁾ Judgment of 9 November 1983 in Case 322/81 NV Nederlandse Banden-Industrie-Michelin v Commission [1983] ECR 3461, point 28; judgment of 5 October 1994 in Case C-323/93 Société civile agricole du Centre d'insémination de la Crespelle v Coopérative d'élevage et d'insémination artificielle du département de la Mayenne [1994] ECR I-5077, point 17; judgment of 26 November 1998 in Case C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and others [1998] ECR I-7791, point 36.

⁽⁵⁵⁾ Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain state measures relating to postal services, OJ C 39, 6.2.1998, p. 7, point 2.6.

⁽⁵⁶⁾ Judgment of 13 December 1991 in Case C-18/88 RTT v GB-Inno-BM [1991] ECR I-5941, points 24 and 25; judgment of 19 March 1991 in Case C-202/88 French Republic v Commission [1991] ECR, I-1223, point 51; judgment of 27 October 1993 in Joined Cases C-46/90 and C-93/91 Procureur du Roi v Lagache and others [1993] ECR I-5284, point 44.

- (64) The Court indicated in its judgment of 13 December 1991 in Case C-18/88 GB-Inno-BM⁽⁵⁷⁾ that a conflict of interest constitutes an abuse in itself. In this Case, the Court was called on to rule on legislation which gave the dominant telephone operator, which also marketed telephone equipment, the right to approve its competitors' telephone equipment. 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. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors'⁽⁵⁸⁾.
- (65) In reply to RTT's arguments, the Court also indicated⁽⁵⁹⁾ that the fact that RTT had not in fact committed any abuses could not be invoked to justify the legislation in question.
- (66) The Court's reasoning in the GB-Inno-BM judgment is applicable in this case. La Poste has a monopoly over the transport of mail and packages not exceeding 350 grams in weight. It is therefore the only available partner for firms in the mail preparation sector which have to make use of its reserved services. It is therefore in a position to impose on mail preparation firms contractual clauses which contain price conditions and technical standards unilaterally determined by itself, despite apparently consulting the partners concerned in some cases. In particular, technical standards governing access to special scales of charges are laid down by 'instructions' drawn up by La Poste and published in the *Bulletin Officiel de La Poste*.
- (67) La Poste referred⁽⁶⁰⁾ to the bipartite nature of the procedure for awarding the status of 'top quality mail preparation firm for advertising, correspondence and message distribution', which since 1994 was a condition for access to La Poste's technical contracts, as evidence that it was not in practice able to determine the conditions of access to its network arbitrarily. The Commission considers, however, that this status-recognition procedure does not resolve the conflict of interest identified in this case. This is because the abuse resides not in any refusal of access but in the determination of the financial and technical conditions offered to mail preparation firms⁽⁶¹⁾.
- (68) For their part, the French authorities maintain that La Poste is monitored by the State, a fact which reduces its freedom in the area of contracts and prices. On the question of the procedures for monitoring the contracts, technical conditions and scales of charges established by the postal monopoly holder, they point out that some of La Poste's pricing decisions are required to be reviewed and approved by the minister.
- (69) The Commission considers, however, that La Poste's contractual freedom is, in reality, far from being completely contained by any *ex ante* or *ex post* scrutiny by the minister. Thus, as far as the services and scales of charges covered by this Decision are concerned, the possible extent of intervention by the minister is in fact restricted and the intensity of monitoring varies considerably. Given the provisions with which this Decision is concerned and the explanations provided by the French authorities⁽⁶²⁾ three situations can be identified with regard to the contracts and scales of charges of concern to mail preparation firms, depending on whether they are regarded as users or suppliers of La Poste's network. Firstly, the 'product contract' rates are approved by the minister if they relate to services reserved for the postal monopoly (e.g. the Postimpact rates)⁽⁶³⁾. Secondly, the contracts for which mail preparation firms are regarded as suppliers, in particular the 'technical contracts', remain outside the scope of any scrutiny by the minister since they relate to services falling outside the postal monopoly. Thirdly, the standards and technical conditions, and more generally the non-price components of La Poste's contracts, which are

⁽⁵⁷⁾ [1991] ECR I-5941, point 25.

⁽⁵⁸⁾ Points 25 and 26.

⁽⁵⁹⁾ Points 23 and 24.

⁽⁶⁰⁾ Letter of 18 December 1998, cited in section 1.5.

⁽⁶¹⁾ It should also be pointed out that this procedure has not been in force since 1999.

⁽⁶²⁾ See point 1.3.1.

⁽⁶³⁾ In practice, scrutiny of the Postimpact rates seems to relate essentially to the absolute level of charges and not to the relevance of the volume thresholds giving access to the levels in this scale of charges.

just as important to the operating conditions of mail preparation firms, are not subject to any scrutiny whether or not the services in question fall within the scope of operations reserved for La Poste ⁽⁶⁴⁾.

(70) The Commission takes the view that where the French State authorises only one undertaking to provide reserved postal services and allows that undertaking to determine its technical and financial relations with commercial partners reliant on services falling within the scope of its reserved operations, without exhaustive scrutiny of those relations, that undertaking is faced with a conflict of interest by dint of the fact that it becomes the sole partner of its own competitors on markets upstream of its reserved operations. By virtue of the imbalance in economic power created by the relevant French rules, La Poste has the *de facto* power to impose rules on its competitors and to regulate their activities even if it does not have any statutory power under domestic law ⁽⁶⁵⁾. Moreover, La Poste is also present on the mail preparation market both itself and via subsidiaries. Such a presence on the mail preparation market creates a conflict of interest for La Poste since it is led as a result of this situation to give preference directly or indirectly to its own subsidiaries and encouraged to abuse its dominant position.

(71) In their reply to the Commission's letter of formal notice, the French authorities did not dispute the Commission's analysis concerning the existence of a conflict of interest facing La Poste. Indeed, they announced measures designed to meet the concerns expressed by the Commission in this regard.

(72) Thus, by letter of 17 July 2001, the French authorities sent the Commission, for information purposes, a copy of a draft decree ⁽⁶⁶⁾ creating an ombudsman for the universal postal service (hereinafter referred to as the 'ombudsman'), which they promised to 'establish quickly'. Although this draft had not become law by the date on which this Decision was adopted, the nature of the solutions planned by the French authorities should be examined.

(73) According to the French authorities, the creation of the ombudsman will result in more thorough scrutiny of La Poste in the area covered by this Decision. The decree, they argue, will explicitly provide for the possibility of intervention by the ombudsman in the initial drafting, subsequent amendment and application of standard contracts tying La Poste to organisations representing homogenous business categories, at the request either of one of the parties or of the minister. The ombudsman will give views not only on aspects relating strictly to the scales of charges, but also on 'the appropriateness and proportionality of the technical constraints' contained in the contracts. Following a hearings procedure, the ombudsman will address a reasoned opinion to the minister and the parties concerned, which he will have the power to publish.

(74) The draft decree would represent significant progress compared with the case at issue and the present legislative situation. First, it would give mail preparation firms the right to appeal against the financial and technical conditions set by La Poste. Second, it would allow for such an appeal to take place after the implementation of the contracts concerned, and thus for *ex post* scrutiny of the contracts and their application, while, under the present rules, intervention by a public authority in relations between La Poste and the mail preparation firms is confined to *ex ante* approval. Third, the decree would explicitly subject non-price elements of the contracts to the monitoring process.

(75) However, in the draft submitted to the Commission, the decree instituting an ombudsman for the universal postal service only partly meets the concerns set out above. The investigation of a case by the ombudsman is of real interest to the requesting party only if it is followed by a decision issued by a body that is distinct from the parties. However, under the draft, no authority independent of La Poste is given the power to issue decisions or orders, beyond the limited powers ⁽⁶⁷⁾ currently conferred on the official monitoring authority by the existing rules. In

⁽⁶⁴⁾ The 'catalogue' rates, which also affect the operations of SNELPD members, are also submitted to the minister for information purposes only since they relate to mail items which are not correspondence items covered by La Poste's exclusive rights. However, this Decision is not concerned with the procedures for monitoring these rates since La Poste is not the only partner available to mail preparation firms for the transport and distribution of such mail items.

⁽⁶⁵⁾ See recital 23.

⁽⁶⁶⁾ This draft itself follows on from a preliminary draft decree amending the service obligations of La Poste, a copy of which had been sent in February 2001 and which was not developed further.

⁽⁶⁷⁾ These are powers of *ex ante* scrutiny of price aspects of La Poste's commercial offers (especially standard contracts) for access to its reserved services. The draft presented to the Commission does not change the current profile of commercial offers that are subject to scrutiny. Although it explicitly treats contracts negotiated with homogenous business categories as standard contracts, it does not change the current rule under which only standard contracts relating to reserved services are subject to *ex ante* scrutiny.

practice, therefore, a combined reading of the provisions of the draft decree on the ombudsman and the existing rules would identify three possible situations, on which the effectiveness of the right to refer cases accorded to La Poste's commercial partners and the extent of the scrutiny carried out would depend:

- (1) the case would be referred to the ombudsman prior to ministerial approval, and would cover services within the scope of La Poste's reserved area ⁽⁶⁸⁾;
- (2) the case would be referred to the ombudsman prior to the entry into force of the contract concerned, but would cover services that were not part of La Poste's reserved activities ⁽⁶⁹⁾; or
- (3) the case would be referred to the ombudsman after the entry into force of the contract concerned, and could cover reserved or non-reserved services ⁽⁷⁰⁾.

In the first case, as regards the scales of charges and contracts submitted to the minister for approval, the ombudsman decree would represent progress compared with the existing situation, as it would allow a requesting party to refer the contract to the ombudsman and a decision to be taken at the end of the procedure. In the second and third cases, on the other hand, while the mail preparation firms would have the right to appeal to the ombudsman, the procedure would end with the ombudsman's opinion, with no power accorded to an official authority to resolve a dispute between La Poste and the mail preparation firms on services outside the scope of La Poste's exclusive rights or provided after approval has been given ⁽⁷¹⁾. As a result, should a dispute

arise between La Poste and the mail preparation firms in drawing up or amending the technical contracts ⁽⁷²⁾, even if the case were referred to the ombudsman, there would be no guarantee that the procedure would conclude successfully and a final decision would be taken by a body independent of La Poste ⁽⁷³⁾.

- (76) In these circumstances, and given the shortcomings of the planned decree as described in point 75, the proposal by the French authorities would not suffice to remove the risk of the public operator's conflict of interest in the case at issue.

2.5.2. *Lack of neutrality in ministerial supervision of La Poste*

- (77) Legislation that does not provide for an independent monitoring authority with sufficient guarantees of neutrality in relation to a public undertaking placed in a situation of a conflict of interest infringes Article 86(1) read in conjunction with Article 82 of the Treaty. More specifically, the absence of an authority providing such guarantees leads to infringements of Article 82 of the Treaty where the State does not effectively monitor how the incumbent operator with an exclusive right conducts itself on the upstream markets that are not covered by the exclusive right and on which the operator with the exclusive right is itself present.
- (78) Where a public undertaking is faced with a risk of a conflict of interest, it is the responsibility of the State to ensure that an effective monitoring system is in place such as will re-establish equal opportunities between operators. This is the conclusion of the Court's reasoning in its judgment in GB-Inno-BM: 'the maintenance of effective competition and the guaranteeing of transparency require that the drawing up of technical specifications, the monitoring of their application, and the granting of type-approval must be carried out by a body which is independent of public or private undertakings offering competing goods or services' ⁽⁷⁴⁾.

⁽⁶⁸⁾ In this situation, the mail preparation firms constitute users of the postal network.

⁽⁶⁹⁾ In this situation, the mail preparation firms constitute suppliers of La Poste.

⁽⁷⁰⁾ This situation could cover cases where mail preparation firms constitute suppliers of La Poste or cases where they constitute users of its network.

⁽⁷¹⁾ In this respect, the draft decree presented in July 2001 does not go as far as was announced by the French authorities in their reply of 4 February 2000. At the time, the French authorities expressly stated that, under the future decree, standard contracts (whatever their subject matter) 'would be subject to approval by the ministry'; they also included technical contracts in the concept of 'standard contract' (memo of 4 February 2000, point 2.2.1).

⁽⁷²⁾ These cover preparation and sorting services that fall partly under La Poste's universal service, but are in no way part of its reserved area.

⁽⁷³⁾ For product contracts falling under the universal service (such as Postimpact) on the other hand, the arrangements under the draft decree do ensure that the ombudsman's opinion is followed by a decision by the supervisory authority.

⁽⁷⁴⁾ See also the judgment of 27 October 1993 in Case C-69/91 Criminal proceedings against Decoster [1993] ECR I-5335, point 19.

- (79) The Commission has confirmed the application of this principle to the postal sector. It has concluded that Member States must entrust the monitoring of postal service operators to an authority which is independent of the public operator or operator granted special or exclusive rights and of any entity linked to it. In particular, it has pointed out that Member States cannot entrust such monitoring to the postal operator itself 'or to a body which is related (legally, administratively and structurally) to that operator' ⁽⁷⁵⁾.
- (80) In its letter of 27 October 1999, the Commission pointed out that the monitoring function and the function of directing the policy of La Poste as a public undertaking were performed within the same ministry. It concluded that a conflict of interest existed within that ministry ⁽⁷⁶⁾.
- (81) In their reply of 7 February 2000, the French authorities clarified a number of points regarding the nature of the links between the minister and La Poste, and the content of the supervisory and price monitoring function. In their view, the supervisory role and the public service contract imply the setting of general objectives for the public operator, which do not entail the ministry's intervening in La Poste's commercial policy, let alone its taking any kind of position as regards the mail preparation business. The French authorities end their explanation by concluding that French legislation ensures appropriate separation of the regulatory and operational functions of the postal service. The minister and the ministerial departments, in the view of the French authorities, are legally, functionally and structurally separate from La Poste.
- (82) The Commission takes note of these explanations but cannot wholly endorse the analysis. However real the degree of separation referred to by the French authorities, it does not, under the current rules, guarantee indisputable neutrality in the monitoring of relations between the public operator and mail preparation firms. The French authorities themselves point out that 'the budget directorate and the Treasury directorate responsible for managing the State's assets are actively involved' in setting La Poste's objectives ⁽⁷⁷⁾. The same official authority responsible for monitoring La Poste is therefore also clearly in charge of ensuring its profitability and financial soundness. The fact that these powers are divided between various departments of a service answerable to the same minister is by no means sufficient proof of the independence of the scrutiny carried out. Furthermore, within DiGITIP itself, the postal services department is responsible both for regulation and for economic and financial supervision ⁽⁷⁸⁾. The minister's supervision of La Poste, and in particular the scrutiny of its contracts and scales of charges, is likely to be influenced by considerations relating to the State's financial interest unrelated to the concerns of equity that should prevail in the monitoring of relations between La Poste and its users and commercial partners. It is therefore clear that, under current French legislation, the minister cannot be considered to constitute an authority providing sufficient guarantees of independence of La Poste for its monitoring to be effective.
- (83) Given the existing legislative framework, the Commission finds that the separation between the economic and financial supervision function and the regulatory function as described by the French authorities is not such as to provide sufficient guarantees of neutrality and independence in the monitoring of relations between La Poste and mail preparation firms. In these circumstances, the public authority, itself placed in a situation of conflict of interest, is not in a position to carry out effective scrutiny of La Poste in such a way as to counteract the conflict of interest previously identified within the public postal operator.
- (84) In their letter of 17 July 2001, the French authorities assert that, in the near future, the introduction of an ombudsman alongside the minister will resolve the issue of the neutrality of scrutiny. They argue that the decree will lay down a number of solutions to ensure the ombudsman's independence. Appointed by decree on the proposal of the minister from a list of three put forward by the chair of the postal and telecommunications services commission, the ombudsman will be appointed irrevocably for a non-renewable term of five years and will have his own resources and budgetary appropriations, without coming under the authority of

⁽⁷⁵⁾ Point 6.4 of the notice cited in footnote 55.

⁽⁷⁶⁾ See Commission letter of 27 October 1999, p. 9.

⁽⁷⁷⁾ Memo from the French authorities dated 4 February 2000, p. 6, third paragraph. In the third paragraph on p. 5 of the same memo, it is also stated that 'the budget directorate and the Treasury directorate responsible for managing the State's assets are also involved, each where it is concerned and within the limits of its mandate'.

⁽⁷⁸⁾ In points 16, 17 and 22 of Decoster, cited above, the Court found that the different directorates of a single authority could not be regarded as independent of each other for the purposes of Articles 82 and 86 of the Treaty. It is all the more true that the mixing within the same directorates under the authority of one and the same minister of monitoring and state asset management tasks prevents these tasks being performed independently of one another.

the ministry's departments. While the minister will retain decision-making power (especially the power to give prior approval), with the ombudsman's role being consultative only, the latter's opinions will give reasons and be made public, making it difficult for the minister to deviate from the decision recommended by the ombudsman without giving objective reasons for doing so.

(85) The Commission takes note of the existence of this draft decree, which, by assigning an ombudsman to work alongside the minister and giving him certain investigative powers, resources and statutory guarantees of independence, reflects a concern to introduce a number of elements of independence, transparency and effectiveness into the exercise of scrutiny by the supervisory authority in the area covered by the present Decision. In this connection, the power to publish reasoned opinions may take on particular importance in the resolution of disputes and difficulties such as those cited by the complainant in the case at issue. In relation to the specific problem that is the subject of the complaint, this power is capable of counteracting the bias that might influence a discretionary decision by the minister.

(86) However, solving the conflict of interest within the authority responsible for monitoring and regulating the postal sector presupposes the ombudsman's total independence of the public postal operator. In this connection, the Commission notes that, in its present form, the draft decree does not provide for sufficient distance between the ombudsman, together with his colleagues, and the public postal operator⁽⁷⁹⁾. In these circumstances, establishing the ombudsman could prove to be inadequate as a means of ensuring the satisfactory independence of the supervisory authority, despite the powers conferred on him by the planned decree.

⁽⁷⁹⁾ According to point 1.2.1 of the French authorities' memo of 17 July 2001, 'the ombudsman and his immediate colleagues fall expressly under the legislative and regulatory provisions restricting and submitting to a check for regularity their possibilities for employment in private firms at the end of their terms of office' (emphasis added). The French authorities are probably referring to Decree No 95-168 of 17 February 1995 on the carrying on of private activities by civil servants who have been released from active service or have definitively ceased their duties (French Official Gazette No 43 of 19 February 1995, p. 2717). However, this decree does not cover activities in a public undertaking. No provision seems to be made as regards the possibility of the ombudsman or his colleagues joining La Poste at the end of their terms of office, which could affect their neutrality in the performance of their tasks.

2.5.3. Possible effect of the conflict of interest on the conduct of La Poste

(87) The conflict of interest itself constitutes an abuse. It is not necessary to wait for the undertaking concerned actually to commit an abuse before finding that there is an infringement. It is sufficient that the undertaking is placed by the legislation itself in a situation that leads it to commit an abuse as soon as it is in its interest to do so. The creation and maintenance of a dual conflict of interest as described above must be considered in itself contrary to Article 86(1) read in conjunction with Article 82 of the Treaty, even in the absence of evident abuses⁽⁸⁰⁾.

(88) However, there is some value in entering into further detail as to the nature of the conduct contrary to Article 82 in which La Poste could engage in or might have been tempted to engage in as a result of the dual conflict of interest described above.

(89) First, La Poste has the power to impose on its mail preparation partners technical and financial conditions unrelated to the relevant economic reference point. La Poste could set technical and financial conditions that, while apparently applicable equally, would in fact put competitors of La Poste and its subsidiaries at a disadvantage. There is nothing to show, for example, that the volume thresholds set by La Poste for access to certain types of technical contract, or the remuneration 'per thousand' granted to mail preparation firms for preparation and sorting work, are based on indisputable economic and technical data (saving on processing for La Poste, economies of scale, value added, etc.). On the contrary, there is a risk that La Poste is using its position as an unavoidable partner to conduct the negotiations leading to the conclusion of these contracts as it chooses. It is therefore possible that the terms set by La Poste, while apparently non-discriminatory, result in difficulties for mail preparation competitors or certain categories of mail preparation competitor.

(90) Certain technical and price decisions taken by La Poste in July 1999 illustrate the public operator's room for manoeuvre and its potential effects on the conditions in which mail preparation firms operate. Without needing to comment on the appropriateness or equity of the thresholds set by La Poste, or on their justification, the

⁽⁸⁰⁾ Judgment of 13 December 1991 in Case C-18/88 RTT v GB-Inno-BM [1991] ECR I-5941, points 23 and 24; Case C-163/96 Criminal proceedings against Silvano Raso and others [1998] ECR I-533, points 27 and 31.

Commission confines itself to observing, for example, that the sudden and significant ⁽⁸¹⁾ increase in the annual volume of envelopes delivered to post offices required of mail preparers for access to the preparation contract excluded from this type of contract ⁽⁸²⁾ around half ⁽⁸³⁾ of the mail preparation firms that had benefited from it previously, thus dramatically changing the conditions in which they operated. However, this decision had no effect on the conditions of operation of the La Poste subsidiaries concerned, which, for their part, remained in any event above the critical threshold, given their size and volume of activity.

- (91) Likewise, as regards the remuneration 'per thousand' granted to mail preparers for certain preparation and sorting work, La Poste amended the applicable terms in July 1999, leading to a 16 % reduction in the payments made to mail preparation firms. Admittedly, this reduction was ultimately compensated for by La Poste at the end of the year, by way of an 'exceptional bonus' paid to the mail preparation firms. However, the initiative of the reduction in July 1999 and the compensation at the end of the year demonstrates the scope of the public operator's discretion to determine the financial terms of access to its network. Remuneration 'per thousand' is far from neutral as regards the economic equilibrium of mail preparation firms, whose margins are traditionally small. According to the complainant, this remuneration accounts for some 9 % of their turnover. These means that (taking as an example what was observed in 1999) by varying this remuneration by 16 %, La Poste can decide to influence 1,5 % of the turnover of mail preparation firms. This figure must be compared with the conclusions of the study carried out by GBC on behalf of La Poste, according to which the net margins of mail preparation firms vary between 0 % and 2 % ⁽⁸⁴⁾. Therefore, mere variation in the conditions of access to the network by La Poste can mean that mail preparation firms see their profitability fall considerably. They thus find themselves in a position

of particular structural vulnerability vis-à-vis the public operator, while neither La Poste nor its mail preparation subsidiaries, which have other sources of revenue and support from a major group ⁽⁸⁵⁾, find themselves in a similar situation of financial dependence.

- (92) Second, in applying the technical standards referred to previously, La Poste may also be tempted to be less strict with its own subsidiaries and with major originators of mail with which it deals directly than with competing mail preparers. La Poste could thus apply in a discriminatory fashion standards which themselves comprise no discriminatory element. The complainant gave examples of cases where subsidiaries of La Poste had not complied with the rules on quantity, format, presentation, and times and places of delivery, or with rules on the nature of the mail, but had none the less benefited from contractual discounts and access to preferential rates. This situation had also been identified by La Poste's general management ⁽⁸⁶⁾.
- (93) Whatever and whoever is at the origin of La Poste's alleged conduct ⁽⁸⁷⁾, the simple fact that such conduct exists or even is likely to exist is evidence of the shortcomings in the scrutiny exercised over La Poste's setting of its technical standards and scales of charges, and of their application.

2.6. Applicability of Article 86(2)

- (94) Under Article 86(2) of the Treaty, undertakings entrusted with the operation of services of general economic interest are subject to the competition rules laid down in the Treaty, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

⁽⁸¹⁾ From 6 million to 30 million.

⁽⁸²⁾ This type of contract is considered by mail preparation firms to be the most advantageous of the technical contracts, as it allows the bundling of mailshots.

⁽⁸³⁾ There were only 27 preparation contracts at the end of 1999 compared with 58 prior to the decisions described.

⁽⁸⁴⁾ *Routeurs ou prestataires de services — Synthèse de l'étude réalisée par le Cabinet GBC à la demande de La Poste*, June 2000. On p. 2, we read: 'If we exclude from the financial analysis mail order preparers, which come out best, operating margins in other mail preparation segments fluctuated in 1998 between 2 % and 4 %, and net margins between 0 % and 2 %'.

⁽⁸⁵⁾ Datapost's large deficit over a number of successive years is evidence of the reality of this advantage.

⁽⁸⁶⁾ A letter to department managers from La Poste's director of mail dated 17 September 1999 is evidence of the awareness of these problems: 'The various audits conducted recently on conditions of operation and billing for services related to the mail service (collection and delivery, franking on behalf of third parties, enveloping, addressing) clearly identified inconsistencies between national and local instructions, resulting in a certain lack of uniformity of operating arrangements or even pricing. This situation means that La Poste is running serious risks with regard to competition law (...)'.
⁽⁸⁷⁾ Certain forms of behaviour described by the SNELPD in its 1998 complaint, in particular the discrimination practised, seem to have originated in initiatives by certain department managers at La Poste with a view to optimising volumes. The abovementioned letter of 17 September 1999 was written precisely to discipline such practices.

- (95) The French authorities did not rely on Article 86(2). In any event, it would not be possible to demonstrate that removing conflicts of interest or eliminating the potentially discriminatory practices of La Poste which are their corollary would be likely to obstruct the performance of the services of general economic interest entrusted to the public postal operator.

stances, the French Government has allowed a situation to persist in which La Poste finds itself led to commit abuses in the form of discrimination against its mail preparation competitors,

HAS ADOPTED THIS DECISION:

2.7. Effect on trade between Member States

Article 1

- (96) The state measures set out above are likely to affect trade between Member States. Mail entrusted to mail preparation firms may originate from companies based in other Member States of the Community, whose cross-border activities may thus be affected by the distortion of competition, as could the business of mail preparation firms based in Member States other than France which might want to establish themselves in France or provide their services there ⁽⁸⁸⁾.

Article 25 of Law No 90-568 of 2 July 1990 and Articles 22, 23 and 33 of La Poste's service obligations, together with Articles 4 and 6 of Decree No 93-1272 of 1 December 1993 as amended and the Order of 2 November 1998 on the organisation of DiGITIP, are contrary to Article 86(1), read in conjunction with Article 82 of the EC Treaty, to the extent that they allow only limited scrutiny of the non-discriminatory nature of the scales of charges and technical conditions applied by La Poste to mail preparation firms, and to the extent that this partial scrutiny is furthermore exercised by a public authority that is insufficiently independent and neutral in relation to La Poste.

- (97) In conclusion, La Poste has a monopoly on the basic postal service and thus constitutes an unavoidable partner for mail preparation firms, which are active on a market upstream of the basic postal service on which La Poste and some of its subsidiaries are also present. French legislation gives La Poste the power to set the scales of charges and technical conditions applied to mail preparation firms for access to its reserved services. These conditions and the arrangements for implementing them are subject only to partial scrutiny, accompanied by limited decision-making powers. In addition, the public authority responsible for this scrutiny does not offer sufficient guarantees of independence and neutrality in relation to La Poste. In these circum-

Article 2

France shall inform the Commission, within two months of being notified of this Decision, of the measures it has taken to put an end to the infringements identified in Article 1.

Article 3

This decision is addressed to the French Republic.

Done at Brussels, 23 October 2001.

⁽⁸⁸⁾ See judgment of 1 February 1978 in Case 19/77 *Miller v Commission* [1978] ECR I 31, point 15, and paragraph 48 of the opinion of Advocate General Jacobs prior to the judgment of 23 April 1991 in Case C-41/90 *Höfner v Macrotron* [1991] ECR I-1979.

For the Commission

Mario MONTI

Member of the Commission