1st December 2004 : Anticompetitive discounts in contracts between the French post office, La Poste, and mail order companies - The Conseil de la concurrence notes the undertakings given by La Poste and reduces the penalties imposed by 90%

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The practices concerned

In response to a request by the Minister of Economy, on 10th April 2001 the *Conseil de la concurrence* issued an opinion, in which it drew *La Poste*'s attention to the anticompetitive nature of certain discounts contained in its sales contracts with major customers.

On 1st July 2002, considering that *La Poste* had failed to heed all its recommendations, the *Conseil de la concurrence* assumed jurisdiction at its own initiative, with the intention of ruling on this contract situation. On 30th November 2004, it published a substantive decision on the merits of the case.

In the decision, the *Conseil* observed that *La Poste* altered a part of its sales contracts as early as 1st January 2002. However, the mail order sector, which represents a very substantial volume of activity, continued to benefit from tied reductions and loyalty discounts up until 1st January 2003. In accordance with case law, the *Conseil* qualified these practices as abuse of a dominant position, prohibited by French and European competition law.

However, since *La Poste* did not seek to contest the complaints made against it, the *Conseil* noted its undertakings for the future and decided to reduce the

penalty imposed by 90%.

Substantial, credible and verifiable undertakings by La Poste

La Poste has made the following undertakings:

- for those of its products covered by a monopoly, to refrain from practising discounts that discriminate against customers who are themselves operating in the same market;

- for products and services open to competition and for which *La Poste* occupies a dominant position, to refrain from practising tied reductions based on the combined sales of two or more services belonging to distinct markets; also to refrain from granting loyalty discounts (development discounts) dependent on growth in the beneficiaries' sales figures;

- as soon as possible and within no more than twelve months, to adapt its sales system to each modification in the perimeter of its reserved sector, notably to eliminate any risk of price tying between activities that are open to competition and those in the reserved sector.

- following the *Conseil'*s decision, to inform all its sales and regional managers of the terms and importance of these undertakings, and to remind them periodically of the measures taken during internal training.

Acceptance of undertakings: an instrument available to the Conseil de la concurrence

For the *Conseil de la concurrence*, handing down penalties and accepting undertakings are two instruments, which, despite concerning different situations and having different effects, nevertheless fulfil the same purpose of re-establishing and maintaining a normal competitive situation. In the first case, significant penalties deter the company from re-offending, whilst in the second case, the undertakings indicate that the company will substantially and credibly alter its behaviour, and abandon its anticompetitive practices.

In certain market circumstances, undertakings by companies may, for competition rules, prove more effective that penalties. This is particularly true in cases where the undertakings lead the company to substantially alter its behaviour, and where the competition authorities are able to check that they are properly respected.

Under the New Economic Regulations law which came into force on 16th May 2001, the *Conseil de la concurrence* may reduce any penalties imposed on companies, provided they do not dispute the validity of the complaints made against them and agree to give certain undertakings regarding their future behaviour. This is the so-called "transaction" procedure, permitted under article L.464-2 of the code of commercial law (*code de commerce*) , which has been applied to La Poste in this particular case.

Since the ordinance of 4th November 2004 came into force, the *Conseil* is able to accept the company's undertakings even before any complaints are officially made, and to close litigation proceedings at this early stage. This procedure is permitted by the new wording of paragraph 1, section I of article L.464-2 of the code of commercial law, which is based on that practised by the European Commission. It has not yet been applied in practice.

Penalty reduced by 90%

The *Conseil de la concurrence* considers that the undertakings given by *La Poste* are substantial, credible and verifiable, and that they entail a satisfactory alteration to the behaviour, which led the *Conseil* to assume jurisdiction at its own initiative on 1st July 2002. Furthermore, it has observed that the situation of the mail order sales sector was rectified in 2003.

Consequently, it notes the undertakings given by *La Poste* and orders the company to observe all aspects of them. In return, the *Conseil* has decided to grant *La Poste* a 90% reduction in the financial penalty it would normally have imposed following ordinary litigation proceedings. The penalty is thus reduced from €6 Million to €600,000.