

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
28 May 2001 *

In Case T-53/01 R,

Poste Italiane SpA, established in Rome, Italy, represented by G.M. Roberti, P. Mathijsen, A. Perrazzelli, E. Rubini and A. Sandulli, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by L. Pignataro and M.K. Wiedner, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for suspension of the operation of Commission Decision 2001/176/EC of 21 December 2000 concerning proceedings pursuant to

* Language of the case: Italian.

Article 86 EC in relation to the provision of certain new postal services with a guaranteed day- or time-certain delivery in Italy (OJ 2001 L 63, p. 59),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Legal background

1 Article 16 EC provides:

‘Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.’

2 Article 86(1) EC requires that, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89 inclusive.

3 Under Article 86(2) and (3):

‘2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

3. The Commission shall ensure the application of the provisions of this article and shall, where necessary, address appropriate directives or decisions to Member States.’

Background to the dispute

4 Poste Italiane SpA (hereinafter ‘Poste Italiane’ or ‘the applicant’) is an undertaking wholly controlled by the Italian State. It provides, in Italy, the universal postal service, within the meaning of Article 3 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules

for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14). Under Article 3(1) the universal service involves ‘the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users.’

- 5 Article 1 of Decree No 156 of the President of the Italian Republic of 29 March 1973 on assent to the single text of the legislative provisions on mail, postal banking services and telecommunications (GURI No 113 of 3 May 1973, ordinary supplement) provides: ‘Within the limits laid down in this decree, the State shall have the sole right to provide the following services: collection, carriage and delivery of letter post...’.
- 6 Nevertheless, Article 4 of Decree No 156 provides that the services referred to in Article 1 may be provided by Poste Italiane or by delivery agencies, that is to say, any private operator who has obtained a licence from the Ministry of Communications (hereinafter ‘the delivery agencies’).
- 7 On 22 July 1999 the Italian authorities adopted Legislative Decree No 261 (GURI No 182 of 5 August 1999) designed to transpose Directive 97/67 into Italian law; it entered into force on 6 August 1999.
- 8 Article 4 of Decree No 261 defines the services reserved to Poste Italiane, as provider of the universal service. It states:

‘1. There may be reserved to the provider of the universal service, to the extent necessary to maintain the service, the collection, sorting and delivery of items of

domestic and cross-border correspondence, whether by accelerated delivery or not, the price of which is less than five times the public tariff for an item of correspondence in the first weight step of the fastest standard category, provided that the items weigh less than 350 grams.

2. The area reserved in paragraph 1 includes each of the phases taken separately.

3. Cross-border post comprises the items which form part of the reserved area and are going abroad or coming from abroad.

4. With respect to the delivery phase, the items of correspondence referred to in paragraph 1 include those generated by telematic technologies.

5. Irrespective of the price and weight limits, the reserved area referred to in paragraph 1 includes registered mail connected with administrative and legal procedures; administrative procedures are taken to mean procedures relating to the activities of the public authorities and manifestly public calls for tenders.'

9 It is apparent from the documents before the Court that 'hybrid electronic mail' is mail which is collected, sorted and transported electronically but, after printing, delivered in physical form.

The contested decision

- 10 After holding several meetings with the representatives of the Italian authorities and of Poste Italiane, the Commission, by letter of formal notice dated 16 May 2000, initiated an infringement procedure against Italy for infringing Article 86 EC in conjunction with Article 82 EC.
- 11 The Italian Government and Poste Italiane submitted their observations, in writing and at meetings with the Commission's representatives, on the complaints formulated in the letter of formal notice.
- 12 On 21 December 2000, the Commission adopted Decision 2001/176/EC concerning proceedings pursuant to Article 86 EC in relation to the provision of certain new postal services with a guaranteed day- or time-certain delivery in Italy (OJ 2001 L 63, p. 59, hereinafter 'the contested decision'), the operative part of which reads as follows:

'Article 1

The Italian postal legislation, as presently reflected in Article 4(4) of Legislative Decree No 261 of 22 July 1999, contravenes Article 86(1) in conjunction with Article 82 of the Treaty, insofar as it excludes competition with respect to the day- or time-certain delivery phase of hybrid electronic mail services.

Italy shall bring this infringement to an end by eliminating the exclusive rights granted to Poste Italiane SpA with respect to the day- or time-certain delivery phase of hybrid electronic mail services.

Article 2

Italy shall refrain in the future from granting exclusive rights with respect to the day- or time-certain delivery phase of hybrid electronic mail services.

Article 3

Italy shall inform the Commission within three months of notification of this Decision of the measures taken in order to end the infringement referred to in Article 1.

Article 4

This Decision is addressed to the Italian Republic.'

- ¹³ In the contested decision, the Commission finds that the exclusive right granted to Poste Italiane by virtue of Article 4(4) of Decree No 261 covers all deliveries undertaken for items of mail created by telematic means, irrespective of whether they provide added value when compared to the conventional delivery service and irrespective of whether Poste Italiane provides the added value delivery service itself or not.

- 14 The Commission also points out that Ministerial Decrees No 333 of 24 June 1987 (GURI No 184 of 8 August 1987), No 269 of 29 May 1988 (GURI No 165 of 15 July 1988), and No 260 of 7 August 1990 (GURI No 218 of 18 September 1990), which provided the legal basis for the establishment of Poste Italiane's hybrid electronic mail service, did not include the delivery phase of this service in the reserved area.
- 15 In the recitals of the contested decision, several facts relating to the services under consideration are highlighted:
 - private operators offer new mail outsourcing service packages to undertakings, in particular to banks and insurance companies. Such services include the production, preparation, transport and delivery of time-sensitive mail items;
 - the services offered in relation to the processing of the hybrid electronic mail increase speed and reliability at the delivery phase by providing for two key features — guaranteed delivery on a pre-arranged day or guaranteed delivery at a pre-arranged time — which differentiate them from the traditional service;
 - the service providing delivery on a pre-arranged date or at a pre-arranged time is offered by the private operators under a contractual guarantee and is provided across at least the territory of an entire province in Italy;
 - there are variants of these two key features, in particular a service providing for day- or time-certain delivery according to a day or time sequence determined by the customer, or day-certain delivery to one or more

alternative destinations, where delivery at the first chosen location is unsuccessful; there are additional associated services, such as: tracking throughout the electronic and physical delivery phase; electronic reporting on successful delivery either on the pre-arranged day or at the pre-arranged time; electronic records of these delivery reports, the electronic reporting of failed deliveries, efforts to locate the customer at his new address; and constant updating of customer-specific mailing lists;

- private operators have established the infrastructure necessary to provide the hybrid electronic mail outsourcing service across a substantial part of the Italy (approximately 40% of the country);

- Poste Italiane's delivery network does not offer the guaranteed day- or time-certain delivery services.

¹⁶ In the part of the contested decision devoted to the legal assessment, the Commission, after pointing out that Poste Italiane is a public undertaking within the meaning of Article 86(1) EC, to which the Italian State has granted exclusive rights on the basis of Article 4 of Decree No 261,

- examines the relevant services markets (recitals 16 to 21) and the geographic market concerned (recital 22);

- finds that Poste Italiane occupies a dominant position in a substantial part of the common market within the meaning of Article 82 EC, since it has a legal monopoly over the market covered by the exclusivity granted by Article 4 of Decree No 261 (recital 23);

- considers that a State measure reserving a neighbouring but separate market infringes Article 86(1) EC in conjunction with Article 82 EC, especially when that measure leads the operator to limit supply of the newly-reserved service, like Poste Italiane, which does not offer a day- or time-certain delivery service and which, by the simple exercise of its exclusive right, precludes private operators from satisfying the demand for that service (recital 26);

- points out that the abuse is capable of affecting trade between Member States (recital 29);

- considers that, by virtue of Article 86(2) EC, the competition rules apply to Poste Italiane, as an undertaking entrusted with a service of general economic interest, since it has not been established by the Italian authorities that their application obstructs the performance, in law or in fact, of the particular tasks assigned to it. In the present case, it cannot be claimed that competition with respect to day- or time-certain deliveries would jeopardise the financial equilibrium of Poste Italiane, or that opening the service in question to private operators would result in depriving the public operator of some of its profitable activities (recital 30).

17 Finally, it is pointed out in the conclusion of the contested decision that ‘no other Member State except Italy has adopted a provision like Article 4(4) [of Decree

No 261] which specifically reserves the delivery phase of the hybrid electronic mail service irrespective of the special features offered in this phase' (recital 31).

- 18 On 24 January 2001, for the purposes of implementing that decision, the Italian authorities adopted Circular DGRQS/208 (hereinafter 'Circular 208'). The circular specifies the meaning to be given to Article 4(4) of Decree No 261.
- 19 Article 3 of Circular 208 states that 'the delivery phase of the hybrid electronic mail service [comes within the] area reserved to [Poste Italiane], in the same way as any mail within the weight and price limits currently in force'.
- 20 However, Article 4 specifies that day- or time-certain delivery of time-sensitive hybrid electronic mail does not come within the reserved area if certain conditions are met, namely: the requirement that the operator intending to provide the service, over at least the territory of a province, should obtain a licence (Article 5); the requirement that the operator should produce results: day- and time-certain delivery and payment conditional on delivery of the post within the contractual period (Article 6); the requirement that the operator should keep a register in which he records each delivery, noting the essential relevant details (Article 7); the requirement to make sure that day- and time-certain deliveries are identifiable (Article 8); the requirement that the operator should prove the date, or the time and date, by means of the addressee's signature on the register provided for the purpose, making it possible to track the post at the delivery phase (Article 9), the requirement that the operator should keep the registers for a period of six months (Article 11).
- 21 Circular 208 does not contain any conditions relating to the price level of the day- or time-certain hybrid electronic mail delivery service.

Procedure

- 22 By application lodged at the Court Registry on 6 March 2001, Poste Italiane brought an action under the fourth paragraph of Article 230 EC for annulment of the contested decision.
- 23 By separate document lodged at the Court Registry on the same day, Poste Italiane lodged an application under Articles 242 EC for suspension of the operation of that decision until such time as the Court has given a judgment on the main application.
- 24 By applications lodged at the Court Registry on 29 and 30 March 2001 respectively, Recapitalia Consorzio Italiano delle Agenzie di Recapito Licenziatricie del Ministero delle Comunicazioni (hereinafter 'Consorzio Recapitalia'), represented by L. Magrone and M. Giordano, lawyers, and the company TNT Post Groep NV, represented by M. Merola and C. Tesauero, lawyers, all with an address for service in Luxembourg, applied for leave to intervene in these proceedings in support of the form of order sought by the Commission.
- 25 The applications for leave to intervene were served on the parties, in accordance with Article 116(1) of the Rules of Procedure of the Court of First Instance.
- 26 The Commission submitted its written observations on the application for interim relief on 30 March 2001.
- 27 By letters dated 30 March and 2 April 2001, the Court Registry invited each of the applicants for leave to intervene to attend the hearing.

- 28 On 4 April 2001, the Commission requested the confidential treatment, *vis-à-vis* Consorzio Recapitalia and TNT Post Groep, of an annex to the application for interim relief (letter of formal notice of 16 May 2000, addressed to the Italian authorities) and of an annex to the Commission's observations (letter from the President of the Council of Ministers dated 14 December 2000 addressed to Mr Monti, a Member of the Commission).
- 29 The parties to these proceedings and the applicants for leave to intervene were given the opportunity to express their views on 5 April 2001. On the same day, Poste Italiane requested the confidential treatment of certain information contained in the application for interim relief and also in several of its annexes.
- 30 At the hearing, Poste Italiane and the Commission were invited to comment on the applications for leave to intervene submitted by Consorzio Recapitalia and TNT Post Groep. The applicant had no objection to the granting of the request for confidential treatment submitted by the Commission. It also produced a document, a brochure publicising the services offered by Poste Italiane, which was accepted by the President of the Court, in spite of its late submission, after he had heard the observations presented by the Commission and the applicants for leave to intervene.
- 31 On 6 April 2001, the Commission stated that it had no objection to the request for confidential treatment made by Poste Italiane.
- 32 On 1 March 2001 the Italian Republic brought an action before the Court of Justice for the annulment of the contested decision, which was lodged under number C-102/01. No application was lodged for suspension of the operation of that decision.

- 33 By document lodged at the Court Registry on 30 March 2001, the Italian Republic informed the Court of Justice, in accordance with Article 78 of its Rules of Procedure, that it was discontinuing its action. The Commission took formal note of this on 20 April.
- 34 By order of the President of the Court of Justice of 27 April 2001 in *Italy v Commission* (not published in the European Court Reports), which was communicated to the parties by letter of 11 May 2001, Case C-102/01 was removed from the register of the Court of Justice.
- 35 By letter of 15 May 2001, the Registry of the Court of First Instance, at the request of the President of the Court, informed the parties in the proceedings for interim relief, and also the two applicants for leave to intervene, that Case C-102/01 had been removed from the register of the Court of Justice.

Law

- 36 Before giving a decision on this application for interim relief, it is necessary to establish precisely the scope of the contested decision.
- 37 In this connection, even though certain passages in the contested decision, in particular recital 18, do not specifically refer only to hybrid electronic mail, it is apparent from the wording of Article 1 of its operative part that it is not calling in question the legality of Article 4(4) of Decree No 261 in its entirety, but only in so far as the provision applies to day- or time-certain delivery of hybrid electronic mail.

38 At the hearing, the Commission expressly confirmed this interpretation of the contested decision.

39 Without prejudice to the compatibility of Circular 208 with the rules of the Treaty, the wording of that national legal measure also demonstrates that the Italian authorities interpreted the scope of the contested decision in the same way. Circular 208 opens to competition, subject to conditions which it specifies, the day- or time-certain delivery phase of time-sensitive items of hybrid electronic mail.

40 It follows, first, that Article 4(4) of Decree No 261 is not declared contrary to the provisions of Article 86 EC, read in conjunction with Article 82 EC, since mail transmitted electronically is delivered by a completely different method from day- or time-certain delivery.

41 It follows, second, that the contested decision applies only to the day- or time-certain delivery of hybrid electronic mail and does not call in question the compatibility with the provisions of the Treaty of the national rules relating to the same kind of delivery of ordinary mail.

42 Under the combined provisions of Article 242 EC and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC, of 8 June 1993 (OJ 1993 L 144, p. 21), the Court may, if it considers that the circumstances so require, order the suspension of operation of the contested measure.

- 43 Article 104(2) of the Rules of Procedure provides that an application for interim relief is to specify the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim relief applied for. Those conditions are cumulative, so that an application for interim relief must be dismissed if any one of them is absent (order in Case C-268/96 P(R) *SCK and FNK v Commission* [1996] ECR I-4971, paragraph 30, and order of 1 February 2001 in Case T-350/00 R *Free Trade Foods v Commission* [2001] ECR I-493, paragraph 32). Where appropriate, the judge hearing the application for interim relief also weighs up the interests involved (order of 23 February 2001 in Case C-445/00 R *Austria v Council* [2001] ECR I-1461, paragraph 73).
- 44 The measure requested must further be provisional in the sense that it must not prejudice the points of law or fact in issue or neutralise in advance the effects of the decision subsequently to be given in the main action (order in Case C-149/95 P(R) *Commission v Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 22).
- 45 Finally, under Article 104(3) of the Rules of Procedure, the application is to be made by separate document and in accordance with the provisions of Articles 43 and 44.

The applications for leave to intervene

- 46 Under the second paragraph of Article 37 of the EC Statute of the Court of Justice, applicable to the Court of First Instance by virtue of the first paragraph of Article 46 of the Statute, the right to intervene is subject to the requirement of establishing an interest in the outcome of the case.

- 47 In so far as concerns the outcome of the case, the applications, submitted by Consorzio Recapitalia and TNT Post Groep respectively, for leave to intervene in support of the form of order sought by the Commission in the proceedings for interim relief must be considered separately.
- 48 At the hearing Poste Italiane expressed reservations with regard to whether the applicants for leave to intervene had a sufficient interest in the outcome of the case. It also doubted whether they should be allowed to intervene in the light of the fact that Consorzio Recapitalia and TNT Post Groep would not have been able, if the Commission had decided not to dispute the compatibility of Article 4(4) of Decree No 261, to contest that decision before the Court of First Instance.
- 49 The Commission, for its part, declared that it had no objection to the applications for leave to intervene.
- 50 The President of the Court understands the applicant's argument, put forward during the hearing, as being to the effect that, since a party who has lodged a complaint with the Commission with the aim of obtaining a finding of infringement of Article 86 EC, read in conjunction with Article 82 EC, is not entitled to dispute, by virtue of Article 230 EC, the legality of the decision refusing to adopt the measure sought pursuant to Article 86(3) EC, the applicants for leave to intervene cannot, by analogy, be allowed to intervene in a case concerning proceedings pursuant to Article 86(3) EC. That argument cannot be accepted since, as the Court of Justice has held, the possibility cannot be ruled out that exceptional situations might exist where an individual or, possibly, an association constituted for the defence of the collective interests of a class of individuals has standing to bring proceedings against a refusal by the Commission to adopt a decision pursuant to its supervisory functions under Article 86(1) and (3) EC (Case C-107/95 P *Bundesverband der Bilanzbuchhalter v Commission* [1997] ECR I-947, paragraph 25). Furthermore, that argument is irrelevant because the admissibility of an application for leave to intervene must be evaluated only in the light of the conditions laid down in Article 37 of the Statute of the Court of Justice.

- 51 With respect to the application for leave to intervene lodged by Consorzio Recapitalia, it must be pointed out that the case-law shows that representative associations whose object is to protect their members in cases raising questions of principle liable to affect those members are allowed to intervene (orders in Joined Cases C-151/97 P(I) and C-157/97 P(I) *National Power and PowerGen* [1997] ECR I-3491, paragraph 66; Case C-151/98 P (I) *Pharos v Commission* [1998] ECR I-5441, paragraph 6; and Case T-13/99 R *Pfizer v Council*, not published in the ECR).
- 52 The contested decision finds that the exclusion of competition with respect to the day- or time-certain delivery phase of the hybrid electronic mail service infringes Articles 86(1) EC and Article 82 EC, read in combination (recital 31 and Article 1). It provides that Italy is to refrain in the future from granting exclusive rights with respect to the day- or time-certain delivery phase of hybrid electronic mail services (Article 2), so that this phase in the delivery of that mail is to be open to competition. This case raises, *prima facie*, matters of principle relating to the conditions for implementing the provisions of Articles 86 EC and 82 EC in the area of postal services and, in particular, to the extent of that area which may be reserved by the operation of those provisions.
- 53 Consorzio Recapitalia is an Italian association of delivery agencies authorised to provide services which are not reserved but are part of the universal service, and/or services unconnected with the universal service. Those undertakings are equipped with infrastructures which enable them to provide the contractually guaranteed day- or time-certain delivery service.
- 54 Article 4(a) of the statutes of Consorzio Recapitalia provides that its objects are 'to promote, coordinate, encourage and protect the initiatives of the delivery agencies holding concessions to make express home deliveries, issued by the Ministry of Posts and Telecommunications' and that the aim of its activity is, in particular, 'to support and develop the delivery work carried out by the [delivery] agencies, and to do this also by establishing new services'.

- 55 According to Article 4(n) of the statutes of Consorzio Recapitalia, protection of the interests of its members in court proceedings, whether as claimant or defendant, forms part of its objects.
- 56 Furthermore, Consorzio Recapitalia points out, without being contradicted on this point by Poste Italiane, that the undertakings which are its members are the same as those which, through another association (Consorzio Riposta), had complained to the Commission that Italy had infringed Articles 82 EC and 86 EC, in so far as the area reserved to Poste Italiane had been extended in disregard of the provisions of Directive 97/67.
- 57 It follows that the undertakings which are members of Consorzio Recapitalia and wish to provide the day- or time-certain delivery service of hybrid electronic mail, are able to establish an interest in the dismissal of the application for suspension of the operation of the contested decision.
- 58 As Consorzio Recapitalia's object is to protect the financial interests of its members, and as those members are affected by the contested decision, the association definitely has an interest in the outcome of the case. That finding is confirmed by the fact that, during the month of February 2001, Consorzio Recapitalia brought an action before a national court, coupled with an application for interim relief, contesting the legality of Circular 208 on the ground that the conditions it lays down for providing the day- or time-certain delivery service for hybrid electronic mail do not constitute adequate implementation of the contested decision.
- 59 The other applicant for leave to intervene, TNT Post Groep, a company incorporated under Netherlands law, is the finance company of the TPG Group which operates worldwide in the postal services, express transport and logistics

sectors. The TPG also carries out an activity in the ordinary transport and the air leasing sectors. In Italy the TPG Group operates a mail delivery service and has, in particular, acquired indirectly several delivery agencies working in various municipalities on the basis of concessions issued under Article 29 of Decree No 156 (see paragraph 5 above), now replaced by a system of individual licences and general permits governing, respectively, the provision of unreserved postal services and the provision of services which are not part of the universal service. Through subsidiaries, the TPG Group also provides express transport services and logistic services.

- 60 TNT Post Groep relies, in essence, on two arguments to establish its interest in the outcome of the case. The first is that it would find it impossible to perform the delivery service in point by reason of Decree No 261 if operation of the contested decision were to be suspended.
- 61 The second argument rests on the fact that, in June 1999, TNT Post Groep lodged a complaint with the Commission seeking a finding that the Italian legislation infringed Directive 97/67 and the combined provisions of Articles 86 EC and 82 EC, and supplemented its complaint after Decree No 261 had been adopted by the Italian authorities.
- 62 The President of the Court considers that those arguments are adequate to establish that TNT Post Groep has an interest in the operation of the contested decision not being suspended.
- 63 In those circumstances, Consorzio Recapitalia and TNT Post Groep are granted leave to intervene in support of the form of order sought by the Commission in the proceedings for interim relief.

The request for confidential treatment

- 64 In relation to the request for confidential treatment submitted by the Commission on 4 April 2001, Poste Italiane stated at the hearing that it had no objection.
- 65 The Commission, after being notified at the hearing of a request for confidential treatment lodged by Poste Italiane on 5 April 2001, stated on the following day that it raised no objection.
- 66 For the purposes of the proceedings for interim relief, the requests for confidential treatment of the information referred to in the applications made by the Commission and by Poste Italiane must be granted, in so far as that information may, *prima facie*, be considered as secret or confidential within the meaning of Article 116(2) of the Rules of Procedure, and this has not been disputed by either of those parties.

The application for suspension of operation

The plea of inadmissibility raised by the Commission

- 67 In its written observations, the Commission submits that the application for interim relief does not satisfy the formal requirements imposed in Article 104(2) and (3) of the Rules of Procedure. In particular, it states that the requirements are not met by an application such as that presented by Poste Italiane which, although technically submitted in a document separate from the main applica-

tion, is absolutely identical to it. Since no difference can be established between a mere reference to the main application in the application for interim relief — penalised by the inadmissibility of the latter application (order in Case C-278/00 *R. Greece v Commission* [2000] ECR I-8787, paragraphs 25 and 26) — and its reproduction in full in the application for interim relief — making the latter, as lodged by the applicant here, particularly voluminous —, the Commission contends that the application is inadmissible because it does not comply with the formal requirements laid down in the Rules of Procedure.

- 68 At the hearing, the applicant replied that the application for suspension of operation was lodged by separate document and contains the information enabling the President of the Court to give a decision. This situation is therefore different from that in which a mere reference is made to the application in the main proceedings.
- 69 Faced with this situation and bearing in mind what is at stake in the case, the President of the Court asked the Commission whether it wished to be able to submit further written observations on a summary — which it would be for the applicant to produce — of the factual and legal grounds establishing a *prima facie* case for the suspension of operation sought by the application.
- 70 In reply to that question, the Commission, while continuing to assert that the form in which the application is submitted does not comply with the prescribed requirements, stated that it refrained from asking that Poste Italiane should be requested to produce a summary of the factual and legal grounds establishing a *prima facie* case for the granting of the requested measure, on which the Commission could present its observations.
- 71 In those circumstances, the President of the Court considers that there is no need to decide whether an application for interim relief which incorporates almost the whole text of the application in the main proceedings and, in addition, contains an introduction, a summary of the circumstances giving rise to urgency and

arguments concerning the balancing of the interests involved, accords with the requirements of Article 104(2) and (3) of the Rules of Procedure.

Prima facie case

- 72 In its application for interim relief, the applicant reproduces the pleas it put forward in the application relating to its substantive claim and maintains that they are such as to show that the condition relating to a *prima facie* case is satisfied.
- 73 The pleas allege, first, infringement of the right to a fair hearing and of the principles governing the conduct of the administrative procedure, second, manifest error of assessment and failure to state reasons as far as concerns the definition of the relevant market, third, non-existence of a dominant position, fourth, misapplication and misinterpretation of Directive 97/67, fifth, misinterpretation and misapplication of the rules of the Treaty regarding the universal service, and, sixth, absence of any effect on trade between the Member States.
- 74 At the hearing the Commission, although denying that the pleas put forward were well founded, stated that it did not dispute that there was considerable force in them.
- 75 It should be observed that there is a fundamental disagreement between the parties with regards to whether the applicant is active in the market of day- or time-certain delivery services of hybrid electronic mail. This disagreement is due, in particular, to the fact that, according to the applicant, the delivery phase of the hybrid electronic mail service inevitably merges with the postal delivery services

which fall within the area reserved to Poste Italiane and for which it provides additional features, amongst which, in particular, is contractually guaranteed delivery on a certain day, although it is stated in the contested decision that 'access to the incumbent's delivery network does not maintain the guaranteed day- or time- certain delivery features' (recital 10) and that Poste Italiane 'has submitted that, at this stage, it does not offer a day- or time-certain delivery service' (recital 26).

- 76 That fundamental disagreement affects the assessment of the effects of opening to competition the delivery services to which the contested decision applies. In this regard, it should be pointed out that the Commission did not take into account the prices charged for those services in order to define the relevant market, even though that factor may prove to be relevant for the purpose of evaluating, on the one hand, the degree of substitutability between the different services proposed and, on the other, the risk that the universal operator may be deprived of activities necessary to its financial viability. On this latter point, it will be for the Court, when it hears the case on its merits, to determine, when considering the fifth plea, whether it is necessary to grant or maintain the exclusive right accorded to Poste Italiane for the services in question in order to ensure that it can carry out the task of general economic interest entrusted to it and, in particular, that it may enjoy satisfactory financial terms in order to perform that task successfully. For the purpose of assessing the lawfulness of the exclusion of competition which is the consequence of the exclusive right, it will be necessary, in particular, to consider whether the Commission was entitled to conclude that the day- or time-certain postal delivery services of hybrid electronic mail, by their nature and the conditions in which they are offered, do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right, in accordance with the criteria laid down in the judgment in Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 19. However, that matter cannot be considered in proceedings for interim relief.

- 77 In the light of the above, the factual and legal pleas put forward by the applicant cannot be regarded, *prima facie*, as entirely ungrounded (order in *Commission v Atlantic Container Line and Others*, cited above, paragraph 26).

- 78 In the light of that finding and the position adopted by the Commission at the hearing, it must be held that the pleas put forward by Poste Italiane are sufficient to fulfil the condition relating to establishment of a *prima facie* case.

Urgency and the balancing of interests

— Arguments of the parties

- 79 The applicant maintains that it will suffer serious and irreparable damage if operation of the contested decision is not suspended.

- 80 Having regard to the conditions laid down in Circular 208, Poste Italiane assesses its loss of profit, as a result of the removal from the reserved area of the delivery services with the addressee's signature as acknowledgment of receipt, at between 316 and 411 thousand million Italian lire (ITL), depending on whether or not the delivery is made within 24 hours of dispatch. The contested decision would cause the services traditionally provided by Poste Italiane to be immediately replaced by the new service covered by that decision, which would enable private operators to deprive Poste Italiane of the income it received from the only sectors of activity in which it made a profit.

- 81 The applicant points out that the loss of income could even exceed that amount because it would find it extremely difficult to ensure that third parties strictly observed the limits established by Circular 208 and did not, on the contrary, take this opportunity in large numbers to evade the exclusive rights defining the reserved area.

82 If, however, the Commission were to consider that the contested decision does not have to be implemented in compliance with the conditions laid down in Circular 208, the damage, assessed by Ernst & Young, could be as much as ITL 1 639, 1 261 and 411 thousand million a year in the case, respectively, of delivery after 24 hours without signature as acknowledgment of receipt, delivery within 24 hours without the signature and delivery after 24 hours with the signature. If the proceedings in the main action before the Court of First Instance last two years, these amounts would be doubled.

83 Such loss of income would serve to increase the deficit which Poste Italiane has to bear as provider of the universal service, which, after deduction of profits from the reserved area, is close to ITL 2 500 thousand million for the financial year 1999 and assessed to be the same for the financial year 2000.

84 This damage is not only serious but also irreparable.

85 The amount of the income taken away from the provider of the universal service can only be recovered by means of an action for damages. However, in such a case, the damage suffered 'would be difficult to quantify for the purposes of making reparation, as the applicant would be unable to determine with sufficient accuracy the proportions of the recorded drops in [income] caused respectively by stronger competition on the market or by... variations' related to the market involved (order in Case T-65/98 R *Van den Bergh Foods v Commission* [1998] ECR II-2641, paragraph 65). The damage in question does not therefore seem likely to be the subject of compensation.

86 The applicant also maintains that the immediate implementation of the contested decision will cause critical difficulties in running the undertaking and, in particular, in performing the universal postal service in Italy.

87 As the contribution from the reserved area is already insufficient to finance the cost of the universal service, the contested decision can only jeopardise the equilibrium which has been achieved with difficulty. The applicant states that this will mean:

- the interruption of the restructuring process, which will be set back by the appearance in the short term of wholly unforeseen and unforeseeable deficits in the amount of ITL hundreds/thousands of thousand million; .
- the impossibility of continuing to finance the actions and investments which have helped to improve the quality of the universal service; more particularly, the subsequent reduction in the contribution from the reserved area will make it impossible to maintain and *a fortiori* to develop the methods and standards of service in the areas in which delivery most particularly makes a loss, leading to the emergence of a ‘dual’ service;
- a subsequent reduction in employment levels, owing to the need to reduce costs further in order to cope with the loss of income resulting from the contested decision.

88 As regards the balancing of interests, Poste Italiane contends that its interest coincides with a fundamental public interest, namely that relating to the regular provision of the universal postal service, which is most certainly worthy of protection at Community level. This interest prevails over the Commission’s interest in protecting free competition in the provision in postal services relating to the guaranteed day- or time-certain delivery of electronically-generated mail.

- 89 As a preliminary point, the Commission questions whether the urgency pleaded by the applicant in order to obtain suspension of operation of the contested decision is genuine, since the present application was lodged more than two months after the date on which the Italian Republic was notified of the decision (see, to that effect, order in Case 28/65 R *Fonzi v Commission* [1965] ECR 1966, pp. 734, 739). It also points out that the Italian Republic did not bring proceedings for suspension of operation before the Court of Justice in Case C-102/01.
- 90 First, it maintains that the applicant will not suffer any damage as a result of the implementation of the contested decision.
- 91 As the applicant itself has stated and acknowledged, Poste Italiane is not active in the market of day- or time-certain delivery services of hybrid electronic mail (recitals 26 and 30, first indent, of the contested decision, annex 1 to the Commission's observations and points 135 and 136 of the application for interim relief). Consequently, the implementation of the Commission's decision would not have the effect of reducing Poste Italiane's turnover in that market since the company does not provide the services in question. The effects of the implementation of the contested decision on the applicant would therefore be only potential and indirect (order of 17 January 2001 in Case T-342/00 R *Petrolessence and SG2R v Commission* [2001] ECR I-67, paragraph 48).
- 92 The hypothetical damage alleged by the applicant, namely, the loss of profit which Poste Italiane would suffer for provision of a service which it never offered before the adoption of the contested decision and which it still does not offer, would not be a direct consequence of the implementation of the decision. Furthermore, the fact that an applicant is unable to obtain a financial advantage which it did not previously enjoy does not constitute serious and irreparable damage (order in Case C-195/90 R *Commission v Germany* [1990] ECR I-3351, paragraphs 42 and 43).

- 93 Furthermore, the damage alleged by the applicant is based on the unpredictable probability of future and uncertain events. It is not, therefore, real but hypothetical (order in Case T-322/94 R *Union Carbide v Commission* [1994] ECR II-1159, paragraph 31). In order to quantify the damage at ‘almost’ ITL 316 and 411 thousand million or at ITL 1 639, 1 261 and 411 thousand million, the applicant starts from the premiss that the decision entails the substitution of the services traditionally provided by Poste Italiane by the hybrid electronic mail service which is the subject-matter of the decision, and that the effect will be immediate. Nevertheless, the applicant has not only been unable to show that the day- or time-certain delivery service for hybrid electronic mail are interchangeable, acknowledging, on the contrary, that the traditional services do not guarantee day- or time-certain delivery, but also does not adduce any evidence to substantiate the assumption that the decision would have the immediate effect of substituting the services. Moreover, the applicant acknowledges that the deficit which would be the consequence of opening the services in question to competition is ‘unforeseeable’.
- 94 Furthermore, even if the substitution effect were immediate, the Commission doubts whether the private operators, who employ about 2 000 people and whose turnover is not, in any case, more than ITL 200 thousand million, are in a position to deflect the whole volume of the ‘traditional’ services of Poste Italiane, which, in the year 2000, has 14 131 post offices and 70 000 letter boxes distributed throughout Italy, employs 175 315 people and has a turnover of more than ITL 5 600 thousand million.
- 95 Moreover, Poste Italiane does not indicate what financial and factual data form the basis of the assessments of pecuniary damage, made ‘according to the circumstances’.
- 96 With regard to the other damage, the Commission contends that the reduction in personnel is possible damage suffered by third parties, namely, the employees, which cannot therefore be taken into account (order in Case T-213/97 R *Eurocoton v Council* [1997] ECR II-1609, paragraph 46).

- 97 In the light of those considerations, the Commission contends that the causal connection between the contested decision and the damage alleged by the applicant is not established.
- 98 It also contends that the damage is not, in any event, irreparable.
- 99 As the damage is of a purely financial nature, it cannot be considered irreparable, or even reparable with difficulty, since it may form the basis of subsequent pecuniary compensation (order in *Petrolessence and SG2R v Commission*, cited above, paragraph 46). If suspension of operation is not granted, the applicant will not be placed in a situation which might jeopardise its very existence or irreparably alter its market share (see the same order, paragraph 47).
- 100 Moreover, an action for damages will allow it to recover the loss of income which it will suffer as a result of the contested decision. In this context, the Commission disputes, as irrelevant in the circumstances of the case, the reference made by the applicant to the order in *Van den Bergh Foods v Commission*, cited above, on the ground that the decision adopted by the President of the Court in that case is based on the ‘very particular circumstances’ of the case (paragraph 72 of that order), which were connected with the nature of the product being marketed.
- 101 As regards the damage constituted by the interruption of the restructuring process and the risk of a ‘dual’ service, the applicant does not put forward any argument to show that this is irreparable. Even if it were shown that that damage is the direct consequence of the deficit suffered as a result of the opening of the market following the decision, the applicant cannot prove that this would put it in a situation which might jeopardise its very existence or irreparably alter its market share (see order in *Petrolessence and SG2R v Commission*, cited above, paragraph 47).

- 102 The Commission contends, therefore, that it has not been established that the alleged damage is a direct consequence of the decision and that, in any event, it is neither immediate, nor real, nor irreparable.
- 103 Lastly, the suspension of the contested decision would be of assistance to the applicant only if Circular 208 is revoked by the Italian authorities. Applications for interim relief have been dismissed when lodged by applicants who have not adduced proof that the national legal remedies did not enable them to avoid the damage in question (orders in Case 310/85 R *Deufil v Commission* [1986] ECR 537 and Case 303/88 R *Italy v Commission* [1989] ECR 801, summary publication). The applicant did not challenge Circular 208 before the national court.
- 104 As regards the balancing of the interests, the Commission contends that it is for the judge hearing the application for interim relief to make an overall evaluation taking into account not only the interests of the parties, including the Commission's interest in bringing to an end forthwith the infringement of the competition rules under the Treaty, but also the more general interest of the sound administration of justice and the interests of third parties (orders in Case 56/89 R *Publishers Association v Commission* [1989] ECR I-1693, paragraph 35; Joined Cases T-24/92 R and T-28/92 R *Langnese-Iglo and Schöller Lebensmittel v Commission* [1992] II-1839, paragraph 28; and Case T-96/92 R *CCE de la Société générale des grandes sources and Others v Commission* [1992] ECR II-2759, paragraph 39).
- 105 The need to maintain and develop effective competition in the common market has been acknowledged as a requirement relating to the public interest that is worthy of protection (order in *Petrolessence and SG2R v Commission*, cited above, paragraph 52). In the present case, suspension of operation of the contested decision would maintain a competitive situation which would be

particularly unfavourable to consumers, who would be unable to benefit from the new service which is the subject-matter of the decision, inasmuch as it would help to consolidate the present structure of the market in which Poste Italiane is abusing its dominant position. The very unusual speed with which the Commission adopted its decision also shows its interest in restoring effective competition in the market and, therefore, the need to implement the decision immediately.

¹⁰⁶ Moreover, suspension of the operation of the contested decision would adversely affect the market position of private operators who have made heavy initial investment, which would be irreparably lost.

¹⁰⁷ Suspension could have a serious impact on the rights and interests of third parties who are not parties to the case and have not been able to express their views; also, a measure of this kind could only be justified if the applicant had shown that, without such a measure, it would be exposed to a situation which could jeopardise its very existence (order in *Petrolsennce and SG2R v Commission*, cited above, paragraph 53); this has not been proved.

¹⁰⁸ Finally, if the applicant's interest in providing a regular postal service were actually put in jeopardy by the implementation of the contested decision, the Italian authorities would not have been prepared to amend the legislation at issue and would not have adopted Circular 208.

¹⁰⁹ At the hearing the applicants for leave to intervene supported the arguments expounded by the Commission.

Findings of the President of the Court

- 110 It is settled case-law that the urgency of an application for interim relief must be assessed in relation to the necessity for an interim order to prevent serious and irreparable damage to the party applying for that relief. It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering damage of that nature (orders in Case T-73/98 R *Prayon-Rupel v Commission* [1998] ECR II-2769, paragraph 36, and in *Greece v Commission*, cited above, paragraph 14).
- 111 It does not have to be established with absolute certainty that the harm is imminent. It is sufficient that the harm in question, particularly when it depends on the occurrence of a number of factors, should be foreseeable with a sufficient degree of probability (order in *Commission v Atlantic Container Line and Others*, cited above, paragraph 38 and order of 8 December 2000 in Case T-237/99 R *BP Nederland and Others v Commission* [2000] ECR II-3849, paragraph 49). However, the applicant is still required to prove the facts forming the basis of its claim that serious and irreparable damage is likely (order in Case 335/99 P(R) *HFB and Others v Commission* [1999] ECR I-8705, paragraph 67).
- 112 First of all, it is necessary to consider the Commission's objection that Poste Italiane did not bring an action before the national court in order to avoid the damage which it alleges.
- 113 When questioned on this point at the hearing, the applicant explained that it had not challenged Circular 208 before the Italian administrative court on the ground

that an action, if it were upheld, would have the effect of suspending, or even eradicating from the legal system, the conditions imposed by that Circular for providing day- or time-certain delivery services of hybrid electronic mail. Far from making it possible to avoid the damage alleged by Poste Italiane, this situation would only aggravate it, since the contested decision would then be immediately applicable. As to the option of intervening in support of the form of order sought by the Italian State as a party summoned before the national court in a case relating to the Circular, the applicant expressly stated that that situation was contemplated.

114 In response to that argument, the Commission submitted that, even if operation of the contested decision is suspended, such suspension is not effective, since Circular 208 remains in force until it is withdrawn by the Italian authorities.

115 The explanations given by the applicant constitute appropriate reasons for its refusal to contest the legality of Circular 208 and distinguish this case from those resulting in the orders cited by the Commission in support of its contention. The annulment of Circular 208 by the Italian administrative court might not necessarily avoid the alleged damage, inasmuch as that annulment would involve the eradication of the conditions for performing the day- or time-certain delivery services of hybrid electronic mail, and might possibly help to aggravate that damage.

116 Furthermore, the fact that Circular 208 would have to be withdrawn from the Italian legal system in order to give full effect to a suspension of operation of the contested decision, is not capable of depriving this remedy of its effectiveness. It is precisely by relying on the order suspending the contested decision that the applicant would be in a position to request the Italian State to revoke Circular

208, which, moreover, mentions that decision in its recitals, and to return the postal services concerned, at least provisionally, to the reserved area.

- 117 In the present case, the consequence of the immediate implementation of the contested decision is that the day- or time-certain delivery services of hybrid electronic mail may be provided in Italy by various operators. According to the applicant, the provision of these services, even in accordance with the conditions laid down in Circular 208 (see paragraph 20 above), will cause it to lose income and, consequently, to be unable to provide the universal service entrusted to it.
- 118 The applicant has provided several assessments of the alleged financial damage, caused by the lack of income. However, the only relevant assessments of that damage are those which refer to the delivery phase with the addressee's signature on receipt. The conditions laid down in Circular 208 seek to ensure actual delivery, in particular by requiring the addressee to sign on receipt. Therefore, the amount of the alleged damage to be considered is between ITL 316 and 411 thousand million.
- 119 That damage is of a purely pecuniary nature. Damage of that kind cannot, otherwise than in exceptional circumstances, be regarded as irreparable or even as reparable with difficulty, since it may be the subject of subsequent pecuniary compensation (orders in Case C-231/91 R *Abertal and Others v Commission* [1991] ECR I-5109, paragraph 24, and Case T-70/99 R *Alpharma v Council* [1999] ECR II-2027, paragraph 128).
- 120 In accordance with those principles, the suspension requested would be justified if it appeared that, without such a measure, the applicant would be in a situation

which might jeopardise its very existence (see, in particular, the order in Case T-11/99 R *Van Parys v Commission* [1999] ECR II-1355, paragraph 62).

¹²¹ Inasmuch as Poste Italiane, as provider of the universal service, is entrusted with a task of general economic interest within the meaning of Article 86(2) EC, performance of which is essential, the suspension requested would also be justified if it were proved that exclusion from the reserved area of the day- or time-certain delivery phase of the hybrid electronic mail service would prevent the applicant from carrying out successfully the task entrusted to it until judgment is given on the merits of the main application. Such proof would be furnished if it were shown, in the light of the financial conditions in which the task of general economic interest has been performed successfully up to that point, that the exclusive right concerned is absolutely necessary to the performance of that task by the holder of the right.

¹²² However, in this case, proof has not been adduced that the profit made by Poste Italiane will be reduced if the reserved services are replaced by the services open to competition.

¹²³ First of all, without prejudice to the compatibility with the Treaty of the detailed rules for implementing the contested decision contained in Circular 208, which it is for the Commission to evaluate, the circular provides that the permit authorising provision of the day- or time-certain delivery services for hybrid electronic mail can be issued only to operators who meet the cumulative conditions which it lays down.

¹²⁴ During the hearing, the intervening parties stated, without being contradicted by Poste Italiane, that no application for a permit had been submitted to the relevant

national authorities, in view of the prescribed requirements. It follows that, for the moment, Poste Italiane, is not suffering from the competition of which it complains, or the subsequent loss of income.

125 Next, substitution of the reserved services by the services open to competition, as a consequence of the contested decision, is not sufficiently proved for the purposes of assessing whether the condition relating to urgency is met. In particular, such substitution depends, amongst other criteria, on the price at which day- or time- certain delivery services of hybrid electronic mail will be offered by the operators and the price which the undertakings interested in those services will be prepared to pay. However the President of the Court does not have the concrete evidence which would enable him to determine the precise consequences which the absence of suspension might entail (orders Case T-143/99 R *Hortiplant v Commission* [1999] ECR II-2451, paragraph 18, and in Case T-144/99 R *Institut des mandataires agréés v Commission* [2000] ECR II-2067, paragraph 43).

126 Finally, the extent of the alleged damage depends on several uncertain factors, such as the number of operators providing the hybrid electronic mail delivery services to which the contested decision relates, the time of their respective entries into the market and the growth in the demand for services. It cannot therefore be considered that the amount of the alleged damage, between ITL 316 and 411 thousand million, is an inevitable consequence of the implementation of the contested decision.

127 In those circumstances, it must be concluded that the evidence adduced by the applicant does not establish to the requisite legal standard the likelihood that the alleged financial damage will occur.

- 128 Since the conditions for establishing the occurrence of financial damage have not been substantiated, the other damage alleged, which depends on that damage, cannot be regarded as proved.
- 129 It follows from the foregoing that the applicant is unable to prove that, if the requested measure is not granted, it will suffer serious and irreparable damage.
- 130 In any event, even supposing that the applicant had proved satisfactorily that it would suffer serious and irreparable damage if implementation of the contested decision were not suspended, it would still be for the President of the Court to balance, on the one hand, the applicant's interest in obtaining the interim relief requested and, on the other, the public interest in the implementation of the Commission's decision adopted under Article 86(3) EC, the interests of the Member State to which that measure is addressed and the interests of third parties who would be directly affected by a possible suspension of the contested decision (see, to that effect, orders in *CCE de la Société des grandes sources and Others v Commission*, cited above, paragraph 39, Case T-88/94 R *Société commerciale des potasses et de l'azote and Entreprise minière et chimique v Commission* [1994] ECR II-263, paragraph 44, *Union Carbide v Commission*, cited above, paragraph 36, and *Petrolessence and SG2R v Commission*, cited above, paragraph 51).
- 131 The balance of interests thus inclines in favour of maintaining the contested decision.
- 132 It is true that Article 16 EC confirms the place of services of general interest amongst the shared values of the European Union and also their role in promoting social and territorial cohesion. The Commission recognised that place

and role in the communication entitled ‘Services of general interest in Europe’ (OJ 2001 C 17, p. 4).

133 Nevertheless, Article 86(3) EC entrusts the Commission with the task of ensuring that, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, the Member States fulfil their obligations, and expressly invests it with the power to intervene for that purpose through directives or decisions. Thus, Article 86(3) EC confers on the Commission the power to determine, by a decision, that a given State measure is incompatible with the rules of the Treaty and to indicate what measures the State to which the decision is addressed must adopt in order to comply with its obligations under Community law (judgments in Joined Cases C-48/90 and C-66/90 *Netherlands and Others v Commission* [1992] ECR I-565, paragraph 28, and in Case T-266/97 *Vlaamse Televisie Maatschappij v Commission* [1999] ECR II-2329, paragraph 34).

134 Furthermore, a procedure leading to the adoption of a decision under Article 86(3) EC is a procedure initiated against the Member State concerned and the decision adopted at the end of the procedure is addressed to that Member State, in this case the Italian Republic (Article 4). The measure requested from the President of the Court may have a serious impact on the rights and interests of the Italian Republic, which, on the one hand, is not a party to the case and has, therefore, not been heard and, on the other hand, did not lodge an application for suspension of implementation of the contested decision in Case C-102/01 which it brought before the Court of Justice before discontinuing its action (see paragraphs 33 and 34 above). Therefore, such a measure can be justified only if it appears that, if it is not granted, the applicant will be unable to fulfil the task entrusted to it. However, evidence that the implementation of the contested decision will expose it to such a situation has not been adduced.

135 As the condition relating to urgency is not satisfied and the balance of interests inclines in favour of not suspending the contested decision, this application must be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. Recapitalia Consorzio Italiano delle Agenzie di Recapito Licenziatarie del Ministero delle Comunicazioni and TNT Post Groep NV are granted leave to intervene in Case T-53/01 R in support of the form of order sought by the Commission;
2. The requests for confidential treatment made by Poste Italiane SpA and by the Commission are granted for the purposes of the proceedings for interim relief;
3. The application for interim relief is dismissed;
4. Costs are reserved.

Luxembourg, 28 May 2001.

H. Jung

Registrar

B. Vesterdorf

President