JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
12 September 2007 *

In Case T-60/05,

Union française de l'express (UFEX), established in Roissy-en-France (France),

DHL Express (France) SAS, formerly DHL International SA, established in Roissy-en-France,

Federal express international (France) SNC, established in Gennevilliers (France),

CRIE SA, established in Asnières (France),

represented by É. Morgan of Rivery and J. Derenne, lawyers,

applicants,

* Language of the case: French.

Commission of the European Communities, represented initially by A. Bouquet and O. Beynet, and subsequently by Bouquet and V. Di Bucci, acting as Agents,

defendant,

supported by

Chronopost SA, established in Issy-les-Moulineaux (France), represented by D. Berlin, lawyer,

and by

La Poste, established in Paris (France), represented by H. Lehman, lawyer,

interveners,

APPLICATION for annulment of Commission Decision SG-Greffe (2004) D/205294, of 19 November 2004, dismissing the complaint made by the applicants against the French post office and the French Government relating to the French international express mail market,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of J. Pirrung, President, N.J. Forwood and I. Pelikánová, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 26 April 2007,

gives the following

Judgment

Background to the dispute

1. *Parties*

1 The applicants are the addressees of a Commission decision of 19 November 2004 dismissing their complaint relating to the French international express mail market.

2 The Union française de l'express ('UFEX'), until 1997 known as the Syndicat français de l'express international ('SFEI'), is a professional union under French law which incorporates almost all companies offering express mail services, including the three other applicants.

3 From the end of 1985 and the beginning of 1986, the French Post Office ('the Post Office') entrusted the management of its express mail service, which until then was operated under the name Postadex, to the Société française de messagerie internationale ('SFMI'). The share capital in that company was divided between Sofipost (66%), a financial company wholly owned by the Post Office, and TAT Express (34%), a subsidiary of the aviation company Transport aérien transrégional.

4 En 1992, the structure of the express mail operations run by SFMI was changed. Sofipost and Transport aérien transrégional started a new company, Chronopost SA, in which they still held 66% and 34% of the shares respectively. Chronopost took over SFMI's national operations; SFMI retained the international side. Chronopost, via an agency, managed the international express mail service on behalf of its principal. Since 1997, Sofipost (which became Geopost in 2001) has controlled Chronopost as to 100%.

5 SFMI transferred its international express mail operations to Global Delivery Express Worldwide France, a French subsidiary of Global Delivery Express Worldwide ('GDEW'). GDEW is a joint undertaking which incorporates the Australian company TNT, the Post Office, and the German, Canadian, Netherlands and Swedish post offices. That concentration was authorised by the Commission in the decision of 2 December 1991 declaring a concentration compatible with the common market (IV/M.102 — TNT/Canada Post, DBP Postdienst, the Post Office, PTT Post and Sweden Post) (OJ 1991 C 322, p. 19, the 'GD NET decision') on the basis of Regulation (EEC) No 4064/89 of the Council of 21 December 1989 on the control of concentrations between undertakings (OJ 1990 L 257, p. 13). GDEW absorbed SFMI by merger on 28 July 1994 and SFMI therefore ceased to exist as a legal entity at that time. In 1996, the Post Office left GDEW.

6 In the remainder of this judgment, the name SFMI-Chronopost is used to designate the subsidiary of the Post Office operating in the international express mail market.

2. *Complaint of 21 December 1990*

7 In its complaint of 21 December 1990, SFEI argued that the French State was illegally subsidising SFMI-Chronopost in the field of international express mail services. At the informal meeting held between the representatives of SFEI and the Commission on 18 March 1991, questions were raised as to possible infringements of Article 82 EC by the Post Office as an undertaking, of Article 86 EC by the French State, and of Article 3(g) EC and Articles 10 EC and 82 EC by the French State.

8 In the light of Article 82 EC, SFEI criticised the arrangements for the logistical and commercial assistance which the Post Office provided to its subsidiary. In the view of the Post Office, the wrongdoing consisted in allowing its subsidiary to benefit from its infrastructure, under abnormally advantageous conditions, in order to extend its dominant position on the market for basic mail services to the connected market for international express mail services. That wrongful practice resulted in cross-subsidies in favour of SFMI-Chronopost.

9 In the light of Article 86 EC on the one hand, and Article 3(g) EC and Articles 10 EC and 82 EC on the other, SFEI claimed that the Post Office's unlawful activities in the field of assistance to its subsidiary originated in a series of instructions and directives from the French State.

3. *Letter of the Commission of 10 March 1992*

10 By letter of 10 March 1992, the Commission informed SFEI that it did not intend to pursue its enquiry under Article 82 EC. SFEI, together with three of its members, namely DHL International (now DHL Express (France) SAS, 'DHL'), Service Crie ('CRIE') and May Courier, brought an action for annulment of the decision taken by the Commission in that letter. By order of 30 November 1992 in Case T-36/92 *SFEI and Others* v *Commission* [1992] ECR II-2479, the Court of First Instance dismissed the action as inadmissible.

11 By a judgment of 16 June 1994 in Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR I-2681, the Court annulled that order and referred the case back to the Court of First Instance. By letter of 4 August 1994 the Commission withdrew the contested decision and informed the applicants that their complaint was still being examined.

4. *Decision to dismiss the complaint of 30 December 1994*

12 By a decision of 30 December 1994, the Commission dismissed the complaint concerning the aspects relating to Article 82 EC for lack of any Community interest on the ground that there was not enough evidence to prove that the alleged wrongful practices were continuing. SFEI, DHL, CRIE and May Courier brought an application for annulment which was dismissed by the Court of First Instance in a judgment of 15 January 1997 in Case T-77/95 *SFEI and Others* v *Commission* [1997] ECR II-1.

13 On appeal, the Court of Justice annulled that judgment and referred the case back to the Court of First Instance (Case C-119/97 P *UFEX and Others* v *Commission* [1999] ECR I-1341).

14 Following the reference back by the Court of Justice, the Court of First Instance annulled the decision dismissing the complaint (Case T-77/95 *UFEX and Others* v *Commission* [2000] ECR II-2167). Following that judgment, the Commission reopened the examination of its complaint.

5. *National proceedings*

15 In parallel with their action before the Commission, the applicants, in 1990 and 1996, brought before the French Competition Council complaints against the Post Office, Sofipost, SFMI-Chronopost and Transport aérien transrégional, in which they alleged an abuse of a dominant position between 1986 and 1996, contrary to the provisions of French competition law. The French Competition Council suspended investigation of the matters pending the results of the investigation of the complaint by the Commission. In 2005, the applicants withdrew their complaints.

16 In 1993, SFEI and some of its members brought an action for damages before the Tribunal de commerce de Paris (Commercial Court, Paris) against, inter alia, the Post Office, Sofipost, SFMI-Chronopost and GDEW France, on the basis of liability in tort (unfair competition) as a result of a breach of Article 82 EC and acceptance of the benefit of aid granted contrary to Article 88(3) EC. In 1999, the Commercial Court rejected the application with regard to the State aid aspects of the case. With regard to the aspects relating to abuse of a dominant position in 2000, it stayed proceedings pending the Commission's decision.

6. *Contested decision*

17 By decision SG-Greffe (2004) D/205294 of 19 November 2004, dismissing the complaint brought by the applicants against the Post Office and the French Government relating to the international express mail market (the 'contested decision'), the Commission again rejected the complaint for lack of Community interest. The decision relates purely to the aspects of the file that come within Articles 82 EC, 86 EC, 3 EC and 10 EC.

18 In the decision, the Commission first of all established that the conduct challenged had come to an end (paragraphs 48 to 63 of the contested decision) and, secondly, that the alleged past anti-competitive conduct on the part of the Post Office did not have continuing effects (paragraphs 64 to 121 of the contested decision). Thirdly, the Commission determined whether there was a sufficient Community interest to pursue the investigation of the complaint. The Commission states that in a situation where the conduct under challenge ended in 1991 and is not continuing to have any effect on the market it is not bound to assess either the gravity or the duration of the alleged infringement in the context of its analysis of the Community interest. It explains that it will none the less examine the applicants' arguments in this regard in the interests of sound administration.

19 The Commission found that there was no Community interest and dismissed the complaint on this ground.

7. *Decision on the section of the complaint dealing with State aid*

20 With regard to the section on State aid, the Commission, by Decision 98/365/EC of 1 October 1997 concerning alleged State aid granted by France to SFMI-Chronopost

(OJ 1998 L 164, p. 37, the '1997 decision'), found that the measures referred to in the complaint did not constitute State aid to SFMI-Chronopost.

21 Following the action for annulment brought by the applicants, the Court of First Instance, in Case T-613/97 *UFEX and Others* v *Commission* [2000] ECR II-4055, partially annulled that decision.

22 Chronopost, the Post Office and the French Republic brought appeals against that judgment. By its judgment in Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost and Others* v *UFEX* [2003] ECR I-6993, the Court annulled the judgment and referred the case back to the Court of First Instance.

23 By its judgment in Case T-613/97 *UFEX and Others* v *Commission* [2006] ECR II-1531, delivered after the case was referred back, the Court of First Instance annulled the 1997 decision in as much as the Commission had found that neither the logistical and commercial assistance provided by the Post Office to its subsidiary, SFMI-Chronopost, nor the transfer from Postadex, constituted State aid to SFMI-Chronopost. The Court of First instance found that the transfer of the Postadex service to SFMI-Chronopost amounted to State aid because the Post Office did not provide any consideration to SFMI-Chronopost (paragraph 167 of the judgment). Furthermore, the Court of First Instance held that the reasons for the 1997 decision, which were limited to a very general explanation of the Commission's way of assessing the costs and the final result obtained, did not meet the requirements of Article 253 EC in so far as it related to the provision of logistical and commercial assistance (paragraphs 98 and 101 of the judgment).

24 Chronopost and the Post Office brought appeals against that judgment (Joined Cases C-341/06 P and C-342/06 P, pending).

Procedure and forms of order sought

25 By an application lodged at the Registry of the Court of First Instance on 2 February 2005, the applicants brought this action.

26 By submissions lodged at the Registry of the Court of First Instance on 3 June 2005, Chronopost and the Post Office sought leave to intervene in support of the arguments of the Commission. Those applications were accepted by order of the President of the second chamber of 21 July 2005.

27 By order of 21 March 2006, the President of the second chamber ruled on the applications for confidential treatment with regard to the interveners in relation to certain information in the parties' submissions and annexes.

28 Chronopost and the Post Office lodged statements in intervention. The applicants submitted observations on those statements within the time limit allowed.

29 Upon hearing the report of the Judge Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure and, in the context of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure of the Court of First Instance, invited the parties to reply in writing to questions. With the exception of the Post Office, they complied with that request in the time-limit allowed.

30 Oral argument from the parties and their replies to the questions put by the Court of First Instance were heard at the hearing of 26 April 2007. After the hearing, by letter

of 19 July 2007, CRIE, which is in liquidation, withdrew its application. CRIE must therefore be removed from the list of applicants, so that, in the rest of this judgment, the term 'applicants' will refer only to UFEX, DHL and Federal express international (France) SNC ('FedEx'). By contrast, the term 'complainants' will refer to UFEX, DHL, FedEx and CRIE.

31 The applicants request that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

— reject the application;

— order the applicants to pay the costs.

33 Chronopost contends that the Court should:

— allow the Commission's submissions, in particular:

— declare inadmissible the part of the application relating to Article 3(g) EC, and Articles 10 EC, 82 EC and 86 EC taken together and/or

— reject the applicants' application in its entirety as unfounded;

— order the applicants to pay the costs.

34 The Post Office contends that the Court should:

— declare the application inadmissible owing first of all to the lack of a formal complaint to the Commission, and, secondly the infringement of the fundamental rights of the Post Office guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 ('the ECHR');

— in the alternative reject the application;

— in any event order the applicants to pay the costs incurred by it.

Admissibility

1. *Arguments of the parties*

35 The Post Office advances two bars to admissibility: the first is lack of a complaint from UFEX and the second, breach of its fundamental rights.

36 In the context of the first bar to admissibility, the Post Office argues that it is clear from the wording of the complaint of 21 December 1990 that this is a complaint lodged in the field of State aid and not a complaint relating to abuse of a dominant position. The applicants' challenging of the dismissal of a complaint that does not exist is therefore not admissible. In the view of the Post Office, an informal meeting which gave rise to exchanges of views cannot constitute a complaint for the purposes of Article 3 of Regulation No 17 of the Council of 6 February 1962, Regulation No 17: First Regulation implementing Articles [81] and [82] of the Treaty (OJ 1962, 13, p. 204).

37 In the context of the second bar to admissibility, the Post Office recalls that, according to Article 6 of the ECHR, everyone is entitled to a fair and public hearing within a reasonable time and to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.

38 The Post Office is the subject of an accusation for the purposes of Article 6 of the ECHR since the Commission had investigated an abuse of a dominant position for which it was criticised. It takes the view that a judgment annulling the decision of the Commission, which would entail resumption of the proceedings, would constitute an infringement of its fundamental rights. The Post Office is not in a position to research the evidence necessary for its defence relating to the 1980's and 1990's.

39 The Commission does not contest the admissibility of the application other than with regard to the third plea (see paragraph 188 et seq. below).

40 The applicants consider generally that the bars to admissibility relied on by the Post Office are inadmissible, since the intervener does not have the right to raise pleas not raised by the main party.

41 With regard to the first bar to admissibility, the applicants consider that the fact that there was a complaint relating to the abuse of a dominant position cannot seriously be challenged.

42 With regard to the second bar to admissibility, the applicants argue that in reality the Post Office is not relying on a bar to admissibility but a substantive plea which it does not have capacity to plead.

2. *Findings of the Court*

Preliminary Observations

43 It must first of all be examined whether the bars to admissibility raised by the Post Office are admissible.

44 According to the last paragraph of Article 40 of the Statute of the Court of Justice, which applies to proceedings before the Court of First Instance under Article 53, an application for leave to intervene must be limited to supporting the form of order sought by one of the parties. Furthermore, under Article 116(3) of the Rules of Procedure, the intervener must accept the case as he finds it at the time of his intervention. It is settled case-law that the intervener is not therefore entitled to raise a plea of inadmissibility that is not relied on by the party in support of whose form of order it was granted leave to intervene. The Court is not therefore bound to consider the pleas on which it relies in this regard (see, to this effect, judgments in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 22, and Case T-193/02 *Piau* v *Commission* [2005] ECR II-209, paragraph 36).

45 Yet in its submissions, the Commission did not raise a bar to admissibility. The Post Office does not therefore have locus standi to raise such bars to admissibility.

46 However, under Article 113 of the Rules of Procedure, the Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case, including any raised by the interveners (Cases T-239/94 *EISA* v *Commission* [1997] ECR II-1839, paragraph 26, and *Piau* v *Commission*, cited in paragraph 44 above, paragraph 37).

47 In this case, the absolute bar to proceeding with the case relied on by the Post Office raises questions of public policy in that it relates to the admissibility of the application (see, on this, Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 35). In this case the Court must examine it of its own motion.

First absolute bar: lack of a complaint from UFEX

48 With regard to the first absolute bar, it must be observed that, under paragraph 1 of the contested decision, the Commission considers that it has been seised of a complaint relating to allegations of infringement of, inter alia, Article 82 EC. In those circumstances the question whether the complaint lodged on 21 December 1990 related originally to an alleged infringement of Article 82 EC is irrelevant (see, to that effect, *SFEI and Others* v *Commission*, cited in paragraph 11 above, paragraph 23).

49 The argument of the Post Office that SFEI and UFEX should have made a formal complaint to the Commission cannot succeed. The complainants clearly expressed their wish that the complaint be considered in the light of Article 82 EC. For

example, after the Commission had, on 28 October 1994, addressed to SFEI a letter informing it of its intention not to allow the complaint with regard to the aspects concerning Article 82 EC, SFEI sent the Commission its observations, in a letter of 28 November 1994, in which it maintained its position with regard to the abuse of a dominant position (paragraphs 2 and 3 of the decision to dismiss of 30 December 1994, cited at paragraph 8 of the judgment in *UFEX and Others* v *Commission*, cited in paragraph 14 above). It follows that the Commission was validly seised of a complaint based on Article 82 EC.

Second absolute bar: infringement of the fundamental rights of the Post Office

50 As a preliminary matter it must be observed that, as the applicants rightly claim, this plea as submitted by the Post Office does not in fact constitute a plea of inadmissibility. In fact, the interest of third parties not to have an act annulled on the ground that they would as a result suffer inconvenience or the loss of an advantage, that is, injury to their rights, is not one of the conditions of admissibility for an action for annulment as set out in Article 230 EC and in the Statute of the Court of Justice and interpreted by the case-law. Although such an interest may where appropriate be taken into account when the substance of the case is considered, for example, under the principle of legal certainty, it cannot as such be relied on in support of an absolute bar.

51 In any event, the argument of the Post Office that a judgment annulling a contested decision in itself constitutes an infringement of its fundamental rights cannot succeed. In fact, as is clear from paragraph 57 below, the alleged infringement is not the result of the annulling judgment itself but of the future and hypothetical conduct of the Commission upon resumption of the examination of the complaint. That argument, which furthermore is wholly speculative, cannot prevent the Court of First Instance from carrying out its function under Article 220 EC, in other words observance of the law, and, more specifically in this case, review of the lawfulness of the contested decision in the circumstances set out in Article 230 EC.

52 However, it must be pointed out that the Post Office stated at the hearing, in reply to a question put by the Court, that the absolute bar referred in part to the applicants' lack of locus standi. In that respect, the question of the length of the proceedings does indeed constitute an issue of admissibility. If the length were liable to prevent the Commission from adopting a decision finding an infringement in the future it would be necessary to ask what was the applicants' interest in having the contested decision annulled.

53 In accordance with settled case-law, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure. In order for such an interest to be present, the annulment of the measure must of itself be capable of having legal consequences (see Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 21, Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraphs 59 and 60 and the case-law cited, and Case T-188/99 *Euroalliages* v *Commission* [2001] ECR II-1757, paragraph 26) or, pursuant to a different form of words, the action must be liable, if successful, to procure an advantage for the party who has brought it (Case C-174/99 P *Parliament* v *Richard* [2000] ECR I-6189, paragraph 33, and Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 21; Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 44).

54 Given that the applicants are the addressees of a decision dismissing their complaint, their interest in bringing proceedings can only be denied in exceptional circumstances. Only if it were certain that the Commission was unable to adopt a decision finding an infringement by the interveners would it be possible to disallow the applicants' interest in bringing proceedings.

55 It is therefore necessary to consider whether one may be certain that the Commission is not able to adopt such a decision. First of all it must be pointed out that compliance with the reasonable time requirement in the conduct of

administrative procedures relating to competition policy constitutes a general principle of Community law whose observance the Community judicature ensures (Case C-105/04 P *Nederlandse Federatieve Vereniging voor of Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 35). In that context, it is necessary to consider whether the excessive duration of the entire administrative procedure, including the phase preceding notification of the statement of objections, might affect the ability of the undertakings involved in the investigation to defend themselves in future (see, in this connection, *Nederlandse Federatieve Vereniging voor of Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraph 51).

56 In order to demonstrate an infringement of the rights of the defence, including by reason of the excessive duration of the investigation stage, it is for the party to establish that its opportunities to refute the Commission's objections were limited for reasons arising from the fact that the first phase of the administrative procedure took an unreasonably long time (see, in this connection, *Nederlandse Federatieve Vereniging voor of Groothandel op Elektrotechnisch Gebied* v *Commission*, cited in paragraph 55 above, paragraph 56).

57 In this case the Post Office has not established that a possible decision finding an infringement would necessarily prejudice its rights of defence. In this connection it must be pointed out that it is for the Commission, if it wishes to adopt a decision finding an infringement, to prove the facts characterising that infringement. At this point it is impossible to know exactly what are the objections that the Commission could uphold in a possible statement of objections and the evidence on which it could be based. Yet it is not possible to establish hypothetically that the Post Office is not in a position to defend itself against any accusations. If the procedure were to continue it would not be impossible for the Post Office to claim subsequently that it is unable properly to defend itself against a specific objection addressed to it by the Commission or against a plea as to specific evidence, by reason of the excessive length of the proceedings. In this connection it must be pointed out that abstract and imprecise allegations such as the Post Office's claim that it could 'obviously [not] find the evidence necessary for its defence for the 1980's and 1990's' are not such as to establish in fact a breach of the rights of the defence which must be examined according to the specific circumstances of each case (see, in this

connection, *Nederlandse Federatieve Vereniging voor of Groothandel op Elektrotechnisch Gebied* v *Commission*, cited in paragraph 55 above, paragraphs 56 to 59).

58 With regard to the argument of the Post Office that to be under continuous investigation is seriously damaging to it, in the sense of its departments being deployed for unproductive ends, incurring fruitless expenses and its competitors gaining access to a large amount of commercial information, suffice it to say that that is not such as to establish a breach of its rights of defence. Those facts cannot therefore prevent the Commission from adopting a decision finding an infringement in the future.

59 It follows from all of the foregoing that the application is admissible.

Substance

1. *First plea: infringement of the rules of law relating to assessment of the Community interest in considering the complaint*

60 This plea is divided into four limbs, namely, respectively, a misreading of Case T-77/95 *UFEX and Others* v *Commission*, cited in paragraph 14 above; misappraisal of certain elements appertaining to the definition of Community interest; misappraisal of the role of the Commission compared to that of the national courts in the examination of the existence of a Community interest; and breach of the principles of good faith and loyal cooperation between the Community institutions.

First limb: manifest misreading of the judgment in Case T-77/95 UFEX and Others *v* Commission *drawing the consequences of the judgment on appeal in Case C-119/97 P* SFEI and Others *v* Commission

Arguments of the parties

61 The applicants consider that the judgment in Case T-77/95 *UFEX and Others* v *Commission*, cited in paragraph 14 above, requires the Commission to analyse three cumulative conditions in the order stated — namely the seriousness of the alleged infringements, their duration and whether they continue to have effects — with a view to assessing the existence of a Community interest in pursuing the procedure in a given case.

62 According to the applicants, the entire reasoning of the Commission is based on paragraph 22 of the contested decision, in which the Commission states that '[the] judgment of the Court of Justice plainly demonstrates that where anti-competitive effects subsist — but only if they do (hence the term "if appropriate") — the Commission must consider the seriousness of the alleged infringements'. In doing so the Commission disregarded its obligations in the context of the examination of a complaint.

63 The Commission challenges the applicants' arguments. It claims that in the contested decision it did not intend to state that it was not required to consider the seriousness and duration of the infringement as alleged by the complainants, but that it was not obliged to conduct an entire investigation to establish and determine it with precision. In this case, the Commission did take account of the seriousness and duration of the alleged infringement.

Findings of the Court

64 First of all, it is appropriate to bear in mind the Commission's obligations in general when seised of a complaint.

65 In this connection it is apparent from well established case-law (see Case T-115/99 *SEP* v *Commission* [2001] ECR II-691, paragraphs 31 to 33, and the case-law cited therein), that when it decides to assign different priorities to the examination of complaints submitted to it, the Commission may not only decide on the order in which they are to be examined but also reject a complaint on the ground that there is an insufficient Community interest in further investigation of the case. The discretion which the Commission has for that purpose is not unlimited, however. First, the Commission is under an obligation to state reasons if it declines to continue with the examination of a complaint. Second, in deciding to take no further action on a complaint against those practices on the ground of lack of Community interest, the Commission cannot rely solely on the fact that practices alleged to be contrary to the Treaty have ceased, without having ascertained that anti-competitive effects have ceased and, if appropriate, that the seriousness of the alleged interferences with competition or the persistence of their consequences has not been such as to give the complaint a Community interest.

66 In the contested decision, the Commission maintains that, where an infringement has long since been terminated and there are no continuing effects, it is authorised to reject the complaint on the ground of a lack of Community interest, without taking account of the duration and seriousness of the infringement. That follows from paragraph 22 of the contested decision (paragraph 62 above), and paragraph 123 of the same decision in which the Commission states as follows:

'[The] Commission considers that the conduct terminated in 1991 and does not continue to have consequences on the market. In such a situation the Commission is

not ... bound to take account of the seriousness of the alleged infringement nor or its duration in its analysis of the Community interest. However in the interests of sound administration, the arguments of the complainants in this matter are examined below.'

67 In light of the express terms of those statements, it is appropriate to dismiss the Commission's argument that it was not seeking to assert that it was not obliged to consider the seriousness and duration of the infringement, as alleged by the complainants, but only that it was not obliged to conduct a whole inquiry in order to establish and determine them with precision. In the contested decision, the Commission clearly maintained that it is not obliged to take account of the seriousness and duration of the infringement, when it finds that an infringement is terminated and there are no continuing effects. It was only 'in the interests of sound administration' that it analysed the arguments of the complainants concerning the seriousness and duration of the infringement.

68 It is therefore necessary to examine whether that interpretation complies with the Commission's obligations, laid down in particular in the judgment in Case C-119/97 P *UFEX and Others* v *Commission*, cited in paragraph 13 above.

69 In that judgment, the Court reasoned as follows. The Commission is required to assess in each case how serious the alleged infringements of competition law are and how persistent their consequences are. That specifically means that it is required to take account of the duration and significance of the infringements complained of and of their effect on the competitive situation in the Community (paragraph 93 of that judgment). The Commission cannot rely on the mere fact that practices alleged to be contrary to the Treaty have ceased in order to decide to take no further action, owing to the absence of a Community interest, in regard to a complaint against those practices, without first verifying that anti-competitive effects were not persisting and that, 'if appropriate', the seriousness of the alleged anti-competitive practices or the fact that their effects were persisting were not such as to confer a Community interest on that complaint (paragraph 95 of that judgment). The Court of Justice ruled that the Court of First Instance had taken an incorrect view of the

Commission's tasks in the sphere of competition, by holding, without ascertaining that the anti-competitive effects had been found not to persist and, if appropriate, had been found not to be not such as to give the complaint a Community interest, that the investigation of a complaint relating to past infringements did not correspond to the task entrusted to the Commission by the Treaty but served essentially to make it easier for complainants to show fault in order to obtain damages before the national courts (paragraph 96 of the same judgment).

70 The Commission's arguments set out in paragraph 22 of the contested decision are based on use of the term 'if appropriate' in paragraph 95 of the judgment of the Court. None the less, that paragraph must be construed in light of paragraph 93, which suggests that the Commission must take account of the duration, the seriousness and the persisting effects of the alleged infringement. Paragraph 95 of that judgment is to be construed as follows: if anti-competitive effects persist ('if appropriate'), the Commission is required to verify whether either the seriousness of the infringements alleged or the fact that their effects were persisting gives the complaint a Community interest. It follows from paragraph 96 of the judgment that the mere persistence of anti-competitive effects may be sufficient to give the complaint a Community interest. If, conversely, anti-competitive effects do not persist, the Commission is plainly not required to assess whether their continuance confers a Community interest on a complaint. However, that does not warrant an *a contrario* inference that the Commission is not required to verify whether the seriousness of the alleged infringements confers a Community interest on the complaint. In such a case, the Commission remains obliged to take account of the duration and seriousness of the alleged infringements (judgment in Case C-119/97 P *UFEX and Others* v *Commission*, cited in paragraph 13 above, paragraph 93).

71 In the judgment in Case T-77/95 *UFEX and Others* v *Commission*, cited in paragraph 14 above, the Court of First Instance confirms that the Commission cannot satisfy itself with verifying whether there continue to be consequences, but must also take account of the seriousness and duration of the alleged infringements. Thus, in accordance with paragraph 44 of that judgment, the Commission '[is] obliged to assess, on the basis of all the elements of fact and law obtained, the seriousness and duration of the alleged infringements and whether they continued to have effects'.

72 The Commission's argument set out at paragraphs 24 and 25 of the contested decision cannot be upheld; any interpretation other than that given in the contested decision would have the effect of requiring the Commission to conduct an analysis of the substance of each complaint, since an assessment of the duration and seriousness of an abuse would *a fortiori* necessitate an investigation and determination of the existence or absence of an infringement. In fact, it is possible for the Commission to take account of the seriousness and duration of the alleged infringement as described in the complaint in assessing the Community interest in pursuing the complaint, without determining the existence and precise characteristics (relating to seriousness and duration) of the infringement.

73 However, the applicants' argument that the Commission is required to assess the seriousness, duration and continued effects of the alleged infringement in a specific order must be rejected.

74 In that connection it must be pointed out that, according to the case-law, the assessment of the Community interest raised by a complaint depends on the circumstances of each case, and the number of criteria of assessment the Commission may refer to should not be limited, nor conversely should it be required to have recourse exclusively to certain criteria (Case C-119/97 P *UFEX and Others* v *Commission*, cited in paragraph 13 above, paragraph 79). It follows that the Commission is not required to examine certain specific criteria in a particular order. The reasoning adopted by the Court and the Court of First Instance in the case of *UFEX and Others* v *Commission* relates to a situation where the Commission based its reasons for deciding not to follow up a complaint about the alleged practices for lack of Community interest purely on the fact that those practices had finished. According to that case-law, if the Commission wishes to base its reasoning on the fact that conduct has ceased, it is bound to verify whether the anti-competitive effects are still ongoing and to take account of the seriousness and duration of the infringement in assessing the Community interest in pursuing the complaint. However, that does not reverse the case-law according to which the Commission may decide to take no further action in regard to a complaint for lack of Community interest on another basis than that of cessation of the wrongful conduct. It follows from the order of the Court of 13 December 2000 in Case C-39/00 P *SGA* v

Commission [2000] ECR I-11201, paragraph 64), that the case-law set out in the judgment in Case C-119/97 P *UFEX and Others* v *Commission*, cited in paragraph 13 above, only applies where the Commission bases its decision on the fact that the practices allegedly contrary to the Treaty have ceased.

75 It is open to the Commission to examine, first of all, whether the conduct challenged is ongoing, secondly whether the anti-competitive effects are ongoing and thirdly whether there is a community interest in pursuing examination of the complaint. However, the Commission is bound, in the context of the examination of the Community interest, to take account of the seriousness and duration of the alleged infringement. Contrary to what the applicants contend, that approach cannot be considered illogical. There is nothing to stop the Commission from following the stages of reasoning indicated in the decision if it takes account, in the context of the last stage, of the seriousness and duration of the alleged infringements.

76 It follows from the foregoing that the Commission, in the contested decision, interpreted its obligations incorrectly in stating that it was not bound to consider the seriousness and duration of the alleged infringements.

77 That does not necessarily mean that the contested decision must be annulled. According to the case-law, an error in a decision of the Commission is not sufficient to warrant annulment of the decision if, in the particular circumstances of the case, it could not have had a decisive effect on the outcome (see judgment in Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, paragraph 49, and the case-law cited therein).

78 It follows that the applicants' argument that the Commission erred in finding that it was not required to take account of the seriousness and duration of the alleged

infringements is ineffective if that error could not have had a decisive effect on the outcome. In this case the Commission examined the complainants' arguments on the seriousness and duration of the infringements 'in the interests of sound administration'. If it follows that it found that, even taking account of the characteristics of the infringements, there was no Community interest in pursuing examination of the complaint, and if the Commission did not commit any error in the context of that argument, the Commission's error could not have affected the operative part of the decision.

79 It is therefore necessary to examine, in the context of the second limb of the first plea, whether the Commission's assessment of the seriousness and duration of the alleged infringements is vitiated by error.

Second limb: manifest misappraisal of certain facts that necessarily form part of the definition of the Community interest

80 The applicants argue that the Commission did not correctly assess the seriousness of the alleged infringements, their duration or whether their anti-competitive effects were continuing.

Summary of the contested decision

81 In so far as it is relevant to the resolution of this case, the contested decision contains the following observations. The Commission considers that the alleged infringements ended in 1991, referring in this connection to the GD NET decision

(see paragraph 5 above). The Commission considers that after 1991, there was no further incentive to grant cross subsidies. In that connection it points out that, under the GDEW contracts, when SFMI-Chronopost merged with TNT's express courier operations and the German, Netherlands, Swedish and Canadian postal operators, the Post Office owned only a 12.5% shareholding in GDEW, made up, in France, of SFMI-Chronopost. The Commission considers that, owing to the merging of the profits of GDEW and the division thereof among all the shareholders, none of the postal operators caused GDEW to benefit unilaterally from cross subsidies (paragraph 51 of the contested decision).

82 It also emphasises that, as from March 1995, the Post Office was required to honour the undertaking, appended to the GD NET decision, to provide infrastructure services as a subcontractor to third parties on conditions analogous to those under which it provided equivalent services to SFMI-Chronopost (paragraph 58 of the contested decision).

83 The Commission points out that in 2002 it checked with the complainants whether they had requested the Post Office to provide them with sub-contracted services of the kind which it provided to SFMI-Chronopost, and that it was apparent from the replies that no operator had shown itself willing to do so (paragraph 61 of the contested decision). It stresses that FedEx entered into contracts with the holding company of Chronopost concerning certain infrastructure services, which came into force in 2002 (paragraph 63 of the contested decision).

84 Next, the Commission points out that the alleged past anti-competitive conduct is not having persistent effects.

85 In that connection, the Commission produced the following table showing the progression in share value of the French international express courier market:

				In %
	1986	1990	1996	2001
SFMI/ Chronopost	4	24 to 32	22	25
DHL	42	22 to 28	28	35
FedEx	7 to 16	10 to 17	11	10
UPS	2	3 to 6	9	7
TNT v GDEW	4 to 7	4 to 13	10	11
Jet Services	6	4 to 5		11

86 The Commission emphasises that the market share held by SFMI-Chronopost was 25% in 2001, that is to say three percentage points less than in 1990, in relation to the average bracket ranging from 24 to 32%. The insignificance of that variation shows how little SFMI-Chronopost's market share is dependent on the alleged abuse. According to the Commission, it follows that the SFMI-Chronopost's market share is determined by other factors (paragraph 73 of the contested decision).

87 The Commission adds that there have been few departures from the market since 1991 and that only two very small suppliers have withdrawn from the French market for international mail: CRIE and Extracom (paragraph 79 of the contested decision). As to CRIE, the Commission notes that the reasons it gave to explain that departure, in reply to a request for information on its part, were linked neither to lack of access to the Post Office network, nor to an abuse of a dominant position by it (paragraph 80 of the contested decision). It stresses that it has no evidence available to it demonstrating a causal link between the conduct challenged and the departure of any operator from the market (paragraph 85 of the contested decision).

88 The Commission also notes that French customers are extremely price sensitive when choosing their express mail service supplier, that customers desirous of changing supplier do not encounter obstacles and, moreover, do so frequently (paragraphs 86 to 100 of the contested decision).

89 As to the complainants' argument that the availability of a national network is essential in order to operate in regard to the ad hoc segment (occasional customers), the Commission replies that, if the availability of the Post Office network was essential, competition would of necessity have had to develop on the basis of commercial agreements since March 1995 (paragraph 104 of the contested decision). The major and growing market share held by DHL in the ad hoc segment proves that SFMI-Chronopost's exclusive access to the Post Office's ubiquitous local postal network until 1995 did not significantly and permanently distort competition in that segment (paragraph 105 of the contested decision). The Commission also mentions the growing importance of telesales and internet sales (paragraphs 113 and 114 of the contested decision).

90 The Commission goes on to state that there are no continued effects in regard to price. It stresses that the complainants have confirmed that SFMI-Chronopost had aligned its prices with those of its competitors towards 1991 and that those prices had subsequently become excessively high again, in any event towards 2000 and 2002 (paragraph 116 of the contested decision). In regard to the complainants' argument that those prices embodied the continued effects of cross subsidies, the Commission maintains that it is not established that the prices charged by SFMI-Chronopost from 2000 are in any way related to the cross subsidies from which SFMI-Chronopost allegedly benefited (paragraph 118 of the contested decision). In any event, it would seem unlikely for an undertaking to implement an excessively low pricing policy over more than a decade (paragraph 119 of the contested decision).

91 In the part of the contested decision devoted to examination of whether the Community interest is sufficient to pursue examination of the complaint, the

Commission notes that the fact that the alleged wrongful conduct lasted five years does not confer Community interest on the case where the conduct came to an end thirteen years before and has no ongoing consequences (paragraph 124 of the contested decision).

92 As to the seriousness of the alleged abuse, the Commission notes, at paragraphs 125 to 126 of the contested decision, the arguments of the complainants that, under the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; the 'Guidelines') the alleged wrongdoing was 'very serious' because the Post Office has a monopoly. In this connection it claims that the Guidelines were drawn up with the aim of providing greater transparency in relation to the Commission's policy in the setting of fines but do not relate to the Commission's ability to dismiss a complaint for lack of Community interest.

93 The Commission also points out that the relevant market did not become substantially more concentrated than it was in 1986, by comparing the degree of concentration, calculated according to the Herfindahl-Hirschmann index, in 1986 with 2000 and 2001 (paragraphs 131 and 132 of the contested decision).

Arguments of the parties

— Seriousness of the alleged infringements

94 The applicants consider that the market concerned by the alleged infringements has a clear Community dimension and submit that the complaint emanated from almost all the operators concerned. The alleged infringement, namely cross-subsidies

financed from the resources of the postal monopoly, has repeatedly been recognised by the Commission as being of certain seriousness. Accordingly, the Commission should have found in the contested decision that the alleged infringement was particularly serious.

95 The Commission states that it replied to the applicants' arguments on this point in the contested decision. It argues that, even assuming that the alleged infringement was particularly serious, that finding did not alter its assessment as to the lack of Community interest in pursuing the alleged infringement in the light, inter alia, of the fact that it had ceased and was not continuing to have effects.

— Duration of the alleged infringements

96 The applicants claim that the facts in the file could not but lead the Commission to classify the alleged infringements as long standing.

97 They argue that the infringement has not ceased and that SFMI-Chronopost continued to benefit from Post Office prices which did not reflect the full costs. That would have enabled it to choose the most efficient weapon against its competitors according to the circumstances, namely either applying predatory pricing or aligning its prices with those of its competitors and driving very large profits. The grant by the Post Office of unlawful subsidies from a legal monopoly to the competitive activity in itself constitutes an abuse of a dominant position. Furthermore, the Commission did not draw any consequence from certain very precise evidence provided by the applicants, in particular examples of predatory pricing or abnormally low prices charged by SFMI-Chronopost in 1994 and 1999.

98 The Commission challenges those arguments. It considers that it is not established that the under-invoicing of services by an undertaking in a dominant position to its subsidiary which carries on business in another market where it is not in a dominant position in itself constitutes an abuse of a dominant position within the meaning of Article 82 EC. The effects of wrongful conduct ought in principle to be perceptible on the market, which is not true in the case of achieving high operating margins and the frequent distribution of high dividends.

— Continued anti-competitive effects of the alleged infringements

99 The applicants consider that it is as a result of the alleged infringements that SFMI-Chronopost was able to acquire a leader position in the market concerned in less than four years. They argue that the Commission committed an error by merely checking in the contested decision whether secondary effects of the alleged infringements were persisting (the development of market shares, exits from the market, the sensitivity of demand to price, the lack of hindrances to changing provider, the need to have a dense local network and the lack of ongoing effects in the area of price) without being concerned with the main effect, which was structural in nature, of those infringements, namely placing SFMI-Chronopost in a position of market leader and maintaining it.

100 In the reply, the applicants refer to a report drawn up in August 2003 by Professor Encaoua (the 'Encaoua report'), which demonstrates, inter alia, that the structure of the market had become more concentrated, that there had been significant exits from the market and that there were costs connected with the change of operator.

101 The Commission challenges the arguments advanced by the applicants.

Findings of the Court

102 It is necessary to examine first of all whether the Commission committed an error by evaluating the duration of the alleged infringements and finding that there were no ongoing effects.

— Duration of the alleged infringements

103 The Commission's reasoning that the alleged cross subsidies ceased in 1991 is based, inter alia, on the lack of incentive to grant cross subsidies from that date. That analysis is based on the fact that the Post Office only held 12.5% of the shares in GDEW (made up in France of SFMI-Chronopost), and that, as a result of the joining of the profits of GDEW and of their being divided among all the shareholders, none of the postal operators unilaterally caused GDEW to benefit from cross subsidies. It must be stated that the applicants do not challenge either the percentage of the Post Office shareholding, or the division of the profits nor do they argue that the Commission based its reasoning on materially incorrect findings in the context of that analysis.

104 In fact, there was no longer any economic justification for the Post Office to allow GDEW to benefit from cross subsidies since the other shareholders in GDEW should have benefited from the profits resulting therefrom in the amount of 87.5%. In the context of the Community interest in pursuing a complaint, the Commission was able to conclude therefrom, without committing a manifest error of assessment, that the alleged cross subsidies stopped in 1991 (or, more specifically, a little later where the concentration transaction authorised by the GD NET decision was realised). In that connection, the applicants' argument that the Commission never checked whether the undertakings given at the time of the GD NET decision had

been observed, must be rejected. The lack of economic justification is not dependent on the issue of whether the Post Office complied with the obligations it agreed to at the time of the GD NET decision. In that context, the applicants' argument that the Post Office did not have analytical accounting until at least 2001 must also be rejected as irrelevant. In fact the lack of any incentive to grant cross subsidies is not dependent on whether or not there was analytical accounting.

105 In that context, the applicants' argument that the Court of First Instance in Case T-613/97 *UFEX and Others* v *Commission*, cited in paragraph 23 above, partially annulled the 1997 decision relating to the part of the complaint concerning State aids on the basis of an inadequate statement of reasons cannot be upheld. In fact, that decision is based on other reasons, in particular on a calculation of the cost of logistical assistance, and on a comparison with the payment made by SFMI-Chronopost for the years 1986 to 1995. The Commission was not obliged to make such a calculation in the context of the examination of the Community interest in pursuing the complaint as an alleged abuse of a dominant position.

106 In that context, it must be stated that the Commission has exclusive jurisdiction to determine whether aid is incompatible with the common market. With regard to State aid, at the end of the preliminary stage of the investigation, the Commission has a duty to decide that the State measure at issue does not constitute 'aid' within the meaning of Article 87(1) EC; or to decide that the measure, although constituting aid, is compatible with the common market; or it may decide to initiate the procedure under Article 88(2) EC (Case T-95/96 *Gestevisión Telecinco* v *Commission* [1998] ECR II-3407, paragraphs 54 and 55).

107 On the other hand, with regard to a complaint as to abuse of a dominant position, which does not fall within the exclusive competence of the Commission, the latter has a discretionary power to determine priorities and it is not obliged to rule on whether or not there has been an infringement. If the Commission has established

that, as from a particular time, there was no longer any economic justification for pursuing certain conduct, it may in principle take the view that the alleged infringement has ceased if there are not sufficient indications to the contrary. In the context of the examination of the Community interest, which is intended to enable it to establish priorities, it is not obliged to devote resources to making a similar calculation to that which it made relating to that made with regard to the State aid aspect. The fact that the complaint in question relates both to State aid and an abuse of a dominant position does not prevent the Commission from investigating the two aspects of the complaint separately. The fact that the Commission has opened a procedure in relation to State aid and undertaken a more in-depth investigation in that connection does not exclude the possibility of its rejecting the aspect of the complaint concerned with abuse of a dominant position for lack of Community interest according to the criteria applicable to that part of the complaint.

108 The applicants argue that they drew the Commission's attention to SFMI-Chronopost's very high internal rate of return and to an abnormally high distribution of dividends, referring to a report drawn up by a consultancy company in May 1996, which they produced to the Court. In this connection it is sufficient to note that the tables on internal rate of return and dividends paid to the shareholders relate to the periods from 1986 to 1992 and 1986 to 1991 respectively. The figures relating to the period before or immediately following adoption of the GD NET decision are not such as to challenge the finding that the Post Office no longer had an incentive to award cross subsidies after the concentration authorised by that decision had been brought into being.

109 In any event it must be noted that the Commission was right to base its conclusions on the fact that the Post Office was bound, from March 1995, to comply with its undertaking to provide third parties with infrastructure services by way of subcontracting under similar conditions to those under which it was providing equivalent services to SFMI-Chronopost. It was entitled to conclude from that that the cross subsidies had ceased at the latest by that time. In fact, no economic reason can justify an undertaking in a dominant position under-invoicing access to this network to its subsidiary which is carrying on business in a market open to competition if it has to offer the same conditions of access to competitors.

110 In that connection, the applicants criticise the Commission for having failed to check whether the Post Office complied with its obligations. However it is apparent from the contested decision that the Commission checked with the complainants whether they had asked the Post Office to provide them with sub-contracted services of the type that it was providing to SFMI-Chronopost; it is also apparent from the replies received that no operator had shown any desire to do so. In these circumstances the investigative measures taken by the Commission must be regarded as sufficient. If the Post Office has undertaken to provide non-discriminatory access to its network and no undertaking has made a request in that connection, the question whether the Post Office complied with that obligation does not arise since it was not in a position to infringe it.

111 Moreover, as the Commission found in the contested decision, FedEx entered into various contracts with Chronopost's holding company that came into force in 2002. The applicants do not maintain that the conditions awarded to FedEx are discriminatory in relation to those awarded to SFMI-Chronopost.

112 With regard to the price policy pursued by SFMI-Chronopost, the applicants criticise the Commission for not having drawn any consequence from the examples of predatory pricing or abnormally low prices charged by SFMI-Chronopost for 1994 and 1999. In that connection it must be noted that the applicants did not argue in the context of these proceedings that SFMI-Chronopost enjoyed a dominant position on the French international express mail market. The prices charged by SFMI-Chronopost on that market cannot therefore constitute an abuse of a dominant position if there is no link with cross subsidies from the sector in which the Post Office has a monopoly. Nor indeed do the applicants raise any plea based on the Commission's failure in the contested decision to check whether the prices charged by SFMI-Chronopost constituted an infringement of Article 82 EC, irrespective of whether there were cross subsidies. In addition, the example that the applicants cite in the context of this dispute for 1994 relates to the price of a parcel sent from Belgium to Denmark, Greece, Spain. Ireland, Portugal or Switzerland and accordingly does not relate to the French international express mail market.

113 Furthermore, at paragraph 116 of the contested decision the Commission notes that, according to the complainants, SFMI-Chronopost aligned its prices with those of its competitors around 1991. In that context, the applicants' argument that the grant by the Post Office of unlawful cross subsidies of a legal monopoly to the competing business activity in itself amounts to an abuse of a dominant position.

114 It must be pointed out that the mere fact that an exclusive right is granted to an undertaking in order to guarantee that it provides a service of general economic interest does not preclude that undertaking from earning profits from the activities reserved to it or from extending its activities into non-reserved areas (Case T-175/99 *UPS Europe* v *Commission* [2002] ECR II-1915, paragraph 51).

115 The acquisition of a holding (and by analogy of cross subsidies) could raise problems in the light of the Community competition rules where the funds used by the undertaking holding the monopoly derived from excessive or discriminatory prices or from other unfair practices in its reserved market (*UPS Europe* v *Commission*, cited in paragraph 114 above, paragraph 55). In this case the applicants do not allege that such practices existed in the reserved sector.

116 It does not follow from the case-law that in itself the grant of cross subsidies constitutes an abuse of a dominant position, irrespective of the policies pursued in the reserved sector and the sector open to competition. If the Post Office were to under-invoice the supply of its services to SFMI-Chronopost, such conduct would not necessarily constitute an impediment for competitors, inter alia, if, as the applicants maintain, SFMI-Chronopost used those subsidies to yield very large profits or to pay high dividends. Contrary to the applicants' assertion, aligning its prices on those of its competitors and deriving very large profits does not amount to a 'weapon' that may be used against competitors since the fact that an undertaking takes such profits has no influence on the customer's choice of provider. The

Commission was therefore entitled to form the view that the alleged infringement had ceased when, according to the complainants' own statements, SFMI-Chronopost aligned its prices with those of its competitors. The applicants do not claim that the competitors' prices were exceptionally low.

117 With regard to the 1994 price example, it must be observed that this does not relate to the relevant market. The 1999 price examples provided postdate by several years the adoption of the GD NET decision and the entry into force of the obligation on the Post Office to grant access to its network under non-discriminatory conditions. No connection has been established between these price examples and the cross subsidies received in previous years. Furthermore, as the Commission rightly pointed out at paragraph 119 of the contested decision, it seems unlikely that an undertaking would for more than a decade engage in an unlawfully low pricing policy. In fact such a practice must be pursued in a consequential manner in order to attain the objective of forcing out competitors. The applicants have not claimed that, after aligning its prices with those of its competitors, SFMI-Chronopost once again started systematically to offer excessively low prices.

118 In the light of all the foregoing, the Commission was entitled to consider that the alleged infringement was terminated by 1991.

119 The Commission took the view in the contested decision that the fact that the alleged abuse lasted for five years did not result in its having any Community interest since it had ceased thirteen years before and did not have ongoing effects. In this context the applicants have not demonstrated that the Commission relied on substantively incorrect facts or that it committed a manifest error of assessment.

120 Even if an infringement of five years were to be classified as being of long duration that would not mean that the Commission is unable to say that there is no Community interest in pursuing the complaint. It is sufficient for the Commission to take account of the duration of the alleged infringement in assessing the Community interest. The fact, mentioned by the applicants, that in another case the Commission dealt with a file relating to an infringement that lasted little more than two years does not mean that the Commission is obliged in all other cases to pursue infringements of longer duration, since each case must assessed in the light of its specific circumstances.

121 What is more, even if the Commission had merely established that the infringement had ceased as from March 1995, that would not mean that it had committed an error in assessing the Community interest, such as to justify the annulment of the contested decision. At paragraph 124 of the contested decision, the Commission points out that the fact that the alleged abuse lasted five years does not cause the case to have a Community interest where that abuse ceased thirteen years before and does not have continuing consequences. That reasoning is based in substance on the fact that the alleged infringement, even if it was of long duration, ceased a number of years previously and did not have continuing effects, which would also be true if the infringement had ceased only in March 1995.

122 The mere fact that the Commission adopted the contested decision many years after the complaint was lodged does not prevent the existence of a Community interest from being assessed in light of the situation prevailing at the time when the contested decision was adopted. In that connection, it was open to the Commission to defend its decision to dismiss the complaint of 30 December 1994 before the Community courts; that decision was annulled only on 25 May 2000, when the Court of First Instance delivered its judgment in Case T-77/95 after the case was referred back to it. The Commission was entitled to consider, in the contested decision, that the infringement had terminated towards 1991, a long time before the annulment of its 1994 decision to dismiss the complaint. The parameters of the analysis of the Community interest were therefore not significantly altered between 25 May 2000 (the date of annulment of the rejection decision of December 1994) and 19 November 2004 (the date of adoption of the contested decision).

— Continued effects of the alleged infringements

123 At the outset it should be pointed out that the applicants raised new arguments at the reply stage alleging misappraisal by the Commission of certain evidence when examining the persistence of the effects of the alleged infringements; they produced the Encaoua report only at this stage. Those new arguments form part of the second limb of the first plea in which the applicants argue that the Commission was wrong to consider that the alleged infringements did not have persistent effects. Therefore, they do not constitute a new plea within the meaning of Article 48(2) of the Rules of procedure but amplify a plea which must regarded as admissible (see, in this connection, Case C-412/05 P *Alcon* v *OHMI* [2007] ECR I-3569, paragraph 40). Since the presentation of the new arguments is admissible, the Encaoua report must be taken into consideration, in so far as it supports those new arguments, even if the applicants did not expressly justify, as provided for in Article 48(1) of the Rules of Procedure, the delay occurring in the presentation of this offer of evidence. In fact if a new argument is admissible, the party cannot be prevented from producing evidence in support of that argument.

124 In the examination of the question as to continuing consequences, the Commission established that only two very small operators exited the market. In this connection the applicants argue, referring to the Encaoua report, that there were significant exits from the market. It must be pointed out that that report deals in detail only with the FedEx and CRIE cases. It must be noted that the Commission analysed the exit of those two companies in the contested decision. In the case of FedEx, it pointed out that the company, although it withdrew from the intra-European express mail market, was able rapidly to re-enter it in 1996. In those circumstances, the Commission was able to take the view that the partial and temporary exit of FedEx could not be regarded as constituting a persistent effect of the alleged infringement.

125 As for CRIE, the Encaoua report confirms that this undertaking's exit was connected to the predatory pricing applied by SFMI-Chronopost. Yet it must be noted that the

Commission replied to that argument, at paragraph 81 of the contested decision, by referring expressly to the Encaoua report and pointing out that CRIE, in reply to a request for information by the Commission, had cited other reasons to explain its departure from the market. The Commission was justified in basing its findings on the information it received in reply to its request for information, given that incorrect information is punishable with fines and that, furthermore, it did not appear that CRIE had any interest in providing incorrect information to the Commission. In addition it must be pointed out that, in the context of an action for annulment, it is for the Court of First Instance to review the legality of the contested decision; it is not competent to re-examine the complaint. If the applicants consider that the arguments deployed by the Commission in examining exits from the market are incorrect, it is for them to identify an error of law or fact on the part of the Commission. In this context, it is not sufficient to refer to matters raised in the Encaoua report, which the Commission examined in the contested decision, without explaining the manner in which the Commission's arguments are vitiated by error.

126 With regard to the applicants' argument that the Commission did not take sufficient account of the extreme difficulties for undertakings as powerful as UPS in penetrating and maintaining themselves on the international express mail market in France, as the Commission pointed out, at paragraph 84 of the contested decision, UPS had reorganised its French activities in 1996 in order further to devote itself to the international market, but had not exited the French international express mail market. In fact, the table of market shares (paragraph 85 above) achieved from estimates provided by the complainants, shows that the market share of UPS in that market even increased from 1986 to 1996. In those circumstances, the applicants' unsupported statement relating to the alleged difficulties faced by UPS in maintaining itself on the market must be rejected.

127 With regard to the sensitivity of supply to price, the Commission, at paragraphs 87 and 88 of the contested decision, cited studies provided by FedEx and DHL according to which price constituted the most important factor when choosing a supplier. It was entitled to deduce that French customers were extremely price-sensitive when choosing their supplier of express mail. With regard to the

distinction between the elasticity of supply price and the intensity of price competition, made in the Encaoua report, suffice it to note that the Commission replied to that argument, at paragraph 90 of the contested decision, and that the applicants did not advance any argument establishing that an error of law or fact was committed in that argument. With regard to the system of non-transparent rebates within SFMI-Chronopost, mentioned in the Encaoua report, it is not clear what effect lack of transparency could have had on the sensitivity of supply to price. In any event the Commission is right to point out at paragraph 91 of the contested decision, that, in a relatively concentrated market, the fact that suppliers do not know their competitors' tariffs is a guarantee that the tariffs are not stabilising at a supra-competitive level.

128 The applicants also argue that there are costs associated with changing operator and that the Commission did not take account of the impact of SFMI-Chronopost's rebate system, the existence of commercial contracts with regular customers and the absence of notable transfers of customers, as referred to in the Encaoua report. With regard to the alleged lack of notable transfers of customers it must be pointed out that the Commission established, at paragraph 96 of the contested decision, that, out of the three years from 1999 to 2001, customers gained and lost by FedEx represented on average 22% of its annual turnover. The Commission was entitled to deduce from that that there was a high customer turnover and the applicants did not provide examples to show the contrary.

129 With regard to the efforts to create customer loyalty, the Commission replied to the complainants' arguments at paragraphs 99 and 100 of the contested decision, and in particular found that the complainants had not produced evidence on the alleged costs associated with changing operator and had not even provided details of their own efforts to create customer loyalty. In fact, even if the Encaoua report argues that, outside the ad hoc segment, there are 'longer or shorter' term contracts, which may include clauses providing for the payment by the customer of a penalty in the event of changing operator, that statement remains theoretical in so far as the report refers to only a possibility, but does not state that SFMI-Chronopost in fact concluded long term contracts or provided for the payment of a penalty discouraging its customers from changing supplier. The fact that a supplier gives

rebates to major customers does not mean that there is an impediment to changing supplier if another suppler offers a better price, possibly by also giving rebates. The applicants did not argue that the grant of rebates was connected with concluding a long-term contract.

130 With regard to the applicants' argument that SFMI-Chronopost derived an advantage from the fact that it had the benefit of exclusive access to the Post Office's network until March 1995, it must be observed that the Commission devoted paragraphs 101 to 114 of the contested decision to an examination of the need to have a dense local network and, in this context, replied to the complainants' argument that such exclusive access had created barriers to entry to the ad hoc segment. The applicants do not identify an error by the Commission in this part of the contested decision. Furthermore, the Commission rightly emphasised at paragraph 102 of the latter, that the complainants did not challenge the access of SFMI-Chronopost to the Post Office network, but the alleged under-invoicing of that access. In so far as exclusive access up to March 1995 is not in itself challenged, a possible consequence of such access cannot constitute an ongoing effect of the alleged infringement. With regard to the alleged under invoicing of such access, it must be recalled that the Commission was entitled to consider in the context of these proceedings that the alleged cross subsidies had ceased in about 1991.

131 In this context, the applicants' general assertion that the Commission did not examine all the elements of fact and law brought to its knowledge must be rejected. It follows from the foregoing that, in the contested decision, the Commission deployed arguments in response to the arguments of the complainants and the documents provided by them. In these circumstances, it is for the applicants to indicate precisely the elements of law and fact of which the Commission failed to take account, contrary to its obligations.

132 In so far as the applicants criticise the Commission for not having taken account of the principal effect of abuse of a dominant position — namely that of having placed SFMI-Chronopost in a position of market leader and having maintained it there — the Commission noted in the contested decision, that the difference, as between 1990 and 2001, in the market shares of SFMI-Chronopost was only around three percentage points; that showed that that market share depended to a small extent only on the alleged abuse. Furthermore, it argues at paragraph 66 of the contested decision that if demand for the services from individual undertakings was very sensitive to price and customers could easily change provider, which they did regularly, it could not be concluded that the alleged anti-competitive conduct, which had long since ceased, could continue to exert any effects on the market. In that connection it must be pointed out that, on the supposition that the rapid growth of SFMI-Chronopost during the period 1986 to 1990 was connected with the alleged infringement, that does not necessarily mean that SFMI-Chronopost's market share at the date of adoption of the contested decision is connected with this development occurring during the start-up period.

133 In the circumstances of the case, where the Commission has established that customers were very price sensitive, there were no obstacles to changing supplier, only two very small operators had left the market and no causal link was shown to exist between the exits and the alleged abuse, the Commission was entitled to form the view, without committing any manifest error of assessment, that the SFMI-Chronopost's market share at the time of adoption of the contested decision did not constitute a continuing consequence of the alleged infringement. Having established these market characteristics, the Commission was justified in considering that the market structure at the time of the adoption of the contested decision was the result of the competitive conditions prevailing at that time and not of possible cross subsidies granted many years before. The applicants did not argue that after 1991 SFMI-Chronopost removed all price competition by aligning itself systematically with the lowest price charged by its competitors.

134 The Commission was also entitled to rely on the fact that the difference between SFMI-Chronopost's market share for 1990 and that for 2001 was small, to support

the finding that SFMI-Chronopost's market share at the time of the contested decision was governed by determinant factors other than cross subsidies allegedly granted previously. With regard to the applicants' argument that the Commission was unaware that the express mail market represented a growing market in the 1990s, they did not clearly state the consequence that the Commission ought to have drawn from that. If the market was growing and therefore changed it seems even less likely for the structure of the market at the time of the adoption of the contested decision to be connected with the alleged previous infringement.

135 It must be emphasised that even if the view were taken that the Commission had only established that the cross subsidies ended as from 1995, that would not call in question its argument on that paragraph. The table showing the market shares demonstrates that SFMI-Chronopost's share decreased between 1990 and 1996 and recovered three percentage points between 1996 and 2001. If the infringement had ended in 1995, SFMI-Chronopost would have lost market shares during a period that coincided with the alleged abuse (1990 to 1996) and would have gained market shares after that period (between 1996 and 2001). In those circumstances, and in the light of the characteristics of the market, the Commission was entitled to consider that SFMI-Chronopost's market share at the date of adoption of the contested decision was not attributable to the infringement allegedly committed in the past and that there were therefore no continuing effects.

136 Furthermore, the persistent effects of an alleged infringement are not always such as to imbue the examination of a complaint with Community interest. In fact, at paragraph 96 of the judgment in Case C-119/97 P *UFEX and Others* v *Commission*, cited in paragraph 13 above, the Court of Justice criticised the Court of First Instance for not having ensured that it had checked that the anti-competitive effects were not persisting and, if appropriate, were not of a nature to give the complaint a Community interest. At paragraphs 131 and 132 of the contested decision, in the part concerning examination of the existence of a Community interest in pursuing the complaint, the Commission observed that the market had not become substantially more concentrated in 2001 than it was in 1986 and that the Herfindahl-Hirschmann index had remained almost unchanged.

137 That finding is not contradicted by the applicants' argument that the Commission should have expected a substantial reduction in the concentration following the entry on the market of SFMI-Chronopost with a massive market share. The applicants maintain that if the market concentration did not decrease following the entry of SFMI-Chronopost, the latter was more than compensated for by the exit of numerous operators. In this connection it must be pointed out that the fact that the Herfindahl-Hirschmann index remained stable shows that the global market situation did not become less competitive despite the exit from the market of two small operators. That enables the conclusion to be drawn that SFMI-Chronopost's entry on the market did not have a negative effect on the latter's global position beyond the fact that no causal link has been established between the exit of those operators and the conduct of SFMI-Chronopost. Furthermore, as the Commission rightly pointed out at paragraph 133 of the contested decision, the complainants have not shown in what way a market with two large operators was less competitive than a market with a single dominant operator, as was the situation in France before the entry of SFMI-Chronopost.

138 So, even if a link between SFMI-Chronopost's market share upon the adoption of the contested decision and the alleged infringement is established, the Commission was entitled to take the view that this persistent effect was not such as to confer a Community interest on the examination of the complaint, having regard to the global situation on the market which had not become less competitive.

— Seriousness of the alleged infringement

139 The applicants criticise the Commission for not having classified the seriousness of the alleged infringement in the contested decision according to the criteria set out in the Guidelines.

140 In that connection it must be pointed out that the Commission has discretion in setting priorities in relation to complaints made to it. Once the Commission establishes, in a decision dismissing a complaint for lack of Community interest, that the infringement has ceased and that there are no continued effects, and shows that it has taken account of the length and seriousness of the infringements, as criticised in the complaint, it may dismiss the latter even if the infringements are lengthy and very serious, provided that it does not rely on facts that are substantively incorrect or commit a manifest error of assessment.

141 The obligation to take into account the seriousness of the infringement in order to be able to assess the Community interest does not compel the Commission to classify the seriousness according to the 'abstract' criteria contained in the Guidelines.

142 In this case the Commission did take sufficient account of the seriousness of the alleged infringement. In fact it took the view, at paragraph 137 of the contested decision, that '[i]n so far as there [was] no evidence that the infringement [had] in fact led to the elimination of actual or potential competitors, it [was] difficult to say that there [had] been exceptional seriousness justifying an in-depth examination of a potential infringement which [had] long since ended and which did not have continuing consequences for the market'. It follows that the Commission did take into account the 'actual' seriousness of the alleged abuse in the sense of its impact on the market. The finding that there was no evidence that the infringement had led to the elimination of competitors does not relate only to the continued consequences, but also to the consequences at the time of the alleged wrongful conduct. Even if the Commission merely indicated, at paragraph 79 of the contested decision, that there had been few exits from the market 'since 1991', it must be pointed out that the applicants did not argue that the Commission omitted to take account of exits from the market between 1986 and 1991. Furthermore, in reply to a question relating to possible exits between 1986 and 1991 put by the Court of First Instance at the hearing, the parties did not indicate that any companies other than those considered by the Commission in the section of the contested decision dealing with examination of exits from the market had left the market.

143 In the context of its arguments concluding that there were no continued effects and no Community interest in pursuing the examination of the complaint, the Commission did take into account the characteristics of the alleged infringement. The applicants have not shown either that the Commission relied on substantively inaccurate facts, or that it disregarded the seriousness of the alleged abuse.

144 As to the applicants' argument that the Commission was entirely unaware that the complaint was made by nearly all operators concerned, the Commission pointed out, at paragraph 128 of the contested decision, that the number of complainants had never been an assessment criterion for Community interest and that an undistorted competitive situation was already secured. The applicants' reference to the judgment in Case T-77/95 *UFEX and Others* v *Commission*, cited in paragraph 14 above, is not relevant. In fact, at paragraph 52 of that judgment, the Court of First Instance pointed out that it was the Commission's task to ensure, following the complaint brought by an organisation representing almost all the French private operators active in the market in question, a state of undistorted competition. That does not enable the conclusion to be drawn that the number of complainants is a factor liable to confer a Community interest on the pursuit of the complaint. It cannot but be stated that the Commission did not commit a manifest error of assessment when it challenged that argument in the contested decision.

145 The applicants' argument as to the Community dimension of the market concerned (see paragraph 94 above) will be examined and rejected in the context of the third limb of the second plea (see paragraph 158 below).

146 It follows that the second limb of the first plea must be rejected.

147 Given that the Commission's assessment of the duration and seriousness of the alleged infringements is not vitiated by error, the first limb of the first plea must also

be rejected. The Commission's error in considering that it was not obliged to take account of the seriousness and duration of the alleged infringements could not have influenced the operative part of the decision and cannot therefore lead the Court of First Instance to annul the contested decision.

Third plea: manifest and deliberate misappraisal of the role of the Commission by reference to that of the national courts in the examination of the existence of a Community interest

Summary of the contested decision

148 The Commission notes at paragraph 153 of the contested decision that, according to the case-law of the Court of First Instance, the fact that a national court or national competition authority is already dealing with a case concerning the compatibility of an agreement or practice with Article 81 or 82 EC is a factor which the Commission may take into account in evaluating the extent to which a case discloses a Community interest (Case T-5/93 *Tremblay and Others* v *Commission* [1995] ECR II-185, paragraph 62).

149 The Commission considers that the centre of gravity of the alleged infringements is in France, since their effects were effectively limited to France (paragraph 156 of the contested decision). Next, it points out that the complainants have the option of enforcing their rights with the courts and the French competition authority. It considers that it is more appropriate for the case to be dealt with at national level (paragraph 159 of the contested decision).

Arguments of the parties

150 The applicants maintain that the Commission was wrong to take the view that the centre of gravity of the alleged infringements was in France and that their effects were limited to France. They argue that the Commission could not have been unaware of the very clear position of the French competition council, which regarded itself as being ill-placed to deal with the subject-matter and concluded that the Commission, which was dealing with the case, ought to purse the investigation into it. The French conseil de la concurrence (Competition Council) has always shown, by repeatedly staying the proceedings since 1990, that it took the view that this case was essentially of Community interest. In addition, the Tribunal de Commerce (Commercial Court), Paris, by staying the proceedings with regard to the aspect of the complaint concerning abuse of a dominant position, indicated that it was also of the view that the Commission was better placed to deal with this subject.

151 The Commission notes that the complaint concerned the French international express mail market and the geographical market for such a product must be regarded as national.

Findings of the Court

152 As a preliminary matter, it must be pointed out that it is common ground between the parties that the complaint does not fall within the exclusive competence of the Commission. Where jurisdiction is shared by the Commission and the national authorities, the Commission is not obliged to carry out an investigation or take a final decision on the existence or otherwise of the alleged infringement (see Case T-77/95 *UFEX and Others* v *Commission*, cited in paragraph 14 above, paragraph 38, and the case-law cited).

153 In that context, the question whether the French Competition Council deemed itself ill-placed to examine the complaint is not relevant. Like the Commission, it has the power to deal with the complaint concerning the alleged infringements and the French courts are competent to award damages with interest in the event of a breach of Article 82 EC. The applicants' argument that they are in a position that may be equated with that in which the Commission has exclusive competence must be dismissed. It is for the applicants, if they are not satisfied with the manner in which their rights have been taken into account by the competition authorities or the national courts, to take the necessary steps with the latter or to examine the national remedies available to them. A subjective attitude on the part of the authorities or the national courts to the effect that the Commission is better placed to deal with the matter, even if it were established, is not such as to require the Commission to pursue the examination of the complaint as if it fell within its exclusive competence.

154 With regard to the reference made by the applicants to paragraphs 12 and 13 of the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ 2004 C 101, p. 54), it must be pointed out that those paragraphs are intended to avoid a situation where a national court adopts a decision that goes against a decision of the Commission. If a national court suspends its proceedings in order to avoid any contradiction between its decision and that taken by the Commission and then decides to reject the complaint for lack of Community interest, the national proceedings will be reopened, as the Commission rightly points out at paragraph 160 of the contested decision, by the date on which the dismissal becomes definitive at the latest.

155 In this context the applicants' interpretation of this notice to the effect that the Commission is obliged to give priority to a case where a national court has stayed proceedings in that case must be rejected. The relevant sentence in paragraph 12 of the notice reads as follows: 'The Commission, for its part, will endeavour to give priority to cases for which it has decided to initiate proceedings within the meaning of Article 2(1) of Commission Regulation (EC) No 773/2004 and that are the subject of national proceedings stayed in this way, in particular when the outcome of a civil dispute depends on them'. Suffice it to state that the applicants did not claim that

the Commission had decided to open proceedings within the meaning of Article 2 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, p. 18). It follows from sub-paragraphs (3) and (4) of Article 2 that neither the exercise of powers of investigation nor the rejection of a complaint require the opening of a procedure.

156 The applicants further attempt to draw an argument from the fact that the Commission cooperated with the French Competition Council and consulted the latter's files. This kind of collaboration is however not of such a nature as to create an exclusive competence on the part of the Commission or to preempt the Commission's decision on the existence of a Community interest in the case.

157 With regard to the applicants' argument that the Commission was wrong to consider that the centre of gravity of the alleged infringements was in France and that their effects had effectively been limited to France, it must be noted that the Commission does not base its reasoning as to the Community interest solely on the criterion of the centre of gravity or on the fact that the French courts were seised of the matter. The Commission first of all established that the alleged infringements had terminated and that there were no continued effects. Then it examined various pieces of evidence in the context of the assessment of the Community interest in pursuing the complaint. The Commission's statement that the effects of the alleged infringements were effectively limited to France is not essential to its reasoning. The Commission did not make a manifest error of assessment in taking into account, in the context of the assessment of the Community interest, the fact that the alleged infringements were mainly making themselves felt in France and that it was open to the complainants to enforce their rights before the French courts. It is therefore not necessary to deal with the question whether the effects were in fact 'limited' to France in this case.

158 In this context, the applicants' argument based on the Community dimension of the market concerned (see paragraph 94 above) must also be rejected. In so far as there

is concurrent competence on the part of the Commission and the national competition authorities, the Community dimension of a market is not such as to oblige the Commission to conclude that an infringement was of a certain seriousness or that there was a Community interest in a given case.

159 The third limb of the first plea must therefore be rejected.

Fourth plea: by referring, at paragraph 167 of the contested decision, to the aspect of the case relating to State aid to justify its dismissal based on an alleged lack of Community interest, the Commission infringed the principles of good faith and of loyal cooperation between the Community institutions (Article 10 EC)

Summary of the contested decision

160 In so far as it is relevant to the fourth limb of the first plea and the second plea, the contested decision contains the following observations.

161 The Commission, at paragraphs 162 to 168 of the contested decision, deals with the issue of how wide the investigation needs to be and the probability of finding an infringement. In this context it argues that, in order to establish abuse of a dominant position in this case, it is bound to check whether the tariffs invoiced by the Post Office for the infrastructure services provided as a subcontractor of SFMI-Chronopost were at least equal to the incremental costs of the provision of those services (that is to say the costs which are exclusively imputed to the provision of a specific service and which cease to exist once the service ceases to be provided), and that such checking requires that the incremental cost to the Post Office of each

element of infrastructure service provided by it to SFMI-Chronopost must be evaluated for the duration of the alleged infringement. Having regard to the absence of any detailed analytical accounts for the Post Office covering its activities during the period from 1986 to 1991, it is, according to the Commission 'extremely difficult to do [so] to the requisite legal standard of precision' (paragraph 164 of the contested decision).

162 In reply to the complainants' argument that the French Court of Auditors analysed and corrected the accounts of the Post Office between 1991 and 2002, the Commission claims that '[i]t is none the less impossible for a similar correction doubtless relevant and sufficient to carry out the task of monitoring the public funds which falls to that [C]ourt, to enable the Commission to adduce [t]he evidence of an infringement of Article 82 to the requisite legal standard' (paragraph 165 of the contested decision).

163 At paragraph 167 of the contested decision, the Commission states as follows:

'[T]he Commission must in any event analyse whether or not there are cross subsidies from the Post Office to its subsidiary Chronopost, in the case [relating to] State aid (currently on referral to the [Court of First Instance]). In those circumstances an analysis in the light of Article 82 would imply a repetition of work by the Commission'. It considers that an evaluation of the cross subsidies in the context of the rules relating to State aid would be more appropriate because it could cover all the practices complained of, including the tax and customs benefits which could have accrued to SFMI-Chronopost.

Arguments of the parties

164 The applicants argue that the Commission is basing its dismissal of the complaint for lack of Community interest on the fact that it will in any event have to examine

the question whether there were cross subsidies in the context of the aspect of the complaint concerning State aid. That is the only possible interpretation of paragraph 167 of the contested decision. In fact, if the Commission had wished to claim that it only needed to examine this question if the Court of First Instance annulled the 1997 decision under Articles 87 EC and 88 EC, the argument would have no relevance to justification of a dismissal of a complaint for lack of Community interest. The applicants consider that, by this argument the Commission is departing from the position it advanced before the Court of First Instance in the cases which gave rise to the judgments in Case T-613/97 *UFEX and Others* v *Commission* of 14 December 2000, cited in paragraph 21 above, and of 7 June 2006, cited in paragraph 23 above.

165 The Commission's argument at paragraph 167 of the contested decision therefore constitutes a manifest infringement of the principle of good faith, and demonstrates a failure to cooperate in good faith with the Court of First Instance, and therefore an infringement of Article 10 EC, interpreted by the case-law as also applying to inter-institutional relations.

166 The Commission's reasoning, which amounts to basing a decision to dismiss on a future and hypothetical event (annulment by the Court of First Instance of the decision relating to the State aid aspect contested in the case which gave rise to the decision of 7 June 2006 in Case T-613/97 *UFEX and Others* v *Commission*, cited in paragraph 23 above), could not be legally validated.

167 The Commission contests the applicants' arguments.

Findings of the Court

168 As a preliminary point it must be observed that the applicants' arguments contain a contradiction. On the one hand they claim that the Commission found, at paragraph

167 of the contested decision, that it was in any event required to consider the question of cross subsidies in the context of the State aids aspect, and not only if the Court of First Instance annulled the decision of 1997 relating to this aspect. Secondly they state that the Commission based the contested decision on a future and hypothetical event, namely the annulment by the Court of First Instance of the 1997 decision.

169 In any event the Commission's argument in the contested decision, that it '[had] in any event [to] analyse whether or not there are cross subsidies from the Post Office to its subsidiary Chronopost, in the case [relating to] State aid (currently on referral to the [Court of First Instance])', cannot mean that the Commission was going to continue its investigation into the State aid aspect of the case, even if the Court of First Instance was going to uphold the decision finding that there was no State aid. This sentence merely means, as the Commission rightly points out, that the question of the existence of cross subsidies comes within the aspect of the complaint relating to State aid and ought therefore to be dealt with in that context.

170 The Commission was entitled to choose to deal with the question whether there were cross subsides only in the context of the State aid aspect of the complaint. First of all it established, in the contested decision, that the infringement was terminated and that there were no continuing consequences, and then it analysed various items of evidence in the context of the examination of the existence of Community interest. It found that there was no Community interest in the examination of the complaint even if the alleged infringements had really been committed.

171 The Commission, which was not obliged to establish whether the infringement had occurred or not, was entitled to refer to the fact that the question whether there were cross subsidies would be dealt with in the context of the aspect relating to State aid. It was not bound either to suspend examination of the aspect relating to the abuse of a dominant position until final judgment was given on the State aid aspect, nor, in the contested decision relating to the abuse of a dominant position aspect, to

repeat the argument in the 1997 decision on the State aid aspect. Such a repetition would in fact have meant a duplication of work since the same questions would have been dealt with in two parallel cases if the decision dismissing the complaint for abuse of a dominant position had been challenged.

172 Finally the question whether there were cross subsidies is not decisive in the reasoning which the Commission follows in the contested decision, since it ruled out any Community interest on the basis of other reasons. The reference to the fact that the question whether there were cross subsidies or not would be analysed in the context of the State aid aspect cannot be regarded as an infringement of the principles of good faith or loyal cooperation between the Community institutions. Nor, as the Commission correctly points out, is it an argument on which the Commission based its reasoning.

173 It follows that the fourth limb of the first plea must be rejected, as must the first plea in its entirety.

2. *Second plea: contradictory reasons relating to two essential aspects of the contested decision*

Arguments of the parties

174 The applicants take the view that the contested decision is based on a lack of reasoning and a contradiction in the grounds which affect an essential element of its reasoning.

175 They argue that there is a lack of reasoning in regard to the Commission's claim in paragraph 165 of the contested decision that there is no possibility that a correction of the accounts similar to that made by the French Court of Auditors could have enabled the Commission to adduce to the requisite legal standard evidence of an infringement of Article 82 EC. The Commission did not offer any explanation as to the alleged difference between the calculations which it ought to have made and those which the Court of Auditors in fact made.

176 Furthermore, the applicants consider that there is a twofold contradiction in the contested decision. On the one hand, the Commission recognises, at paragraph 167 of the contested decision (see paragraph 163 above), contrary to its assertion at paragraph 164 of that decision (paragraph 161 above), that it is perfectly able to check the level of cover of the Post Office's costs. On the other hand, the Commission states, at paragraph 167 of the contested decision, contrary to what it says at paragraph 164 of that decision, that the reason why it did not check the level of coverage of the Post Office's costs in the light of Article 82 EC was not that it could not do so but rather that this would have represented a duplication of the Commission's work since it would be bound to carry out this verification in relation to the State aid aspect of the complaint. The applicants consider that this amounts to a contradiction equivalent to a failure to state reasons.

177 The Commission challenges the applicants' arguments.

Findings of the Court

178 It is settled case-law that, in order to assess the Community interest in further investigation of a case, the Commission must take account of the circumstances of the case, and in particular of the legal and factual particulars set out in the complaint referred to it. In particular, it must weigh the significance of the alleged infringement as regards the functioning of the common market against the probability of its being

able to establish the existence of the infringement and the extent of the investigative measures necessary in order to fulfil in the best conditions its task of ensuring the observance of Articles 81 EC and 82 EC (Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 86, *Tremblay and Others* v *Commission,* cited in paragraph 148 above, paragraph 62, and Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service and Others* v *Commission* [1999] ECR II-93, paragraph 46).

179 Therefore, the difficulty of being able to establish an infringement to the requisite legal standard in order to adopt a decision establishing the infringement is a matter which may be taken into account in the context of the assessment of the Community interest.

180 In this case, the applicants do not challenge the findings, at paragraphs 164 and 165 of the contested decision, that SFMI-Chronopost's accounts should have been corrected in their entirety from 1986 in order to establish the level of coverage of costs and that the Post Office did not have detailed analytical accounts covering its activities from 1986 to 1991 (even if the applicants argue that the lack of analytical accounts continued until 2001 at least).

181 The Commission's argument that a correction such as that made by the French Court of Auditors could not entitle it to adduce to the requisite legal standard evidence of an infringement of Article 82 EC is sufficiently reasoned, in that the Commission refers to the difference between the task conferred on the Court of Auditors, which is to supervise the use of public funds, and that entrusted to the Commission in examining whether there has been such an infringement. The reason why the Court of Auditors should have assessed the incremental cost of each infrastructure service which the Post Office had supplied to SFMI-Chronopost to fulfil its duty of supervision in respect of the use of public funds is not clear.

182 The applicants merely produced the summary and a page of the report of the French Court of Auditors. The fact that they indicate the address of an internet site on which the report is published cannot be regarded as equating to the production of the complete report. In any event the applicants did not state from which other parts of the report it might appear that a correction of the accounts such as that made by the Court of Auditors was sufficient to demonstrate an infringement of Article 82 EC. It appears from the page added to the file that the Court of Auditors calculated by means of analytical accounting that the results of the parcel business managed by the internal operator were negative for the period 1998 to 2002. However it did not submit the details of the calculation made. In those circumstances, the Commission was correct to presume that similar calculations could not be sufficient to establish an infringement of Article 82 EC. Furthermore, the Court of Auditors states that the results of the parcel business were not known until recently since the business was only distinguished from post in the accounts as from 1998. However, the Commission should have corrected the accounts for the period from 1986 to 1991, that is, for a period during which the Post Office did not have detailed analytical accounts. Even if, as the applicants claim, a correction similar to that made by the Court of Auditors had been sufficient to establish an infringement of Article 82 EC, it was no exaggeration to say that it would have been an 'extremely difficult' task to complete for the period from 1986 to 1991 (paragraph 164 of the contested decision).

183 The Commission was entitled to choose to reject the complaint relating to the abuse of a dominant position for lack of a Community interest by relying on the difficulty of establishing the existence of cross subsidies as a factor among others, instead of suspending the case until the Community courts had delivered their final judgment on the State aid aspect. Furthermore, as the Commission points out, this is not an essential part of its reasoning.

184 With regard to the alleged contradiction claimed by the applicants, it is sufficient to note that the words 'extremely difficult' do not mean 'impossible', as the Commission rightly points out. There is therefore no contradiction between paragraphs 164 and 167 of the contested decision.

185 Therefore the second plea must be dismissed.

3. *Third plea: various errors of law in regard to dismissal of the part of the complaint based on Articles 86 EC, 82 EC, Article 3(g) EC and Article 10 EC*

Arguments of the parties

186 The applicants maintain that, in the complaint, in addition to the conduct alleged against the Post Office under Article 82 EC, they criticised the State measures adopted by the French State intended to favour the unlawful actions. State measures such as privileged customs procedures and fiscal advantages constitute measures seeking to favour the extension of the dominant position of the Post Office from the basic mail service market to the express mail market by means of benefits awarded to SFMI-Chronopost.

187 In that connection, the Commission infringed Article 6 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on hearings in certain proceedings based on Articles [81] and [82] of the Treaty (OJ 1998 L 354, p. 18), by relying, in paragraph 46 of the contested decision, on grounds on which the complainants did not submit argument. It also infringed the rules relating to the application of Article 86 EC, Article 3(g) EC and Articles 10 EC and 82 EC, by claiming, in paragraph 46 of the contested decision, that the measures concerned cannot be caught by Article 86 EC in conjunction with Article 82 EC, since, according to the Commission, they were adopted in exercise of the 'public authority' of the Member State concerned. Finally, the contested decision infringes the rules of law relating to the assessment of the Community interest in regard to rejection of a complaint based on Articles 86 EC, 82 EC, 3(g) EC and 10 EC, and, in the alternative, is unsubstantiated on this point.

188 The Commission maintains that this plea is inadmissible, by reference to the judgment in Case C-141/02 P *Commission* v *max.mobil* [2005] ECR I-1283, the '*max.mobil* judgment'.

Findings of the Court

189 According to the case-law of the Court of Justice, it follows from the wording of Article 86(3) of the Treaty and from the scheme of that article as a whole that the Commission is not obliged to bring proceedings within the terms of those provisions, as individuals cannot require the Commission to take a position in a specific sense. A decision by the Commission to refuse to act on a complaint requesting it to take action is not such as to constitute a measure that is capable of being the subject of an action for annulment (*max.mobil* judgment, cited in paragraph 188 above, paragraphs 69 and 70, *Piau* v *Commission* and order of the Court of Justice of 23 February in Case C-171/05 P *Piau* v *Commission*, not published in the ECR, paragraph 53).

190 The applicants' arguments as to the alleged procedural differences between the present cased and the *max.mobil* case are not pertinent.

191 As to the argument that the applicants submitted the whole of their complaint under Article 3(2) of Regulation No 17, and that the Commission dealt with it as such, it should be stressed that a complainant submitting a complaint on an inappropriate legal basis cannot by virtue of that fact benefit from the opportunity of bringing an action against the Commission's refusal to pursue the examination of a complaint directed against a State. Regulation No 17 is not applicable to Article 86 EC (*max.mobil*, cited in paragraph 188 above, paragraph 71). The same holds true of Council Regulation (EC) No 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1), which entered into force on 1 May 2004. Even if the Commission treated the complaint as a whole as a complaint coming under Article 3(2) of Regulation

No 17, that could not alter the legal framework. In any event, any error by the Commission as to applicable legal basis would not be such as to confer on a complainant the right to bring an action before the Community courts against the rejection of a complaint requesting the Commission to act under Article 86(3) EC.

192 The applicants also claim that they did not bring before the Commission a complaint solely on the basis of an infringement by the French Republic of Article 86 EC, but that the complaint was directed against the Post Office for a separate breach of Article 82 EC, and against the French Republic for infringement of the rules relating to the application of Articles 86 EC, 82 EC, of Article 3(g) EC in conjunction with Article 10 EC. In that connection, it should be stressed that the complaint that gave rise to the *max.mobil* case was also not based only on infringement of Article 86 EC, but on an infringement of the provisions of Article 82 EC in conjunction with Article 86(1) EC (*max.mobil*, cited in paragraph 188 above, paragraph 4). In fact, it is apparent from the wording of Article 86(1) EC that that provision must always be read in conjunction with another treaty provision. In regard to the citation of Article 10 EC, read with Article 3(g), the Commission was correct to point out, in paragraph 170 of the contested decision, that Article 86 EC constituted a *lex specialis*. The mere citation of those provisions, defining the obligations of the Member States in a general manner, is not such as to confer on a complainant a right of action against decisions falling within the scope of Article 86 EC.

193 Nor, finally, may the fact that the complainants combined a complaint directed against a Member State with a complaint against an undertaking confer on them entitlement to challenge the part of the decision concerning the complaint directed against the Member State. Since the Commission is not obliged to initiate an action under Article 86 EC, plainly individuals cannot require it to act in such a way by combining a complaint directed against a Member State with a complaint against an undertaking.

194 The applicants also claim that the Commission never disputed the fact that it was operating entirely within the context of Regulation No 2842/98 then of Regulation No 773/2004. They emphasise that the Commission declared, in the contested decision, that it did not seek to pursue a more thorough investigation of the complaint in light of Article 86 EC, Article 3(g) EC and Article 10 EC for the same reasons that there was no Community interest in pursuing a more thorough investigation under Article 82 EC. In that regard, suffice it to state that those regulations, like Regulations No 17 and No 1/2003, are not applicable to Article 86 EC and do not become so applicable owing to the sole fact that the Commission may have considered itself under an obligation to apply them (before delivery of the judgment in *max.mobil*, cited in paragraph 188 above). Moreover, the fact that the Commission mentioned the raisons why it did not intend to act on the complaint cannot alter the legal classification of that part of the decision, which constitutes an act not open to challenge. Similarly, the fact that the Commission did not distinguish between the various aspects of the contested decision by indicating to the complainants their right of action does not alter the legal nature of the act.

195 The applicants' argument that the new procedural situation in the present case is comparable with that in Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, must be rejected. In that regard it must be noted that, in that case, the complaint was solely directed against undertakings and not against a Member State and that Article 86 EC did not form the basis of the complaint. It was only in the context of the examination of that complaint that the Commission examined the question whether Article 86(2) EC precluded application of Article 81(1) EC. That procedural situation was therefore different from that of the present case.

196 Accordingly, the third plea must be rejected as inadmissible.

197 It follows from all the foregoing that the action must be rejected.

Costs

198 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However under the first paragraph of Article 87(3), where the circumstances are exceptional the Court of First Instance may order that the costs be shared or that each party bears its own costs.

199 In this case the application must be rejected and both the Commission and the interveners asked that the applicants be required to pay the costs. However, account must be taken of the fact that the Commission interpreted its obligations wrongly in the contested decision by claiming that it was not required to assess the seriousness and duration of the alleged infringements (see paragraph 76 above). Even if that error could not have had any influence on the operative part of the decision and cannot therefore cause the Court to annul the contested decision (see paragraph 147 above), it was none the less such as to induce the applicants to challenge the decision before the Court. For that reason the Court considers that the decision that the Commission must bear its own costs properly takes into account the circumstances of the case.

200 However under the first sentence of Article 87(5) of the Rules of Procedure, a party who discontinues or withdraws from proceedings is to be ordered to pay the costs if they have been applied for in the observations of the other party on the discontinuance. In this case, since CRIE withdrew its application, the Commission asked that its costs be borne by CRIE. According to the second sentence of that article, upon application by the party who discontinues or withdraws from proceedings, the costs are to be borne by the other party if this appears justified by the conduct of that party. However, in this case, this second sentence is not applicable, since CRIE did not make any submissions as to costs in the letter of withdrawal. CRIE must therefore be ordered to pay one quarter of the costs borne by the Commission.

201 With regard to the costs incurred by the interveners, it must be observed that they did not make any submission as to the costs following the withdrawal of CRIE. According to the third indent of Article 87(5) of the Rules of Procedure, if costs are not applied for, the parties shall bear their own costs. It must therefore be ruled that Chronopost and the Post Office are to bear one quarter of their own costs. Furthermore, the Court considers that the applicants must be ordered to pay three quarters of the costs incurred by the interveners, as they were asked for in the interveners' submissions.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Removes CRIE SA from the list of applicants;

2. Dismisses the action;

3. Orders Union française de l'express (UFEX), DHL Express (France) SAS and Federal express international (France) SNC to bear their own costs, three quarters of the costs of Chronopost SA and of the Post Office.

Chronopost and the Post Office are ordered to bear one quarter of their own costs. In addition to its own costs, CRIE is ordered to bear one quarter of the Commission's costs. The Commission is ordered to bear three quarter of its own costs.

Pirrung Forwood Pelikánová

Delivered in open court in Luxembourg on 12 September 2007.

E. Coulon J. Pirrung

Registrar President

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