JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
16 September 1998 *

In Cases T-133/95 and T-204/95,

International Express Carriers Conference (IECC), a professional organisation established under Swiss law, having its headquarters in Geneva (Switzerland), represented by Éric Morgan de Rivery, of the Paris Bar, and Jacques Derenne, of the Brussels and Paris Bars, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 Avenue Guillaume,

applicant,

v

Commission of the European Communities, represented initially by Francisco Enrique González-Díaz, of its Legal Service, and Rosemary Caudwell, a national official on secondment to the Commission, and subsequently by Rosemary Caudwell and Fabiola Mascardi, a national official on secondment to the Commission, acting as Agents, assisted by Nicholas Forwood QC, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the cases: English.

supported by,

in Cases T-133/95 and T-204/95,

United Kingdom of Great Britain and Northern Ireland, represented by Stephanie Ridley, of the Treasury Solicitor's Department, and, during the oral procedure, also by Nicholas Green QC, acting as Agents, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

Deutsche Post AG, represented by Dirk Schroeder, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 Rue Goethe,

and

The Post Office, represented by Ulick Bourke, Solicitor of the Supreme Court of England and Wales, and, during the oral procedure, also by Stuart Isaacs QC and Sarah Moore, Barrister, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 Rue Goethe,

and, in Case T-133/95,

La Poste, represented by Hervé Lehman and Sylvain Rieuneau, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

interveners,

APPLICATIONS for, in substance, the annulment of the Commission decisions of 6 April 1995 and 14 August 1995, by which the Commission definitively rejected that part of the complaint filed by the applicant on 13 July 1988 against the interception, pursuant to Article 25 of the Universal Postal Union Convention, by a number of public postal operators, of mail which had been the subject of remailing,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Third Chamber, Extended Composition),

composed of: B. Vesterdorf, President, C. P. Briët, P. Lindh, A. Potocki and J. D. Cooke, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 13 May 1997,

gives the following

Judgment

The facts

The International Express Carriers Conference (IECC) and remail

1 The International Express Carriers Conference (IECC) is an organisation representing the interests of certain undertakings which provide express mail services. Its members offer, *inter alia*, 'remail' services, consisting in the transportation of mail originating in Country A to the territory of Country B to be placed there with the local public postal operator ('public postal operator') for final transmission by the latter on its own territory or to Country A or Country C.

2 It is customary to distinguish between three categories of remail services:

— 'ABC remail', where mail originating in Country A is transported by private companies to Country B and put into the postal system there for forwarding via the traditional international postal system to Country C, where the final addressee resides;

— 'ABB remail', where mail originating in Country A is transported by private companies to Country B and put into the postal system there for delivery to final addressees in Country B; and

— 'ABA remail', where mail originating in Country A is transported by private companies to Country B and put into the postal system there in order to be

sent via the traditional international postal system back to Country A, where the final addressee resides.

3 To those three traditional types of remail should be added so-called 'non-physical remail'. In this form of remail, information from Country A is sent electronically to Country B, where, with or without processing, it is printed, transported and put into the postal system of Country B or Country C for forwarding via the traditional international postal system to Country A, B or C, where the final addressee resides.

Terminal dues and the Universal Postal Union Convention

4 The Universal Postal Union (UPU) Convention, adopted on 10 July 1964 under the aegis of the United Nations Organisation and to which all Member States of the European Community have acceded, provides the framework for relations between all postal administrations worldwide. It was within this framework that the European Conference of Postal and Telecommunications Administrations ('CEPT') was established, to which all the European postal administrations against which the applicant has complained belong.

5 In any postal system, the sorting of 'inward' mail and its delivery to final addressees involve significant costs for public postal operators. For that reason, UPU members adopted in 1969 a system of fixed compensation rates for each type of mail, referred to as 'terminal dues', thereby reversing a principle in force since the UPU was founded, under which each public postal operator bore the costs involved in sorting and delivering inward mail without passing on such costs to the public postal operators of the countries in which that mail originated. The economic value of the delivery service provided by the various postal administrations, their cost structures and the charges invoiced to customers might vary widely. The difference between the prices charged for the delivery of national and international

mail in the various Member States and the level of terminal dues in relation to the various prices in force at national level lie at the root of the remail phenomenon. Remail operators seek, *inter alia*, to take advantage of those price differences by proposing to commercial companies to transport their mail to the public postal operators which offer the best quality/price ratio for a particular destination.

6 Article 23 of the 1984 UPU Convention, now Article 25 of the 1989 UPU Convention, provides as follows:

'1. A member country shall not be bound to forward or deliver to the addressee letter-post items which senders resident in its territory post or cause to be posted in a foreign country with the object of profiting by the lower charges in force there. The same applies to such items posted in large quantities, whether or not such postings are made with a view to benefiting from lower charges.

2. Paragraph 1 shall be applied without distinction both to correspondence made up in the country where the sender resides and then carried across the frontier and to correspondence made up in a foreign country.

3. The administration concerned may either return its items to origin or charge postage on the items at its internal rates. If the sender refuses to pay the postage, the items may be disposed of in accordance with the internal legislation of the administration concerned.

4. A member country shall not be bound to accept, forward or deliver to the addressees letter-post items which senders post or cause to be posted in large quantities in a country other than the country in which they reside. The adminis-

tration concerned may send back such items to origin or return them to the senders without repaying the prepaid charge.'

The IECC's complaint and the 1987 CEPT Agreement

7 On 13 July 1988 the IECC lodged a complaint with the Commission under Article 3(2) of Council Regulation No 17 of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty) (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17'). The complainant essentially alleged, first, that a number of public postal operators established in the European Community and in non-member countries, meeting in Berne in October 1987, had concluded a price-fixing agreement in regard to terminal dues ('the CEPT Agreement') and, second, that a number of public postal operators were attempting to operate a market-allocation scheme on the basis of Article 23 of the UPU Convention with a view to declining delivery of mail posted by customers with public postal operators in countries other than those in which they resided.

8 It is not disputed that, on 17 January 1995, 14 public postal operators, 12 of them from the European Community, signed a preliminary agreement on terminal dues designed to replace the 1987 CEPT Agreement. The new agreement, referred to as 'the REIMS Agreement' (System for the Remuneration of Exchanges of International Mails between Public Postal Operators with a Universal Service Obligation), provides essentially for a system whereby the receiving post office would charge the originating post office a fixed percentage of the former's domestic tariff for any post received. A definitive version of this agreement was signed on 13 December 1995 and notified to the Commission on 19 January 1996 (OJ 1996 C 42, p. 7).

9 The first part of the IECC's complaint concerned the application of Article 85 of the EC Treaty to the CEPT Agreement.

10 In the second part of its complaint, the IECC claimed that a number of public postal operators were applying a system designed to allocate national postal markets on the basis of Article 23 of the UPU Convention. The IECC claimed that the public postal operators in the United Kingdom, Germany and France (hereinafter 'the Post Office', 'Deutsche Post' and 'La Poste' respectively) were also attempting to dissuade commercial companies from using the services of private remail operators such as the IECC's members or that they were trying to persuade other public postal operators not to cooperate with such private operators, as becomes apparent from, *inter alia*, a letter which the Post Office sent in January 1987 to a number of public postal operators, including one within the Community.

11 The IECC further alleged that, in the spring of 1988, Deutsche Post had attempted to discourage mailers in Germany from using remail by citing Article 23 of the UPU Convention and by intercepting and returning inbound international mail destined for addressees residing in Germany.

12 At the Commission's request, the IECC sent to it an additional memorandum on 2 June 1989 dealing with Article 23(1) of the UPU Convention and, in particular, the problem of ABA remail.

13 The IECC also supplied information in October 1989 from the company TNT Skypac concerning the interception by La Poste of mail destined for Africa.

The Commission's handling of the complaint

14 The public postal operators cited in the applicant's complaint submitted their answers to the questions put by the Commission in November 1988. Between June 1989 and February 1991, copious correspondence was exchanged between, on the

one hand, the IECC and, on the other, various officials in the Directorate-General for Competition (DG IV) and the cabinets of Commission Members Bangemann and Brittan.

15 In April 1989 the Post Office assured the Commission that it had not itself used the powers conferred by Article 23(4) of the UPU Convention, and had no intention of doing so in the future. In June 1989 the Commission was informed by Deutsche Post that the latter was prepared to abandon the use of that provision, and in October 1989 made it known that it was no longer applying it.

16 On 18 April 1991 the Commission informed the IECC that it 'had decided to initiate proceedings under the provisions of Council Regulation 17/62 [...] on the basis of Articles 85(1) and 86 of the EC Treaty'.

17 On 7 April 1993 the Commission informed the IECC that it had adopted a statement of objections on 5 April 1993, and that this was to be sent to the public postal operators concerned.

18 The Commission sent a letter to the IECC on 13 July 1994 in which it stated: '[...] I am, however, concerned about the increasing number of incidents in which mail which was physically created in, e. g., the Netherlands, for the purpose of being sent to German customers, is being intercepted and declared "non-physical ABA remail" by [Deutsche Post ...]'.

19 On 26 July 1994 the IECC called on the Commission, pursuant to Article 175 of the Treaty, to send it a letter under Article 6 of Commission Regulation No 99/63 of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47, hereinafter 'Regulation No 99/63'), should the Commission consider it unnecessary to adopt a decision prohibiting the actions of the public postal operators.

20 On 23 September 1994 the Commission sent a letter to the IECC pursuant to Article 6 of Regulation No 99/63 concerning that part of the complaint which related to the CEPT Agreement. With regard to the interception of non-physical ABA remail, the Commission stated that its services 'regard this conduct as very serious and intend to have any such abuse brought to an end'.

21 On 23 November 1994 the IECC called on the Commission to define its position on the complaint as a whole, pursuant to Article 175 of the Treaty. It also requested access to the case-file.

22 Since it formed the view that the Commission had not defined its position within the meaning of Article 175 of the Treaty, the IECC lodged an application on 15 February 1995 for a declaration of failure to act, which was registered as Case T-28/95.

23 On 17 February 1995 the Commission sent to the IECC the decision rejecting its complaint as regards the application of Article 85 of the Treaty to the CEPT Agreement and a letter under Article 6 of Regulation No 99/63 informing the applicant of the reasons why the Commission could not accede to its request concerning interception of mail under Article 23 of the UPU Convention.

24 On 22 February 1995 the IECC sent to the Commission its observations on that letter. It commented, *inter alia*, that:

'So far as the IECC is aware, all of the examples of restriction cited by the IECC represented implementation of Article 23(4) of the 1984 Universal Postal Convention against ABC remail. Since your February 17 letter makes no reference to restrictions on ABC remail, the IECC cannot regard it as an adequate justification for rejecting the IECC's complaint.'

25 On 6 April 1995 the Commission addressed to the applicant a decision concerning the second aspect of the complaint, in which, *inter alia*, it stated:

'4. The comments subsequently submitted by your legal representative, [...], on 22 February 1995 do not, for the reasons set out below, contain any arguments which would justify a change in the Commission's position. The purpose of the present letter is to inform you about the final decision which the Commission has reached with regard to the allegations in your complaint relating to the interception of mail on the basis of Article [23] of the UPU Convention.

5. Summarised briefly, the Commission's letter sent to you on 17 February 1995 pursuant to Article 6 of Regulation No 99/63 identified four types of mail items which have been subject to interception on the basis of the UPU Convention, namely commercial physical ABA remail, non-commercial or private physical ABA remail, so-called "non-physical" ABA remail [...] and normal cross-border mail [...]

6. With respect to commercial physical ABA remail, the Commission's position is that to the extent the commercial collection of mail from residents in country B for subsequent remailing in country A to final destinations in country B constitutes a circumvention of the national monopoly for domestic letter delivery laid down by the law of country B, the interception of such mail when it is re-entering country B may be considered to be legitimate action under the current circumstances and therefore does not constitute an abuse of a dominant position in the sense of Article 86 of the EC Treaty. [...] [The] Commission [...] has [...] specifically noted that such circumvention of the national monopoly is "rendered profitable because of the present unbalanced levels of terminal dues" and that it is precisely for this reason that some form of protection is justifiable at this stage. [...]

7. With respect to the interception of non-commercial physical ABA remail, "non-physical" remail and normal cross-border mail, the Commission's position is

that to the extent the IECC's members do not engage in activities involving this type of mail, they are not harmed in their business activities by the interception of such mail and thus have no legitimate interest as required pursuant to Article 3(2) of Regulation No 17 for applications to the Commission with respect to infringements of the competition rules.

[...] In the Commission's view [...] so-called "non-physical remail" involves the following scenario: a multinational company, for example a bank, [...] sets up a central printing and mailing facility in one particular Member State "A"; information is sent by electronic means from all the bank's subsidiaries and branches to the central service centre, where the information is transformed into actual physical letter-items, e. g. bank statements, which are then prepared for postage and submitted to the local postal operator [...]

[...] [There] are in our view no indications as to how the IECC's members could be involved in this type of arrangement. [...]

8. For the above considerations I inform you that your application of 13 July 1988 pursuant to Article 3(2) of Regulation No 17/62, as far as the interception of commercial physical ABA remail, non commercial physical ABA remail, "non-physical" remail and normal cross-border mail is concerned, is hereby rejected.'

26 On 12 April 1995 the Commission addressed to the IECC a letter pursuant to Article 6 of Regulation No 99/63 regarding application of the competition rules to the interception of ABC remail. The IECC replied to that letter on 9 June 1995.

27 On 14 August 1995 the Commission adopted a final decision concerning the interception of ABC remail by certain public postal operators, in which it stated *inter alia* as follows:

'(A) Interception of ABA remail

3. [...] [You] have received a letter dated 6 April 1995 [...] indicating that the part of your complaint relating to the interception of commercial physical ABA remail, non-commercial physical ABA remail, "non-physical" remail and normal cross-border mail has been rejected. [...]

(B) Interception of ABC remail

6. The letter from [the IECC] of 9 June 1995 states that (i) the Commission no longer has jurisdiction to take a further decision in this matter, and (ii) even if the Commission had such jurisdiction, the rejection of this aspect of the complaint [...] was inappropriate for a number of reasons. [...]

[...]

11. On 21 April 1989 the UK Post Office gave assurances to the Commission that it had not itself used powers under article 23(4) UPU, nor did it intend in future to do so. Likewise, the then German Bundespost Postdienst informed the Commission on 10 October 1989 that it no longer applied Article 23(4) to ABC remail between Member States. [...]

13. Although it is true that the Commission may adopt a formal prohibition decision regarding anti-competitive behaviour which has in the meantime been terminated, it is not under an obligation to do so and will decide whether such a step is appropriate in the specific circumstances of an individual case. In the case at hand there is no evidence that the two postal operators referred to in the IECC's complaint of 1988 [...] have not abided by the undertaking which they each gave to the Commission in 1989 to refrain from invoking Article 23(4) with respect to ABC remail. [...]

14.5. [...] The Commission would point out that the mere existence of Article 23/25 of the UPU is not necessarily contrary to the Community competition rules: it is only the exercise of the possibilities of action granted by Article 23/25 in certain circumstances — i. e. between Member States — which may constitute a breach of those rules. [...]

15. The IECC's request that strict penalties be imposed on the postal administrations in order to bring an end to the violations of EC competition law is inconsistent with the IECC's inability to produce any evidence that the infringements are continuing or that there is a real danger of their resumption. [...]

[...]

18. [...] The French Post Office replied on 24 October 1990 maintaining that it believed [...] use of Article 23 UPU to be legitimate under Community law. The incident [referred to in paragraph 13 of the present judgment] was subsequently referred to in the Statement of Objections of 5 April 1993 [...]: in its response to the Statement of Objections, the French Post Office reiterated its earlier position that the incident was not incompatible with Community law.

19. In the circumstances of the case, taking into account the isolated nature of the incident and that there is no evidence of recurrence of the behaviour, the Commission does not believe that it is necessary to take a prohibition decision against the French Post Office. [...]'.

Procedure

28 By application lodged at the Registry of the Court of First Instance on 20 June 1995, the applicant brought an action under Article 173 of the Treaty seeking annulment of the decision of 6 April 1995. That action was registered as Case T-133/95.

29 By application lodged at the Registry of the Court of First Instance on 28 October 1995, the applicant brought an action under Article 173 of the Treaty seeking annulment of the decision of 14 August 1995. That action was registered as Case T-204/95.

30 By orders of 6 February 1996, the President of the Third Chamber (Extended Composition) of the Court of First Instance granted leave to the United Kingdom, the Post Office, La Poste and Deutsche Post to intervene in support of the form of order sought by the Commission in Case T-133/95.

31 By orders of 13 May 1996, the President of the Third Chamber (Extended Composition) of the Court of First Instance granted leave to the United Kingdom, the Post Office, La Poste and Deutsche Post to intervene in support of the form of order sought by the Commission in Case T-204/95.

32 On 7 August 1996 La Poste requested withdrawal of its intervention in Case T-204/95. On 26 November 1996 the President of the Third Chamber (Extended Composition) of the Court of First Instance made an order removing La Poste as an intervener in Case T-204/95.

33 Following the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure. As part of the measures of procedural organisation, it called on a number of parties to submit documents and reply to questions in writing or orally at the hearing. The parties complied with those requests.

34 In accordance with Article 50 of the Rules of Procedure of the Court of First Instance, Cases T-28/95, T-110/95, T-133/95 and T-204/95, all brought by the same applicant and related in their subject-matter, were joined for the purposes of the oral procedure by order of the President of the Third Chamber (Extended Composition) of the Court of 12 March 1997.

35 The parties presented oral argument and replied to the questions put by the Court at the hearing on 13 May 1997.

36 In accordance with Article 50 of the Rules of Procedure, and after hearing the parties, the Court decided to join Cases T-133/95 and T-204/95 for the purposes of judgment.

37 On 26 September 1997 the applicant requested that the oral procedure be re-opened pursuant to Article 62 of the Court's Rules of Procedure. At the Court's request, the Commission, the Post Office, La Poste and Deutsche Post expressed their view that it was unnecessary to reopen the oral procedure. The applicant sought once again to have the oral procedure reopened on 26 February 1998. The Court takes the view that, in the light of the documents produced by the applicant, it is not appropriate to accede to those requests. The new factors on which the applicant relies in support of those requests either do not contain any

conclusive element for the resolution of the proceedings or are limited to establishing the existence of facts which clearly postdate the adoption of the contested decisions and which cannot therefore affect their validity.

Forms of order sought by the parties

In Case T-133/95

38 The applicant submits that the Court should:

— annul the Commission decision of 6 April 1995;

— order such further or other relief as the Court considers appropriate in order for the Commission to comply with Article 176 of the Treaty;

— order the Commission to pay the costs.

39 In its observations on the statements in intervention, the applicant further claims that the Court should:

— declare inadmissible the statement in intervention of the Post Office;

— order the interveners to pay the costs relating to the observations on their interventions;

— order production of a number of documents.

40 The Commission claims that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

41 Deutsche Post submits that the Court should:

— dismiss the application;

— order the applicant to pay the costs of its intervention.

42 La Poste submits that the Court should:

— dismiss the application;

— order the applicant to pay the costs of its intervention.

43 The United Kingdom and the Post Office submit that the application should be dismissed.

In Case T-204/95

44 In its application, the applicant claims that the Court should:

— declare the Commission's letter of 14 August 1995 to be non-existent;

— in the alternative, annul the Commission decision of 14 August 1995 and order such further or other relief as the Court considers appropriate in order for the Commission to comply with Article 176 of the Treaty;

— order the Commission to pay the costs.

45 In its reply, the applicant further submits that the Court should:

— declare the Commission's letter of 12 April 1995 to be non-existent;

— order the Commission, pursuant to Articles 64 and/or 65 of the Rules of Procedure, to produce, before the hearing, a number of documents on which it relied in its decision or in its defence, or, at least, in the event that confidentiality is raised, to allow the Court to examine those documents.

46 In its observations on the statements in intervention, the applicant also claims that the Court should:

— declare inadmissible the statement in intervention of the Post Office;

— order the interveners to pay the costs relating to the observations on their interventions;

— order production of a number of documents.

47 The Commission submits that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

48 Deutsche Post submits that the Court should:

— dismiss the application;

— order the applicant to pay the costs, including those of Deutsche Post.

49 The Post Office and the United Kingdom submit that the application should be dismissed.

Admissibility of the Post Office's statements in intervention

50 According to the applicant, the statements in intervention lodged by the Post Office in Cases T-133/95 and T-204/95 do not comply with Article 116(4)(a) of the Rules of Procedure in so far as they do not indicate in support of which party they were made and must for that reason be declared inadmissible.

51 Under the third paragraph of Article 37 of the EC Statute of the Court of Justice and Article 116(4)(a) of the Rules of Procedure of the Court of First Instance, the form of order sought in a statement in intervention may have no purpose other than to support the form of order sought by one of the main parties. It is clear from the Post Office's statements in intervention that their purpose was to support the forms of order sought by the Commission, notwithstanding the fact that there were no formal submissions to that effect. The applicant could not therefore have been in any serious doubt as to the scope or purpose of the statements in intervention. It should also be noted that the Post Office's applications to intervene contained, in accordance with Article 115(2)(e) of the Court's Rules of Procedure, an indication of the forms of order sought in support of which leave to intervene was being applied for, and that the abovementioned orders of 6 February 1996 and 13 May 1996, in paragraph (1) of their respective operative parts, granted leave to the Post Office to intervene 'in support of the form of order sought by the defendant'. In those circumstances, the submission of the applicant must be rejected.

Admissibility of the claim for an order requiring the Commission to adopt appropriate measures to comply with its obligations under Article 176 of the Treaty

52 According to settled case-law, it is not the function of the Community judicature to issue directions to the Community institutions or to substitute itself for those institutions when exercising its powers of review. It is for the institution concerned, under Article 176 of the Treaty, to adopt the measures required to give effect to a judgment delivered in an action for annulment.

53 This claim is therefore inadmissible.

Substance

54 It is necessary to determine first of all (A) the scope of the decisions of 6 April 1995 and 14 August 1995 since the parties hold divergent views in this regard, then (B) to examine the pleas in law specific to Case T-133/95 and (C) to examine the forms of order sought and pleas in law relating to Case T-204/95. Finally, (D) the pleas alleging misuse of powers and breach of certain general principles of law, raised in the two cases, will be considered together.

A — *Scope of the decisions of 6 April 1995 and 14 August 1995*

Arguments of the parties

55 In its reply in Case T-133/95, the applicant states that, according to paragraphs 1 to 4 of the decision of 6 April 1995, that decision relates not only to interceptions of ABA remail but also to interceptions of ABC remail. There was therefore nothing in that decision to suggest that this latter type of interception would be the subject of the decision of 14 August 1995. Moreover, in its statement of defence in that case, the Commission acknowledged that its letter of 17 February 1995, pursuant to Article 6 of Regulation No 99/63, related to the entire second part of the complaint.

56 The Commission, the applicant argues, is seeking to limit *a posteriori* the scope of the decision of 6 April 1995 with the sole objective of rectifying the absence of a statement of reasons by which it is vitiated. Thus, the applicant had since 22 February 1995 drawn the Commission's attention to the fact that it had neglected ABC remail in its letter of 17 February 1995.

57 The Commission points out that it had omitted, in its letter of 17 February 1995, to deal with the aspect of the complaint relating to ABC remail, as the applicant had pointed out to it in its letter of 22 February 1995. This is why the decision of 6 April 1995 did not deal with this aspect of the complaint, but only with the other forms of interception.

Findings of the Court

58 It follows from paragraph 8 of the decision of 6 April 1995, which constitutes the conclusion thereof, and from paragraphs 5 to 7, which set out the reasoning of that decision, that it is limited to addressing the aspects of the complaint relating to interception of commercial physical ABA remail, non-commercial physical ABA remail, non-physical remail and normal cross-border mail, as set out in the Commission's letter of 17 February 1995. Furthermore, the applicant had itself, in its letter of 22 February 1995 (cited above in paragraph 24), stressed the limited scope of the Commission's letter of 17 February 1995 sent pursuant to Article 6 of Regulation No 99/63 which preceded the adoption of the decision of 6 April 1995.

59 It thus follows from a reading of the decision of 6 April 1995 that the part of the complaint relating to ABC remail was not covered by that decision.

60 The fact that this omission may have resulted from oversight or even been intentional on the part of the Commission cannot alter the objective delimitation of the scope of the decision of 6 April 1995.

61 Furthermore, it follows from the actual wording of the decision of 14 August 1995 that that decision relates only to the Commission's final assessment of the part of the complaint relating to ABC remail.

62 The applicant's objections regarding the scope of the decisions of 6 April 1995 and 14 August 1995 must therefore be rejected.

B — *Pleas in law specific to Case T-133/95*

The first plea in law, alleging breach of Article 190 of the Treaty

Arguments of the parties

63 The applicant argues in substance that the decision of 6 April 1995 is vitiated by a defective or inadequate statement of reasons with regard to the rejection of those aspects of its complaint concerning ABC remail and non-physical remail.

64 The applicant also submits that neither the statement of objections nor the letter of 17 February 1995 sent pursuant to Article 6 of Regulation No 99/63, nor the decision of 6 April 1995 contain anything to indicate that the Commission examined the part of its complaint in which the applicant stated that Article 23 of the UPU Convention was implemented by means of agreements concluded for that purpose by the public postal operators, contrary to Article 85 of the Treaty.

65 The applicant adds that it is unacceptable that the Commission should examine this latter aspect of the complaint in the context of a decision which it would adopt at a subsequent stage (Case T-74/92 *Ladbroke* v *Commission* [1995] ECR II-115, paragraph 60, and Case T-95/94 *Sytraval and Brink's France* v *Commission* [1995] ECR II-2651, paragraph 62). In so doing, the Commission breached Article 190 of the Treaty.

66 The Commission maintains that the decision of 6 April 1995 concerns neither the ABC remail issues nor the alleged breaches of Article 85 of the Treaty. Furthermore, the decision contains an adequate statement of reasons in regard to non-physical remail.

Findings of the Court

67 It follows first of all from the Court's findings in regard to the scope of the decision of 6 April 1995 (see paragraphs 58 to 62 above) that that decision did not concern ABC remail. The plea alleging defective reasoning of the decision on this point is therefore unfounded.

68 Next, in that decision of 6 April 1995, the Commission took the view that the applicant had failed to provide any information to show that its members might be involved in non-physical ABA remailing activities, so that they had no legitimate interest, within the meaning of Article 3(2) of Regulation No 17. The decision therefore reveals, clearly and unequivocally, the Commission's reasoning. In those circumstances, the plea alleging an inadequate statement of reasons in this regard must be dismissed, whilst the issue of the correctness of the Commission's conclusion is a matter concerning the substance of the case.

69 Finally, it is clear from the decision of 6 April 1995 that it does not relate to the alleged infringements of Article 85 of the Treaty by the public postal operators. It should be pointed out in this regard that the separate treatment of this aspect of the complaint does not affect the examination of its other aspects. Nor does it appear from the case-file that the applicant has argued that those different aspects could not be treated separately, even though it was clear that the Commission was concentrating its examination on the application of Article 85 of the Treaty to the CEPT Agreement and on the application of Article 86 to the alleged interception of remail.

70 In the light of those factors, the plea must be dismissed in its entirety.

The second plea in law, alleging breach of Article 3(2)(b) of Regulation No 17

Arguments of the parties

71 The applicant argues that, by concluding that the IECC's members had no legitimate interest in challenging the abusive practices of the public postal operators in regard to non-physical remail, the Commission has misapplied Article 3(2)(b) of Regulation No 17.

72 First, in order to reach that conclusion, the Commission, according to the applicant, defined the concept of non-physical remail in an unnaturally restrictive way by limiting it to non-physical ABA remail, in which IECC members, by definition, are not engaged.

73 Second, the applicant submits that, by so doing, the Commission ignored the legitimate interest which its members have in denouncing practices of the public postal operators in the case of non-physical ABCA remail. In this type of remail, the mail physically produced in country B is introduced by a private remail operator into the postal system of country C in order to be forwarded to country A. The applicant notes that this form of remail is in practice equivalent to ABC remail. However, on the basis of a broad construction of Article 23(1) of the UPU Convention, the public postal operators could intercept this mail by classifying it as non-physical ABCA remail. Such an interception, under this doctrine of non-physical remail, constitutes a real threat for IECC members, a fact which the Commission overlooked.

74 The applicant points out that its complaint and the statement of objections mentioned examples of ABC remail which Deutsche Post had attempted to classify as

'non-physical remail'. In its letter of 13 July 1994 to the IECC, the Commission stated that it was 'concerned' by the use of this doctrine of non-physical remail. In addition, it had on 5 May 1995 sent a letter to the legal representative of the Lanier company, the mail of which had been intercepted by Deutsche Post. Finally, in June 1994, Deutsche Post had intercepted, on the basis of Article 23(1) of the UPU Convention and the doctrine of non-physical remail, a large consignment of ABC mail sent by the Swiss company Matra AG.

75 The applicant points out finally that, in May 1994, the Executive Council of the UPU proposed extending the scope of Article 23(1) of the UPU Convention with a view to facilitating the interception of non-physical mail. That proposal, it says, was adopted in September 1996.

76 The Commission acknowledges that, in its statement of objections, it indicated that the public postal operators had had difficulties in interpreting the scope of Article 23(1) of the UPU Convention. It takes the view, however, that its role is not to promulgate interpretations of the effect of applying competition law to theoretical scenarios, but to enforce those rules in specific cases.

77 In this case, the Commission argues, the applicant confirms that its members are not concerned with non-physical remail, as defined in the decision of 6 April 1995, and that non-physical ABCA remail is equivalent to ABC remail.

Findings of the Court

78 Article 3(2)(b) of Regulation No 17 provides that natural or legal persons claiming a legitimate interest may file a complaint alleging infringement of Articles 85 or 86 of the Treaty.

79 It follows that the Commission was entitled, and without prejudice to its right to institute, where appropriate, proceedings *ex proprio motu* in order to establish an infringement, not to pursue a complaint from an undertaking unable to demonstrate a legitimate interest. Determining the stage of the investigation at which the Commission ascertained that this condition had not been met does not therefore matter.

80 In the present case, the Commission concluded, in its decision of 6 April 1995, that the members of the IECC had no legitimate interest in challenging the practices relating to non-physical ABA remail.

81 In its written statements, the applicant confirms that its members are, by definition, not involved in non-physical remail transactions, as defined in the decision of 6 April 1995.

82 The fact, to which the applicant attached considerable emphasis in its written statements, that its members could be concerned by another form of non-physical remail, namely non-physical ABCA remail, given the use by the public postal operators of the doctrine of non-physical remail, cannot affect the conclusion reached by the Commission in regard to non-physical ABA remail, the soundness of which, moreover, the applicant recognises. The applicant also confirms that non-physical ABCA remail is, in reality, equivalent to ABC remail, which was examined by the Commission in its decision of 14 August 1995 and will therefore be examined by the Court in the context of the action brought against that decision.

83 The plea in law must therefore be rejected.

The third plea in law, alleging infringement of Articles 85 and 86 of the Treaty

The first and second limbs

— Arguments of the parties

84 The applicant points out first of all that the Commission bases its decision of 6 April 1995, in so far as it relates to commercial ABA remail, on the premiss that public postal operators have the right to intercept any mail which they consider is being carried in breach of their statutory monopoly. In the applicant's view, this practice infringes the principle of the separation of commercial and regulatory functions (Case C-18/88 *Régie des Télégraphes et des Téléphones* v *GB-Inno-BM* [1991] ECR I-5941, paragraphs 25 and 26).

85 Second, the applicant submits that the Commission's argument that interception of ABA remail is intended to protect the postal monopoly of the public postal operators should have been justified by reference to Article 90(2) of the Treaty. It points out in this regard that the Commission suggests that ABA remail constitutes a risk of lost business to public postal operators and also a threat to the universal service which they must provide.

86 Third, the applicant submits that the decision of 6 April 1995, in so far as it relates to commercial ABA mail, is based on the current imbalance between costs borne by the public postal operators and terminal dues. This imbalance, it argues, is merely the result of an unlawful price-fixing agreement between the public postal operators.

87 Fourth, to maintain such a system in place amounts, in the applicant's submission, to discrimination incompatible with Article 86(c) of the Treaty.

88 In reply, the Commission first points out that it started from the premiss that public postal operators, to which the provision of a universal postal service has been entrusted, are entitled to protect their monopoly against circumvention, particularly where there is an imbalance between the costs borne and the sums recoverable under the current system of terminal dues. The Commission therefore concluded that the interception of ABA remail, which in reality is purely internal to country A, did not constitute an infringement of Article 86 of the Treaty. It explains that, in adopting that position, it did not apply Article 90(2) of the Treaty. In its view, such interception does not necessarily constitute the exercise of a regulatory function.

89 The Commission goes on to stress the difficulty which public postal operators face in enforcing their exclusive rights where post is not returned to them for internal delivery. The Commission notes that the type of remail in question was not covered by the CEPT Agreement.

90 It submits, finally, that there is no discrimination in this case, since the supplies of services which were the subject of different treatment are not equivalent.

91 Deutsche Post takes the view that a public postal operator cannot be obliged to deliver mail at a loss where that mail has been unlawfully transported abroad in an attempt to avoid application of the domestic tariff.

92 The United Kingdom points out that it is essential for the financial balance of public postal operators, which are under an obligation to provide a universal service, that adequate revenues be generated through sales of stamps for internal mail.

93 La Poste stresses that the cost of delivering mail to its final destination represents the major part of a public postal operator's overall costs. It also expresses the view that the application of Community law can be guaranteed only in so far as its principles are not misused with a view to bypassing legitimate rules of domestic law (Case 130/88 *Van de Bijl* v *Staatssecretaris van Economische Zaken* [1989] ECR 3039 and Case C-23/93 *TV 10* v *Commissariaat voor de Media* [1994] ECR I-4795).

— Findings of the Court

94 In its decision of 6 April 1995, the Commission took the view that commercial ABA remail amounted, in reality, to a circumvention of the statutory postal monopoly of the public postal operators. It went on to hold that interception of this type of remail was lawful under present circumstances and therefore could not be described as constituting an abuse within the meaning of Article 86 of the Treaty. It thus found that ABA remail prevented the public postal operator of the country of destination from recovering its costs in delivering the mail in so far as terminal dues are not based on real costs.

95 Having regard to the Commission's reasoning, it is necessary to ascertain whether the circumstances on which it relies are such as to exclude application of Article 86 of the Treaty.

96 The existence of the postal monopoly and, consequently, its alleged circumvention by ABA remail cannot be regarded as justifying in themselves interception of this type of remail.

97 Neither national legislation conferring statutory monopolies on public postal operators nor the UPU Convention require those public postal operators to intercept remailings. Public postal operators thus had a margin of discretion allowing them, if they thought it appropriate, not to intercept mail.

98 The necessity for the public postal operators to defend their monopoly cannot, as such, remove interceptions of inward ABA mail from the scope of application of Article 86 of the Treaty. Such reasoning would be tantamount to excluding a practice coming within the scope of that provision solely by virtue of the existence of a dominant position.

99 Contrary to the Commission's contention, the interceptions in dispute cannot be objectively justified by the fact that the terminal dues, which constitute the public postal operators' remuneration in the case of ABA remail, do not enable those operators to cover their costs of delivering the mail.

100 Although there is an imbalance between the costs which a public postal operator bears in delivering incoming mail and the remuneration which it receives, this imbalance is the result of an agreement concluded among the public postal operators themselves, including the three public postal operators involved in the present case, under which the terminal dues are fixed amounts, determined without taking into account the costs actually borne by the public postal operator of the country of destination.

101 Such a practice, which in the case of an undertaking in a dominant position helps to offset the adverse effects of a convention which it itself helped to draft and to which it is a party, cannot be regarded as an objective justification for excluding interception of commercial ABA mail from the scope of Article 86 of the Treaty.

102 Furthermore, it does not appear that the interception of incoming mail is the only means by which the public postal operator of the country of destination can recover the costs involved in delivering that mail, as is demonstrated by the fact that Deutsche Post has, on several occasions, simply recovered the costs from the senders. It does not appear from the contested decision that the Commission examined whether other measures might be regarded as less restrictive than interceptions.

103 La Poste, the Post Office and, albeit indirectly, the United Kingdom have argued that interceptions of commercial ABA remail were justified, under Article 90(2) of the Treaty, by the need to ensure that the public postal operators complied with their obligation to provide a universal service. However, it is clear from the decision of 6 April 1995 that the Commission did not refer to that provision and did not apply it in this case, a fact which it confirmed at the hearing.

104 The arguments set out in that regard by those interveners therefore go beyond the scope of these proceedings. In the review of legality which it must perform under Article 173 of the Treaty, the Court is therefore not required to address those arguments.

105 It must be concluded that the Commission erred in law in finding that interceptions of commercial ABA remail did not constitute an abuse within the meaning of Article 86 of the Treaty.

106 Consequently, the decision of 6 April 1995 must be annulled in so far as it deals with the Commission's assessment of the legality of interceptions of commercial ABA remail by public postal operators.

107 In those circumstances, it is unnecessary to rule on the other arguments raised by the applicant in connection with the first and second limbs of this plea.

The third and fourth limbs

108 The applicant submits essentially that the Commission failed to uphold Articles 85 and 86 of the Treaty by not striking down the efforts of the public postal operators to restrict the development of ABC remail and non-physical remail.

109 It must be pointed out at the outset that the decision of 6 April 1995 does not concern the interception of ABC mail (see paragraphs 58 to 62 above) and that the applicant has failed to establish that it has a legitimate interest in challenging practices of the public postal operators concerning non-physical remail as defined in that decision.

110 The Court accordingly rejects these two limbs of this plea in law.

C — *Forms of order sought and pleas in law specific to Case T-204/95*

The main claims for an order declaring that the letter of 12 April 1995 and the decision of 14 August 1995 are non-existent

Arguments of the parties

111 The applicant points out that the Commission decision rejecting the ABC remail aspect of its complaint is that of 6 April 1995, not that of 14 August 1995. Accordingly, it submits, the latter is the second decision adopted by the Commission on identical facts, which creates serious confusion regarding the various administrative stages.

112 The applicant accordingly considers that that decision of 14 August 1995 and the letter sent on 12 April 1995 pursuant to Article 6 of Regulation No 99/63 are superfluous. For that reason, those two measures must be declared non-existent (Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraphs 48 and 49).

113 It adds that the dispatch of a second letter, pursuant to Article 6 of Regulation No 99/63, and of a new decision on aspects which the decision of 6 April 1995 already sought to deal with deprives it of certain essential rights, in particular those conferred by Article 6 of the European Convention on Human Rights, such as the right to access to an independent and impartial tribunal, the right to equality of arms, and the right to obtain justice within a reasonable time.

114 Finally, the applicant argues that the Commission cannot rely on its concern to protect the applicant's procedural rights. In its letter of 22 February 1995, the applicant had in fact waived all procedural rights relating to the aspects which the Commission had failed to address in its letter of 17 February 1995.

115 The Commission contends essentially that the applicant's argument misconstrues the scope of the decisions of 6 April 1995 and 14 August 1995. It considers that, in any event, the defects which the applicant alleges provide no foundation for a declaration that the decision of 14 August 1995 is non-existent. Finally, it denies that the European Convention on Human Rights is applicable in this case.

Findings of the Court

116 It follows from the Court's examination of the scope of the letters of 6 April 1995 and 14 August 1995 (see paragraphs 58 to 62 above) that the applicant's reasoning is based on a false premiss. In those circumstances, the argument it advances in support of its main claim, for an order that the decision of 14 August 1995 and the Commission's letter of 12 April 1995 pursuant to Article 6 of Regulation No 99/63 be declared non-existent, is invalid.

117 Only acts of the institutions which are tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order are to be treated as non-existent in law. Given the gravity of the consequences attaching to a finding that an act of a Community institution is non-existent, such a finding must, for reasons of legal certainty, be reserved for very extreme situations (*Commission* v *BASF and Others*, cited above, paragraphs 49 and 50). In the present case, the defects alleged by the applicant, even if they were well founded, would not constitute an irregularity of such a nature as to lead to the decision being declared non-existent.

118 This claim must therefore be rejected.

The alternative claim for annulment of the decision of 14 August 1995

1. The first plea in law, alleging infringement of Article 190 of the Treaty

(a) The first limb: failure to state reasons in regard to the alleged infringement of Article 85 of the Treaty by the public postal operators

Arguments of the parties

119 The applicant contends that the decision of 14 August 1995 infringes Article 190 of the Treaty because the Commission has not sufficiently explained its reasons for rejecting the applicant's complaint in relation to the assessment, in the light of Article 85 of the Treaty, of the market allocation agreement put into effect by the public postal operators.

120 The Commission replies that the decision of 14 August 1995 does not relate to the application of Article 85 of the Treaty to the agreement in question.

Findings of the Court

121 A line of argument identical to this first limb was put forward in the context of the first plea in law in Case T-133/95. The Court accordingly dismisses this first limb of the plea on the same grounds as those indicated in paragraph 69 above.

(b) The second limb: insufficient reasoning in regard to ABC remail

Arguments of the parties

122 The applicant first submits that the decision of 14 August 1995 fails to explain properly why there was no risk that Deutsche Post and La Poste would again commit certain infringements, particularly since the Commission had adopted a different view in the statement of objections sent to the public postal operators.

123 Second, it points out that the existence of the undertakings given by the public postal operators, whose observance the Commission subsequently failed to monitor, does not constitute a sufficient reason justifying the radical change in the analysis by the Commission, which, in its statement of objections, had rejected the idea that those undertakings constituted a sufficient response to the issues raised in the complaint.

124 The Commission replies that the decision of 14 August 1995 was motivated solely by the fact that since the time when the public postal operators concerned had provided the undertakings it had not found or obtained any evidence that they were continuing to intercept ABC remail.

Findings of the Court

125 According to settled case-law, the statement of reasons for an individual decision must be such as, first, to enable the person to whom it is addressed to ascertain the matters justifying the measure adopted so that he can, if necessary, defend his rights and verify whether or not the decision is well founded and, second, to enable the Community judicature to exercise its power of review (Case T-5/93 *Tremblay and Others* v *Commission* [1995] ECR II-185, paragraph 29; Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraphs 75 and 76; and Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraphs 103 and 104).

126 It is also clear from the case-law that the precise extent of the duty to state reasons depends on the nature of the act in question and on the context in which it is adopted (Case 819/79 *Germany* v *Commission* [1981] ECR 21, paragraph 19). It should be recalled here that in this case the Commission had called into question, in the statement of objections and in subsequent correspondence, certain practices of the public postal operators concerning ABC remail.

127 It is clear from the decision of 14 August 1995 that the Commission formed the view, first, that it was not under any obligation to adopt a prohibition decision in regard to matters in the past.

128 Second, the Commission has pointed out that Deutsche Post and the Post Office had given undertakings that they would no longer intercept ABC remail. It concluded that it had not found any evidence that those public postal operators were continuing, notwithstanding their undertakings, to intercept ABC remail. In taking this approach, the Commission adequately fulfilled the obligation which Article 190 of the Treaty imposes on it in the present circumstances. The explanation that there were no interceptions of ABC mail during a period of more than five years, including two years following the adoption of the statement of objections, indicates clearly the reasons for which the Commission's definitive assessment differs from its previous one.

129 Furthermore, and irrespective of whether the assessment of the facts or the reasoning of the Commission are correct, the Commission provided sufficient reasoning for the decision of 14 August 1995 with regard to the ambiguous nature of the undertakings given by Deutsche Post, since it was reasonably entitled to form the view that this ambiguity had been dispelled on the ground that the public postal operator concerned had complied with the Commission's directions for several months after the statement of objections had been adopted.

130 Third, the Commission found, in the first place, that one single instance of interception of ABC mail by La Poste, dating from 1989, had been identified, and that there had subsequently been no evidence to indicate any similar interceptions by La Poste. The Commission points out, finally, that it is not under any obligation to adopt a prohibition decision in regard to matters in the past and it concludes, in those circumstances, that the isolated nature of La Poste's interception did not justify the adoption of a decision. In this way, the Commission provided a sufficient explanation as to why it took the view that the interceptions of mail by La Poste should not be the subject of a prohibition decision.

131 This plea must accordingly be dismissed in its entirety.

2. The second plea in law, alleging infringement of Articles 85 and 86 of the Treaty, manifest errors in the assessment of the facts and errors of law

(a) The first limb, concerning ABC remail

Arguments of the parties

132 The applicant submits first that the undertakings entered into by the public postal operators in Germany and the United Kingdom were not made subject to obligations or conditions, such as obligations to submit reports, as is normal in the context of Regulation No 17 and Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1). Furthermore, undertakings that are not published cannot eliminate the harmful consequences of an anti-competitive agreement drawn up within the framework of the UPU Convention.

133 Second, the applicant takes the view that the Commission has breached its own obligation to monitor the application of the undertakings given (*Sytraval and Brink's France* v *Commission*, cited above, paragraphs 76 and 77).

134 Third, it challenges the view that the undertakings relate to all the practices of which it accused the public postal operators in its complaint. Thus, it complained that the Post Office had encouraged other public postal operators to intercept remail originating in Great Britain. The Post Office, it claims, also failed to renounce the use of Article 23(1) of the UPU Convention against ABC remail by applying the doctrine of non-physical remail.

135 Fourth, it draws attention to the fact that the Commission accepts in its written statements that Deutsche Post could not, under German law, refrain from applying Article 23 of the UPU Convention and that it therefore could not reasonably give 'voluntary assurances' incompatible with its statutory obligations.

136 Fifth, the applicant considers that the Commission committed a manifest error in assessing the facts when it stated that 'in the case at hand there is no evidence that the two postal operators referred to in the IECC's complaint of 1988 [...] have not abided by the undertaking which they each gave to the Commission in 1989 to refrain from invoking Article 23(4) with respect to ABC remail [...]'. The Commission ought to have been aware of a document recording efforts by the German Postal Regulatory Council (Regulierungsrat) in December 1995 to discourage the use of remailing services and detailing the interception of ABC remail by Deutsche Post under the doctrine of non-physical remail in cases such as Matra AG, Citibank, GZS Bank, Gartner Group and Lanier. The Commission had, moreover, also recognised the growing number of interceptions in its letters of 13 July 1994 and 23 September 1994.

137 Sixth, the applicant notes that, at paragraph 14.4 of the decision of 14 August 1995, the Commission stated that 'if such infringements of the undertakings had taken place, the IECC would have been in a position to provide prima facie evidence of them.' The applicant considers that, as in the *Sytraval* case, it was far more difficult for it than for the Commission to assemble the evidence of infringements by the public postal operators. The Commission thus underestimated its obligation to investigate the complaints submitted to it.

138 Seventh, the applicant points out that, in paragraph 17 et seq. of the decision of 14 August 1995, the Commission did not consider it necessary to adopt a prohibition decision against La Poste. The applicant considers that this position, based on the isolated nature of one incident, is unlawful in so far as La Poste had not

declared any intention to refrain from invoking Article 23 of the UPU Convention. In adopting that decision, the Commission encouraged La Poste to maintain its restrictive practices, contrary to Article 85 of the Treaty.

139 The applicant notes, finally, that the Commission never expressly invoked 'the absence of Community interest' in the decision of 14 August 1995.

140 The Commission claims that the applicant never adduced evidence to show that the three public postal operators concerned were continuing to intercept ABC remail. It points out that, when the decision of 14 August 1995 was adopted, it had not received any complaint from the IECC or any other commercial remailer denouncing interceptions of ABC remail. It challenges the view that, in the absence of such complaints, it is obliged to employ its limited resources in order to obtain from the public postal operators reports on their activities.

141 The Commission also points out that the undertakings given by the public postal operators differ from those given by the French State in *Sytraval and Brink's France*. The present situation can be distinguished from that in *Sytraval* inasmuch as it does not concern a complainant in a State-aid case. Moreover, proof of practices by public postal operators in relation to private operators is less difficult to obtain than proof concerning financial activities between a State and a private company.

142 The United Kingdom submits that the Commission is entitled to refuse to adopt a prohibition decision if there is no sufficient Community interest. That, it argues, is the case here in view of the undertakings given and the lack of evidence of subsequent infringements. It takes the view that the applicant, in its capacity as representative of a large number of companies engaged in remailing, was, moreover, particularly well placed to identify infringements and notify them to the Commission.

143 The Post Office argues that it conducted itself in accordance with the undertaking given in its letter of 21 April 1989.

144 Deutsche Post refers to the content of the letter which it sent to the Commission on 10 October 1989 containing undertakings relating to ABC remail. It also points out that the IECC has failed to adduce any evidence of breaches of those undertakings.

Findings of the Court

145 It is clear from the decision of 14 August 1995 concerning ABC remail that the Commission did not carry out a definitive examination of the lawfulness of the practices in question under Article 86 of the Treaty. It essentially took the view that, given that there had been infringements in the past and no proof that these had been repeated, it was not appropriate for it to exercise its power to hold that there had been any infringement and, for that reason, rejected the applicant's complaint.

146 Having regard, first, to the general objective which Article 3(g) of the Treaty assigns to Community action in the area of competition law, second, to the task conferred on the Commission in this area by Article 89(1) of the Treaty and, finally, to the fact that Article 3 of Regulation No 17 does not confer on a person making an application under that article the right to obtain a decision, within the meaning of Article 189 of the Treaty, as to whether or not there has been an infringement of Article 85 or Article 86 of the Treaty or of both those articles, it must be concluded that the Commission was lawfully entitled to decide, on condition that it provided reasons for such a decision, that it was not appropriate to pursue a complaint denouncing practices which were subsequently discontinued.

147 In particular, subject to review by the Community judicature, the Commission is entitled to take the view that, where operators against which a complaint has been made have given undertakings and the applicant has failed to provide any evidence whatever that those undertakings have been disregarded, and the Commission has carefully examined the facts of the case, it is unnecessary for it to examine that complaint any further.

148 It should also be borne in mind that the Commission is not obliged to refer expressly to the concept of 'Community interest'. It is sufficient, for this purpose, for this concept to underlie the reasoning on which the decision in question is based.

149 In the present instance, the Commission concluded, in its decision of 14 August 1995, that it was unnecessary to examine further the complaint in regard to the three public postal operators against which it was directed. The case of each of those public postal operators must be considered in turn.

— Deutsche Post

150 In its letter of 30 June 1989 addressed to the Commission, referred to in the statement of objections, Deutsche Post stated that it was prepared to forgo use of Article 23(4) of the UPU Convention for remail within the Community, provided that its right to use the powers under Article 23(1) to (3) of that Convention was recognised. By letter of 10 October 1989, also referred to in the statement of objections, it indicated that it was no longer applying Article 23(4) to intra-Community ABC remail.

151 It also follows from the replies given by Deutsche Post during the hearing that it is not, as such, obliged under German law to intercept remailed ABC mail (see

paragraph 97 above). The undertakings given by Deutsche Post cannot therefore be placed in question on the ground that they are incompatible with German law.

152 Furthermore, it follows from the replies given to the Court's written questions that the applicant had not informed the Commission of any proven cases of interception of ABC mail before the decision of 14 August 1995 was adopted. The only case giving rise to dispute in this regard is the 'Lanier' case. That case, dating back to 1991, is, however, pending before the German courts, which must determine whether the intercepted mail was ABA or ABC. The existence of that single dispute, however, cannot by itself cast doubt on the lawfulness of the decision of 14 August 1995. At most, the Commission could, depending on the findings of the competent German courts, re-open the administrative procedure if it considered this necessary.

153 The document from the German Postal Regulatory Council (see paragraph 136 above) deals with ABA remail and was adopted in December 1995. The Commission's letters of 13 July 1994 and 23 September 1994 concern the phenomenon of non-physical ABA remail, in respect of which the Commission quite properly concluded, in its decision of 6 April 1995, that the applicant did not have any legitimate interest, and not ABC remail. Those documents cannot therefore affect the validity of the decision of 14 August 1995 relating to ABC remail alone.

154 While it is true that the undertaking given by Deutsche Post relates only to Article 23(4) of the UPU Convention and therefore does not rule out the possibility that non-physical ABCA remail, equivalent in reality to physical ABC remail, may be intercepted under a broad interpretation of Article 23(1) of the UPU Convention by virtue of the doctrine of non-physical remail, it does not appear from the documents before the Court that, prior to the adoption of the decision, the applicant had submitted to the Commission any evidence that this doctrine had been applied by Deutsche Post.

155 In the absence of evidence adduced by the applicant, during the administrative procedure, that Deutsche Post had intercepted ABC mail notwithstanding its undertakings, it must be concluded that the Commission quite rightly decided that there were no grounds for examining further the complaints made.

— The Post Office

156 The undertakings given by the Post Office on 21 April 1989 are unambiguous in regard to the present and future non-application of Article 23(4) of the UPU Convention. The Commission also correctly concluded that it had not been established — or even claimed — that the Post Office had subsequently intercepted mail under that article of the UPU Convention.

157 In the absence of evidence provided by the applicant, during the administrative procedure, that the Post Office had intercepted ABC mail notwithstanding its undertakings, it must be concluded that the Commission correctly decided that it was unnecessary to examine further this aspect of the complaint.

158 However, the applicant complains that those undertakings were in two respects too narrow in scope.

159 First, the question of the invitation made to other public postal operators to intercept mail from the United Kingdom is dealt with in paragraph 14.4 of the decision of 14 August 1995. In that decision, the Commission concluded that there was no risk that the practices which were the subject of the complaint would be resumed, referring to the undertakings given by the various public postal operators and to the fact that it had received no evidence that those undertakings had been breached.

160 Even if the undertakings given by the Post Office relate only to the case of interception of ABC mail by the Post Office itself, those undertakings, considered in the light of the fact that there had been no allegations of fresh incitement to intercept mail since the Post Office's letter of January 1987 addressed, in particular, to another Community public postal operator, in the light of the undertaking given by Deutsche Post and the lack of evidence that mail had been intercepted by other public postal operators, provided a sufficient basis for the Commission to conclude that there was no further risk that the Post Office would resume this practice of incitement and that it was therefore unnecessary to examine the complaint further in that connection.

161 With regard, second, to the assessment as to whether the Post Office might invoke the doctrine of non-physical remail under a broad interpretation of Article 23(1) of the UPU Convention, it is sufficient to hold that the applicant has neither established nor even claimed that the Post Office had ever applied that doctrine before or after it gave the undertakings in question.

— La Poste

162 The finding that the interception of mail by La Poste in October 1989 was an isolated incident has not been contested.

163 In those circumstances, and given that there has been no evidence or allegation whatever that mail was intercepted during a six-year period, the Commission was entitled to form the view that there was no risk that La Poste would re-offend and that it was therefore unnecessary to examine the case further or to adopt a prohibition decision in regard to La Poste.

164 It follows from all of those factors that the Commission was entitled to conclude, for each of the public postal operators, that it was unnecessary to examine further this aspect of the complaint. It should be borne in mind in this regard that the Commission, in its decision, did not take a definitive position on the application of Article 86 of the Treaty to the practices of the public postal operators in regard to ABC remail. The decision does not therefore affect the applicant's right to pursue any remedy it considers appropriate should it uncover evidence that practices which it considers to be unlawful have been resumed.

165 The first limb of this plea in law must therefore be rejected in its entirety.

(b) The second limb: the assessment of the existence of Article 23 of the UPU Convention with regard to competition law

Arguments of the parties

166 The applicant points out that, in its decision of 14 August 1995, the Commission concluded that the mere existence of Article 23 of the UPU Convention is not necessarily contrary to the Community competition rules and that only the exercise of the possibilities of action granted by that provision could, in certain circumstances — that is to say, between Member States — constitute a breach of those rules.

167 In the applicant's view, however, for the purpose of applying Article 85(1) of the Treaty, there is no need to take account of the concrete effects of an agreement once it is established that it has as its object the prevention, restriction or distortion of competition (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299). In May 1994, the Executive Committee of the UPU proposed broadening the scope of Article 23(1) of the UPU Convention. In so far as

Article 23 of the UPU Convention constitutes an agreement among public postal operators to allocate markets, it suffices for these to have acted in concert to support the re-enactment of that provision, and for it to be used in the context of the REIMS Agreement, for Article 85 of the Treaty to be infringed.

168 The Commission contends that the public postal operators may put into effect agreements, such as the revised UPU Convention, on condition that they do not apply them in a manner contrary to Articles 85 and 86 of the Treaty. Thus, the application of Article 23 of the UPU Convention is acceptable provided that neither the country in which the mail originates nor the country whose authorities carry out the remailing are Member States.

Findings of the Court

169 The applicant has failed to provide any evidence to underpin its assertion that the support given by each public postal operator with a view to maintaining Article 23 of the UPU Convention and its use within the context of the REIMS Agreement is the result of an agreement between undertakings, a decision by associations of undertakings or a concerted practice between undertakings within the meaning of Article 85(1) of the Treaty.

170 Moreover, even if this were the case, the applicant has not explained how the allegedly concerted support of the public postal operators with a view to maintaining Article 23 of the UPU Convention could call into question the Commission's conclusion that the mere existence of that provision is not necessarily contrary to the Community competition rules.

171 Finally, it must be pointed out that Article 23 of the UPU Convention, which is formally a convention concluded between States and of a universal nature, does not impose an obligation to intercept mail which has been remailed. The mere fact that this provision existed could not lead the Commission to conclude that there was a breach of the Community competition rules on the part of the public postal operators when investigating a complaint made against them. The Commission was therefore entitled to conclude that only reliance by the public postal operators on that provision could come within the scope of the Community competition rules, provided that trade between Member States was affected.

172 The second limb of this plea in law must accordingly be rejected.

(c) The third limb: infringement of Articles 85 and 86 of the Treaty by reason of the absence of a prohibition decision

Arguments of the parties

173 The applicant first points out that interceptions of ABC mail constitute an abuse of a dominant position within the meaning of Article 86 of the Treaty, which cannot be justified under Article 90(2) of the Treaty. Those interceptions, it claims, were, moreover, carried out pursuant to a market allocation agreement, embodied in Article 23 of the UPU Convention. Since that agreement is implemented by public postal operators, each of whom has a dominant position on its respective market, the public postal operators are also committing an abuse of a collective dominant position. From this the applicant concludes that the Commission has infringed Articles 85 and 86 of the Treaty by rejecting the complaint without adopting a decision prohibiting interceptions of ABC remail.

174 The applicant argues, second, that the public postal operators themselves make complex legal assessments concerning the application of competition law, in so far as an assessment of the lawfulness of the interception of ABC mail involves an assessment of the extent to which the postal monopoly is necessary in order to perform the public service tasks entrusted to them. It accordingly takes the view that those interceptions infringe the principle of the separation of commercial and regulatory functions, contrary to Article 86 of the Treaty.

175 The Commission submits that this limb of the plea is irrelevant. The decision, it states, is not based on any assumption that the interception of ABC remail is compatible with competition law.

Findings of the Court

176 In its decision of 14 August 1995, the Commission did not in any way approve the interceptions of ABC mail made under Article 23(4) of the UPU Convention. It based its decision, in substance, on the fact that it was unnecessary to prosecute past practices in regard to which undertakings had been given by the public postal operators which had not been shown to have been breached. It should be borne in mind in this regard that the Court has confirmed that this assessment was well founded.

177 In the absence of any approval by the Commission of the abovementioned interceptions, this part of the plea is irrelevant.

178 In view of all those factors, this plea in law must be dismissed.

D — *Pleas in law common to Cases T-133/95 and T-204/95*

The pleas in law alleging misuse of powers

Arguments of the parties

179 The applicant takes the view that the Commission has used its powers in order to favour the sectoral interests of the public postal operators, thereby neglecting its duty to safeguard competition.

180 It considers that, after an administrative procedure lasting seven years, the Commission deliberately introduced a procedural ambiguity by adopting the letter of 17 February 1995, the decision of 6 April 1995 and the letter of 12 April 1995, thus departing from the symmetry hitherto adopted in the proceedings. The applicant considers that this fragmentation of the decisions and the possible adoption of a final decision on the application of Article 85 of the Treaty to the implementation by the public postal operators of Article 23 of the UPU Convention were designed to slow down the administrative procedure for political reasons.

181 It also takes the view that the Commission's attitude runs counter to its consistent practice, in that it did not condemn an abuse of a dominant position and agreed to terminate its investigation on the strength of mere undertakings by the public postal operators in Germany and the United Kingdom without requiring evidence that those undertakings were in fact being complied with. La Poste has never accepted the Commission's position on the interpretation of Article 23 of the UPU Convention. Such a lax attitude on the part of the Commission is explicable only by the existence of considerable political pressure.

182 The applicant considers that Commission Members Brittan and Van Miert, in their respective speeches of 19 May 1992 and 7 April 1993, recognised that the remail case was being treated in a political manner. It argues that this is also clear from the priority which the Commission granted to the adoption of the Green Paper on postal services as compared with the adoption of prohibition decisions in the remail case.

183 It also points out that, in his letter of 28 March 1995, Mr Van Miert pointed out to the German Minister for Posts and Telecommunications that: 'In conclusion, I wish to state that the IECC's complaint [...] is now unfounded.' Thus, the Commission informed the applicant of the adoption of a final decision relating to its complaint only after it had informed that Minister. The applicant accordingly takes the view that the Commission misused its powers by thus submitting confidential information to third parties prematurely. That letter also demonstrates the Commission's wish not to intervene in numerous cases of interceptions of mail so as not to displease the German authorities.

184 According to the applicant, the Commission's strategy of delaying the procedure in the remail case is the same as that which it adopted when dealing with other complaints lodged against public postal operators.

185 In its reply in Case T-204/95, the applicant states that it repeatedly requested access to the file, and this was refused by the Commission, either in writing or orally. In so doing, the applicant claims, the Commission infringed its rights of defence, the principle of equality of arms and the right to a hearing, thereby confirming the Commission's misuse of powers.

186 The Commission denies that the decisions of 6 April 1995 and 14 August 1995 are vitiated by a misuse of powers.

187 It takes the view that the applicant's arguments concerning access to the file constitute new pleas in law which are not based on matters of law or of fact coming to light in the course of the procedure. They are therefore inadmissible under Article 48(2) of the Court's Rules of Procedure.

Findings of the Court

188 It has consistently been held that a decision is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken for the purpose of achieving ends other than those stated (Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 69; Case T-5/93 *Tremblay and Others* v *Commission*, cited above, paragraph 87 et seq.).

189 In the present cases, the length of the administrative procedure which led to the adoption of the two decisions is justified in large measure by the complexity of the economic aspects of the issues raised, the number of public postal operators involved, the parallel adoption of the Green Paper on postal services, and the fact that implementation of a replacement system such as the REIMS Agreement — which also influenced the Commission in its assessment of the ABA and ABC mail interceptions — required a considerable length of time.

190 In his speech of 19 May 1992, which the applicant itself cites, Sir Leon Brittan stated, moreover, that the Commission was pursuing a twin approach in the postal sector with a view to ensuring in parallel the application of the rules on competition and the adoption of legislation designed to liberalise the sector. The statement of 7 April 1993 by Mr Van Miert, cited by the applicant, must also be construed in the light of this twin approach. In a case such as that here at issue, which formed

part of the more general background to the Commission's thinking on the future of the postal sector within the Community, this twin approach was justified. There is therefore nothing to justify the view that this twin approach reflects a misuse of powers vitiating the decisions of 6 April 1995 and 14 August 1995.

191 With regard to the allegedly ambiguous scope of the decision of 6 April 1995 and the alleged intention on the Commission's part to delay adoption of a final decision closing the entire remail case for political reasons by dividing up the case, it is sufficient to reiterate that it follows from the actual wording of the letter of 17 February 1995 and the decision of 6 April 1995 that the latter decision did not relate to the whole of the complaint. Furthermore, once the Commission intended to reject the other aspects of the complaint by adopting a formal decision, it was required, in accordance with Article 6 of Regulation No 99/63, to send to the complainant a new letter indicating to it, *inter alia*, the grounds justifying its decision not to uphold its complaint. Nor has the applicant established that the fragmentation of the replies given to the various aspects of the complaint could have affected the way in which the complaint was handled by the Commission or that the Commission had the aim of delaying the processing of the complaint.

192 The fact that the Commission informed the German Minister for Posts and Telecommunications of the outcome of the complaint some days before the applicant itself was notified does not establish that the decision of 6 April 1995 was adopted for purposes other than those stated.

193 Furthermore, the applicant's reference to the manner in which the Commission dealt with other complaints or legal proceedings, but relating to postal activities clearly distinct from remail, is irrelevant in determining whether, in the present instance, the adoption of the decisions in question was vitiated by a misuse of powers.

194 The arguments on access to the file are not a specific plea in law advanced by the applicant but, according to the applicant, merely an additional indication of the misuse of power alleged in its application. Consequently, the plea of inadmissibility raised by the Commission on the basis of Article 48(2) of the Rules of Procedure is not well founded.

195 However, even if it is assumed that the applicant did not have proper access to the file, that fact could not in itself establish that the decision of 14 August 1995, annulment of which is sought in Case T-204/95, was adopted for purposes other than those stated.

196 In those circumstances, the pleas in law alleging misuse of powers must be dismissed.

The plea in law alleging infringement of certain general principles of law

Arguments of the parties

197 In the first limb of this plea, the applicant alleges that the Commission infringed the principles of legal certainty, of the protection of legitimate expectations and of sound administration by issuing a letter on 12 April 1995 under Article 6 of Regulation No 99/63 when a final decision addressing the whole of the complaint had already been adopted. The issue of that letter placed the applicant in a situation of uncertainty as to the effects of the decision of 6 April 1995. Those principles were also infringed in so far as that decision left uncertain the acceptability of the doctrine of non-physical remail.

198 In the second limb, the applicant contends that, by sending out warning letters, publishing press releases and speeches of Commission Member Sir Leon Brittan, and adopting a statement of objections in a case similar to earlier cases in which it

had adopted prohibition decisions, the Commission gave to understand that it would apply the competition rules in this case. That attitude gave rise to a justified expectation on the applicant's part that a final prohibition decision would be adopted.

199 In the third limb, the applicant submits that the principle of non-discrimination has been infringed inasmuch as the Commission does not usually rely on such narrowly-drawn and incomplete assurances when refraining from penalising undertakings which have infringed competition law.

200 In the final limb, the applicant submits that the Commission infringed the principle of sound administration because it took 81 months to adopt the final decision of rejection (*Sytraval and Brink's France* v *Commission*, cited above, paragraph 56).

201 The Commission points out that the letter of 12 April 1995 was sent for the purpose of protecting the applicant's right to be heard. It also points out that, according to the case-law, a complainant does not have a right to obtain a decision as to the existence of an infringement and cannot therefore have any legitimate expectation of obtaining such a decision. Finally, the Commission denies that the length of time taken to deal with the complaint allows the applicant to challenge the manner in which it has exercised its powers.

Findings of the Court

202 The first limb of the plea is based on the assumption that the decision of 6 April 1995 rejected the complaint in its entirety. It follows from the Court's assessment of the scope of that decision (see paragraphs 58 to 62 above) that this was not the case. The first limb of the plea must therefore be rejected.

203 With regard to the second limb of the plea, Article 3 of Regulation No 17 does not confer upon a person who lodges an application under that article the right to obtain from the Commission a decision, within the meaning of Article 189 of the Treaty, regarding the existence or otherwise of an infringement of Article 85 or Article 86 of the Treaty (see, in particular, *Tremblay and Others* v *Commission*, cited above, paragraph 59). Consequently, irrespective of how far the case had progressed and the stage which the Commission had reached in examining the complaint, the applicant was not entitled to entertain any well-founded expectation that a decision would be adopted prohibiting the practices of which it complained.

204 As regards the third limb, the applicant has failed to establish that, in a situation comparable to the one here, the Commission would none the less have found against the undertakings in question. The applicant has thus failed to establish its claim that the principle of non-discrimination was infringed.

205 Finally, as far as the unduly long duration of the administrative procedure is concerned, reference is made to paragraph 189 et seq. of this judgment setting out in detail the reasons for which the relatively long period of time taken by the Commission in adopting the final decisions of rejection is justified.

206 For all those reasons, this plea in law must be dismissed.

The request for production of documents

207 In its reply in Case T-204/95 and its observations on the statements in intervention in Cases T-133/95 and T-204/95, the applicant called on the Court to order production of certain documents.

208 Within the context of measures of organisation of procedure, the Court ordered that a number of those documents be produced. Since production of the remaining documents does not appear necessary for the purpose of resolving Case T-204/95, it is not necessary to grant the applicant's request in regard to those documents.

Costs

209 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's submissions. Since the applicant has been unsuccessful in its submissions in Case T-204/95, it shall pay the Commission's costs in that case. Since the Commission has been partially unsuccessful in its submissions in Case T-133/95, it shall pay the applicant's costs in that case.

210 In accordance with the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which intervene in proceedings are to bear their own costs. The United Kingdom shall therefore bear its own costs. In accordance with the second subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener other than that mentioned in the first subparagraph to bear its own costs. Since the various public postal operators which have made interventions have been unsuccessful in their submissions in Case T-133/95 but have succeeded in Case T-204/95, it is appropriate that each intervener should bear its own costs in Cases T-133/95 and T-204/95.

On those grounds,

THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

hereby:

1. Joins Cases T-133/95 and T-204/95 for the purposes of the judgment;

2. **Annuls the decision of 6 April 1995 in so far as it concerns commercial physical ABA remail;**

3. **Dismisses the remainder of the actions;**

4. **Orders the Commission to bear the applicant's costs in Case T-133/95;**

5. **Orders the applicant to bear the Commission's costs in Case T-204/95;**

6. **Orders the interveners to bear their own costs in Cases T-133/95 and T-204/95.**

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 16 September 1998.

H. Jung B. Vesterdorf

Registrar President

Summary