JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
4 March 2003 *

In Case T-319/99,

Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN), established in Madrid (Spain), represented by R. García-Gallardo Gil-Fournier, G. Pérez Olmo and D. Domínguez Pérez, lawyers,

applicant,

v

Commission of the European Communities, represented by W. Wils and É. Gippini Fournier, acting as Agents, assisted by J. Rivas Andrés, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the Commission's decision of 26 August 1999 (SG(99) D/7.040) rejecting a complaint submitted pursuant to Article 82 EC,

* Language of the case: Spanish.

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

composed of: B. Vesterdorf, President, K. Lenaerts, J. Azizi, N.J. Forwood and H. Legal, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 26 February 2002,

gives the following

Judgment

Facts and procedure

1 The applicant is an association of the majority of the undertakings which market the medical goods and equipment used in Spanish hospitals. On 12 December 1997 it submitted to the Commission a complaint alleging that the 26 bodies or organisations, including three ministries of the Spanish Government, which run the Spanish national health system (hereinafter 'the SNS'), were guilty of an abuse of a dominant position, within the meaning of Article 82 EC. Specifically, it accuses these organisations of systematically taking an average of 300 days to pay their debts to its members, even though they settled their debts to other suppliers within a far more reasonable period of time. That discrimination, according to

the applicant, is attributable to the fact that the organisations which manage the SNS enjoy a dominant position in the Spanish market for medical goods and equipment which enables them to delay paying for such goods and equipment without their creditors being able to exert any commercial pressure on them to put an end to that practice.

2 The applicant submitted additional observations to the Commission on 12 May 1998. By letter of 2 December 1998 the Commission informed it of its provisional decision to reject the complaint, whereupon the applicant sent further observations to the Commission in a memorandum dated 10 February 1999.

3 By decision of 26 August 1999 ('the contested decision'), notified to the applicant on 31 August 1999, the Commission definitively rejected the applicant's complaint on the dual ground that 'the 26 ministries and other organisations in question [were] not acting as undertakings when they [participated] in the management of the public health service' and that 'the "demand" of the 26 ministries and other organisations [could not] be dissociated from the subsequent "supply" which they provide'. Consequently, the bodies managing the SNS were not acting as undertakings when they purchased medical goods and equipment from the members of the applicant association. One of the conditions for applying Article 82 EC was therefore not satisfied and thus 'it [was] unnecessary to consider whether the other conditions for applying Article 82 EC [were] fulfilled'.

4 By application lodged at the Registry of the Court of First Instance on 10 November 1999 the applicant brought the present action.

5 After hearing the parties the Court referred the case to a Chamber composed of five Judges, in accordance with Article 51 of its Rules of Procedure.

6 By order of 26 September 2000, the President of the First Chamber, Extended Composition, of the Court of First Instance granted the United Kingdom leave to intervene in support of the form of order sought by the Commission. However, the United Kingdom did not submit a statement in intervention. By letter lodged at the Registry on 19 December 2001 it indicated its intention to withdraw its intervention and by order of 4 February 2002 the President of the First Chamber, Extended Composition, of the Court took formal note of its withdrawal.

7 On hearing the report of the Judge-Rapporteur, the Court (First Chamber, Extended Composition) decided to commence the oral procedure and, by way of measures of organisation of procedure, as provided for in Article 64 of the Rules of Procedure, put certain written questions to the applicant and the Commission.

8 The parties presented oral argument and gave their answers to the questions put to them by the Court at the hearing on 26 February 2002.

Forms of order sought

9 The applicant claims that the Court should:

— order the Commission to communicate to it all documents in its possession relating to the complaint;

— sit in plenary session, in accordance with Article 14 of the Rules of Procedure of the Court of First Instance, and appoint an Advocate General, if appropriate;

— declare the action admissible;

— annul the contested decision;

— order such other measures as it deems appropriate so that the Commission fulfils its obligations under Article 233 EC and, specifically, conducts a fresh examination of its complaint of 12 December 1997;

— order the Commission to pay the costs;

— order the Commission to pay the costs which it incurred during the administrative procedure.

10 The Commission contends that the Court should:

— declare the applicant's fifth and seventh heads of claim inadmissible;

— dismiss the remainder of the action as unfounded;

— order the applicant to pay the costs.

11 At the hearing the applicant withdrew its fifth and seventh heads of claim.

Law

12 The applicant makes three pleas in law, alleging infringement of its rights of defence, error in law or manifest error of assessment in the application of Articles 82 EC and 86 EC, and infringement of an essential procedural requirement consisting in an inadequate statement of reasons and a lack of transparency.

13 It is appropriate to begin by considering the plea alleging error in law or manifest error of assessment in the application of Articles 82 EC and 86 EC, given that this plea calls into question the fundamental premiss, concerning the definition of an undertaking, on which the contested decision is based.

The plea alleging error of law or a manifest error of assessment in the application of Articles 82 EC and 86 EC

Arguments of the parties

14 The applicant disputes the Commission's conclusion that the organisations managing the SNS are not undertakings and that therefore Articles 82 EC and 86 EC do not apply to them. The Commission erred in applying the approach adopted in Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637 to the present case, the circumstances giving rise to that judgment being

quite different from those in the present case. Admittedly, in both cases the organisations in question were responsible for running a public service of a social security nature. However, in *Poucet and Pistre* the question before the Court was whether such bodies act as undertakings, within the meaning of Articles 81 EC and 82 EC, in their dealings with their members, not whether they act as undertakings when purchasing from third parties goods which they need in order to provide services to their members.

15 It is the second of those situations which is in issue in the present case and, according to the applicant, *Poucet and Pistre* is therefore inapplicable. In that case, the applicants were challenging a legal obligation to become members and to pay contributions and the Court expressly stated that it was because the activities in question formed part of a social security scheme founded on the principle of national solidarity that they were not economic activities and that the bodies performing those activities were not to be treated as undertakings (see paragraphs 18 to 20 of the judgment).

16 That functional approach accords with the applicant's argument that, when examining, with reference to Article 82 EC, a specific activity performed by a given body, it is the nature of the activity, not of the body, which decides whether the body is to be regarded as an undertaking within the meaning of Article 82 EC. Moreover, that approach would exclude application of the approach adopted in *Poucet and Pistre* to all the activities performed by the organisations in question in the present case.

17 According to the applicants, other judgments of the Court of Justice confirm their argument. Case-law clearly shows that, 'in the context of competition law... the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is

financed...' (Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21). That case laid down a functional criterion for determining whether a body is an undertaking for the purposes of competition law.

18 Moreover, in a case concerning the scope of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35), the Court emphasised that the distinction between public undertakings and other State bodies 'flows from the recognition of the fact that the State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market. In order to make such a distinction, it is therefore necessary, in each case, to consider the activities exercised by the State and to determine the category to which those activities belong' (Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7). In that case too, therefore, it was the nature of the organisation's activity that proved decisive.

19 In any event, contrary to the Commission's assertion in the contested decision, the fact that the SNS is managed by State bodies in no way implies that, when they purchase medical goods and equipment, they are not carrying on an economic activity. Indeed, private operators provide the same services as the SNS, both in Spain and to an even greater extent in other Member States. Moreover, public hospitals in Spain may on occasion also provide private care for which the patient is charged, as in the case of foreign visitors who are not members of the SNS. The Commission's reasoning would lead to inconsistencies because purchases are made by or on behalf of SNS in exactly in the same way, whether the services the provision of which is facilitated by those purchases are charged to the patient, as would be the case in Spain for foreign visitors, or financed by the system founded on the principle of national solidarity, as would be the case for members of the SNS.

20 Moreover, the fact that the existence of the SNS creates, according to the contested decision, 'a level of demand for medical supplies which would not necessarily exist in a profit-based system' is, in the applicant's submission, equally irrelevant.

21 Furthermore, the Commission erred in referring, in the contested decision, to the 'principle of national solidarity' upon which the SNS is based and the 'strong element of wealth redistribution' which the system implies and the fact that the SNS has no 'profit motive'. Those factors are irrelevant because the present case concerns the purchase of goods and equipment by the organisations which run the SNS — an activity unconnected with the principle of solidarity — and not the public funding of the SNS by means of tax receipts, which the applicant does not call into question. The public authorities can hardly expect third party suppliers to make sacrifices in the name of the principle of solidarity.

22 In any event, it would not be permissible for the Commission to rely on the principle of solidarity in order to excuse an abuse on the part of the SNS of its dominant position consisting in its failure to pay certain of its debts within a reasonable time, as alleged by the applicant in its complaint.

23 According to the applicant, Spanish case-law, legal writers and the Commission's own decision-making practice also militate in favour of the application of a functional criterion. Certain authors go further still and criticise the approach adopted by the Court of Justice in *Poucet and Pistre,* cited in paragraph 14 above. The applicant mentions in particular the observations of José Luis Buendía Sierra in his book *Exclusive Rights and State Monopolies under EC Law, Article 86 (former Article 90) of the EC Treaty.* That author takes the view that it is inappropriate to make social security a 'protected area' sheltered from the rules of competition law. The very existence of the exception laid down in Article 86(2) EC, he feels, implies that activities financed according to the principle of solidarity remain, as a rule, subject to the competition law.

24 The applicant emphasises that the abusive conduct of which it complains should be examined in the light of the exemption expressly provided for in Article 86(2) EC and the criterion of necessity laid down therein. In so far as concerns the purchasing activity, at least, it is this exception which ought to determine whether the conduct of the bodies which run the SNS is legal, rather than the legal fiction that they are not undertakings. Had the Commission considered its complaint in the light of Article 86(2) EC, it would necessarily have concluded that the exception laid down therein was not applicable to the present case. Were the Commission to apply Article 82 EC in order to bring to an end the abusive conduct complained of, that would in no way have hindered the SNS in accomplishing its general mission of providing public health services.

25 The applicant adds that subsequent case-law refined the approach adopted in *Poucet and Pistre*, cited in paragraph 14 above, and contradicts the Commission's position. In paragraph 64 of his Opinion in Joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen* [1995] ECR I-4705, I-4707, Advocate General Jacobs stated that the pension fund in question in that case was not acting as an undertaking 'in its relations with its members'. This confirms that a body may be an undertaking in its dealings with certain classes of third parties, notwithstanding the fact that, in other matters, it acts as a social institution.

26 Moreover, in paragraph 22 of his Opinion in Case C-244/94 *Fédération française des sociétés d'assurance and Others* [1995] ECR I-4013, I-4015, Advocate General Tesauro stated that the health insurance fund in question in that case had to be classified as an undertaking 'at least in so far as... management of [the] scheme [was] concerned'. Having distinguished the facts in issue in that case from those in *Poucet and Pistre*, the Court emphasised that the pursuit of the principle of solidarity is not decisive in all cases and that, in the case then before it, the body in question was clearly carrying on an economic activity (*Fédération française des sociétés d'assurance and Others*, cited above, paragraph 20).

27 In paragraph 85 of its judgment in Case C-67/96 *Albany* [1999] ECR I-5751 the Court held that the absence of any profit motive and the presence of a number of aspects indicating solidarity, including compulsory membership, were not sufficient 'to deprive the sectoral pension fund of its status as an undertaking'. In his Opinion in that case (ECR I-5754, paragraph 312), Advocate General Jacobs went so far as to suggest that 'the non-profit-making character of an entity or the fact that it pursues non-economic objectives is in principle immaterial' to the question whether the entity is to be regarded as an undertaking.

28 Lastly, in paragraphs 110 to 116 of his Opinion in Case C-411/98 *Ferlini* [2000] ECR I-8081, I-8084, Advocate General Cosmas took the view that a public hospital acts as an undertaking for the purposes of Article 81 EC where it provides care to patients who are not members of the social security scheme by which it is financed. The Advocate General stated that 'in each case, the term "undertaking" must be understood in a functional sense, having regard to the activity' in question.

29 The applicant acknowledges that the case-law just cited does not provide direct authority for the present case. In *Fédération française des sociétés d'assurances and Others* and in *Albany*, cited at paragraphs 26 and 27 above respectively, it was the diminished degree of solidarity in the systems in question that led the Court to regard the bodies concerned as undertakings in their dealings with the users of the service they provide on the basis of the principle of solidarity. By contrast, the complaint in the present case concerns relations between the SNS and its suppliers. The applicant submits that, since in certain circumstances there may be doubt whether health services are provided as an economic activity, there is all the more reason, in light of the case-law cited, to treat the SNS as an undertaking in a context in which the principle of solidarity plays no part.

30 According to the applicant, the Commission's analysis of the question whether the SNS is an undertaking cannot have been correct because it failed to analyse

sufficiently thoroughly the way in which the SNS operates. The applicant also takes issue with the Commission's reasoning in the contested decision where it states that the SNS's role as provider of public health services cannot be dissociated from its job of purchasing supplies and equipment. The fact that the SNS needs to obtain supplies and equipment in order to be able to provide health services does not prevent that purchasing activity from being an economic activity. Contrary to the Commission's assertion in the contested decision, it is not necessary for an activity to be autonomously viable in order for it to be regarded as an economic activity and for the body which carries on that activity consequently to be regarded as an undertaking within the meaning of Article 82 EC. The Commission has cited no case-law or other authority in support of this aspect of its argument.

31 Moreover, the Commission's reasoning is tantamount to saying that the business of selling medical supplies and equipment carried on by the members of FENIN, or that of other service-providers supplying the SNS, is not an economic activity. This is clearly wrong. The applicant adds that, if that argument were to be followed, not even the activities of the entities supplying the members of FENIN could be regarded as economic activities because they too are connected with the SNS's supply of health services.

32 The Commission does not dispute the applicant's assertion that the case-law cited in the application, and especially the judgment in *Poucet and Pistre*, cited in paragraph 14 above, relates exclusively to relations between public bodies and the recipients of the public services they provide. However, that does not imply that the bodies in question must be regarded as undertakings in their dealings with their suppliers. On the contrary, it was held in the operative part of the judgment in *Poucet and Pistre* that the bodies in question in that case did not fall within the definition of 'undertaking', for the purposes of Articles 81 EC and 82 EC, and no distinction was made of the kind suggested by the applicant.

33 The Commission emphasises that, contrary to the applicant's assertion, it did apply a functional criterion when making its economic assessment of SNS's position. According to the analysis set out in paragraphs 20 to 24 of the contested decision, it is impossible to dissociate the purchasing or production activity from that of the provision of services because the second is dependent upon the first.

34 The fact that certain hospitals may, exceptionally, provide services to private patients against payment is, at most, relevant only to determining whether those hospitals — not the bodies concerned by the complaint — act as undertakings in their dealings with private patients. The Commission also points out that the applicant failed to mention this circumstance in its complaint.

Findings of the Court

35 It is appropriate to begin by observing that, according to settled case-law, in Community competition law the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (*Höfner and Elser*, cited in paragraph 17 above, paragraph 21, *Poucet and Pistre*, cited in paragraph 14 above, paragraph 17, *Fédération française des sociétés d'assurances and Others*, cited in paragraph 26 above, paragraph 14, Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 21, *Albany*, cited in paragraph 27 above, paragraph 77, Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 50, and Case T-513/93 *Consiglio Nazionale degli Spdizionieri Doganali* v *Commission* [2000] ECR II-1807, paragraph 36).

36 In this connection, it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity (see, to that effect, Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36, and

Consiglio Nazionale degli Spedizionieri Doganali v *Commission*, cited in the preceding paragraph, paragraph 36), not the business of purchasing, as such. Thus, as the Commission has argued, it would be incorrect, when determining the nature of that subsequent activity, to dissociate the activity of purchasing goods from the subsequent use to which they are put. The nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.

37 Consequently, an organisation which purchases goods — even in great quantity — not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles 81(1) EC and 82 EC.

38 Next, it is appropriate to point out that, in *Poucet and Pistre*, cited in paragraph 14 above (paragraphs 18 and 19), in reaching the conclusion that the organisations managing the health funds in question in that case were not carrying on an economic activity and were not, therefore, undertakings for the purposes of Articles 81 EC and 82 EC, the Court relied on the fact that they were fulfilling an exclusively social function, that their activity was based on the principle of national solidarity and, lastly, that they were non-profit-making, the benefits paid out being statutory benefits that bore no relation to the level of contributions. As regards the judgments in *Fédération française des sociétés d'assurance and Others* and *Albany*, cited in paragraphs 26 and 27 above respectively, it should be observed that, in those judgments, the Court confirmed the approach adopted in *Poucet and Pistre* (*Fédération française des sociétés d'assurance and Others*, paragraphs 15 and 16, and *Albany*, paragraph 78),

albeit that a lesser degree of solidarity in the operation of those schemes persuaded it that the organisations concerned were in fact undertakings. Those cases thus leave the principle posited in *Poucet and Pistre* intact.

39 It is not disputed in the present case that the SNS, managed by the ministries and other organisations cited in the applicant's complaint, operates according to the principle of solidarity in that it is funded from social security contributions and other State funding and in that it provides services free of charge to its members on the basis of universal cover. In managing the SNS, these organisations do not, therefore, act as undertakings.

40 It follows that, in accordance with the rule set out in paragraphs 37 and 38 above, the organisations in question also do not act as undertakings when purchasing from the members of the applicant association the medical goods and equipment which they require in order to provide free services to SNS members.

41 However, the applicant submitted in its reply that SNS hospitals in Spain do, at least on occasion, provide private care for which patients not covered by the SNS, such as foreign visitors, are charged. According to the applicant, the organisations in question therefore necessarily act as undertakings at least in so far as they provide such services and in so far as they purchase medical goods and equipment in connection therewith.

42 In this connection, it should be borne in mind that, where a complaint has been submitted to the Commission under Article 3 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1963-1964, p. 47), it is required to examine carefully the facts and points of law brought to its notice by the complainant in order to decide whether they disclose an infringement of Articles 81 EC and

82 EC (see, to that effect, the judgment of the Court of First Instance in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223 ('*Automec II*'), paragraph 79, and Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraph 39, confirmed on appeal by order of the Court of Justice of 16 September 1997 (Case C-59/96 P *Koelman* v *Commission* [1997] ECR I-4809)).

43 On the other hand, the Commission is not required, when considering a complaint, to examine facts which have not been brought to its notice by the complainant before rejecting a complaint on the ground that the practices complained of do not infringe Community competition rules or do not fall within the scope of the Community competition rules (see, by analogy, paragraph 40 of the judgment of the Court of First Instance in *Koelman* v *Commission*, cited in paragraph 42 above). An applicant bringing an action against a decision of the Commission rejecting its complaint in a competition matter cannot, therefore, criticise the Commission for failing to take account of facts which it has not brought to the Commission's attention and which the Commission could only have discovered by investigation.

44 In this case it must be observed, as indeed the Commission does in its rejoinder, that the applicant made no reference in its original complaint to the services which it alleges are provided for consideration. It mentioned them for the first time before the Court and then only in its reply. Therefore, in its review of the legality of the decision contested in the present action, the Court cannot take the existence of those services into account and it is not necessary in this case for the Court to rule on their potential relevance to the question whether the purchasing operations of those organisations amount to an economic activity.

45 It follows from the foregoing that the present plea must be rejected.

The plea of infringement of the rights of the defence

Arguments of the parties

46 The applicant argues that the Commission infringed its rights of defence by deciding to take no further action on its complaint of 12 December 1997 without having analysed thoroughly all the facts submitted to it. The applicant showed in its complaint that the SNS enjoyed a dominant position on the relevant markets. Moreover, the late payments which were the subject of the complaint represent a debt totalling more than a billion euros. The SNS is thus guilty of a clear abuse of its dominant position causing serious harm to the undertakings which are members of the applicant association.

47 That being so, the Commission erred in taking the view that the complaint failed to satisfy the condition of sufficient Community interest, which determines whether it should investigate the case further or take no further action (*Automec II*, cited in paragraph 42 above). In support of this argument, the applicant refers to the Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles [81] or [82] of the EC Treaty (OJ 1997 C 313, p. 3) and in particular paragraph 14 thereof.

48 The Commission argues that it dismissed the applicant's complaint on the ground that Article 82 EC did not apply. The organisations managing the SNS were not, in fact, undertakings and were not therefore subject to the prohibition on abuses of a dominant position. That being so, there was no purpose to be served in assessing whether there was a Community interest.

Findings of the Court

49 As has already been observed, the Commission dismissed the applicant's complaint on the ground that the bodies which manage the SNS do not act as undertakings, for the purpose of Article 82 EC, when purchasing the medical goods and equipment needed to operate the SNS (paragraphs 20 to 24 of the contested decision). Moreover, the Court has found that the Commission was entitled to dismiss the complaint on that ground, given the circumstances of the present case.

50 That being so, there was no point in the Commission considering the other aspects of the applicant's complaint because, even if it had done so and reached the conclusion that there had been an abuse of a dominant position, it could not then have adopted a decision recording an infringement of Article 82 EC or of the combined provisions of Articles 82 and 86 EC. The Commission cannot be accused of infringing the rights of defence of an undertaking simply because it declined to carry out a superfluous analysis of certain aspects of that undertaking's complaint.

51 It follows that the present plea must be rejected.

The plea alleging insufficient reasoning and a lack of transparency

Arguments of the parties

52 According to the applicant, the lack of any response in the contested decision to the arguments put forward in the complaint concerning the existence of a

dominant position and the abusive exploitation of that dominant position is a lacuna in the statement of reasons. Moreover, the Commission's reasoning regarding the question whether the organisations which manage the SNS are undertakings for the purpose of Article 82 EC is also inadequate. The Commission ought to have considered the relevant case-law more thoroughly so as to alight upon a solution fitting the facts of the case, rather than merely cite the single case of *Poucet and Pistre*, without setting out the reasons for which, in its view, that case was applicable to the present matter.

53 In this connection, the applicant refers to paragraph 35 of the judgment in Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, in which the Court of First Instance confirmed that, when a complaint is submitted to the Commission, 'the procedural safeguards provided for by... Article 6 of Regulation No 99/63 [of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964 p. 47)] oblige it... to examine carefully the factual and legal particulars brought to its notice by the complainant in order to decide whether they disclose conduct of such a kind as to distort competition...'. According to the applicant, the Commission failed in the present case to fulfil that obligation and the statement of reasons for the contested decision is therefore insufficient. The applicant adds that, according to case-law, the question whether a statement of reasons is sufficient must be assessed 'with regard not only to its wording but also to its context and to all the legal rules governing the matter in question' (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719). The Commission ought, therefore, to have taken account of the economic significance of the present matter in its statement of reasons for the contested decision.

54 Furthermore, the Commission breached the general principle that administrative procedures should be transparent, first, by omitting to keep the applicant properly informed of progress in the procedure, in particular by failing to send it a copy of its decision to communicate its complaint to the 26 organisations in question and of the observations which the organisations made in reply and, secondly, by refusing to see its representatives.

55 The Commission is of the view that its statement of reasons for the contested decision meets the relevant legal standard, as set by case-law, in that the reasons given enable the Court to conduct its review and the applicant to apprise itself of the single ground on which its complaint was rejected, namely the conclusion that the organisations which manage the SNS are not undertakings for the purposes of Article 82 EC, so that it can protect its rights and verify whether the decision is well founded (Case T-236/97 *Ouzounoff Popoff* v *Commission* [1998] ECR-SC I-A-311 and II-905, paragraph 56).

56 As regards the allegation that it failed to observe the principle of transparency, the Commission points out that it at no time communicated the applicant's complaint to the organisations in question and, consequently, the documents of which the applicant seeks disclosure never existed.

57 Moreover, the Commission is under no obligation to meet complainants, although in the present case it voluntarily met the applicant's representatives on 25 February 1998.

Findings of the Court

58 It is appropriate to point out that the Commission, in stating the reasons for the decisions which it is led to take in order to enforce the competition rules, is not obliged to adopt a position on all the arguments relied on by the parties concerned in support of their request; it is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision (Case T-111/96 *ITT Promedia* v *Commission* [1998] ECR II-2937, paragraph 131).

59 In the present case it should be observed, for the reasons set out above in paragraphs 49 and 50, that there was no point in the Commission responding to the arguments concerning the existence or abuse of a dominant position. Furthermore, the Commission was entitled to rely, in the contested decision, on the judgment in *Poucet and Pistre*, cited in paragraph 14 above, without analysing the subsequent case-law cited by the applicant, because the basic rule laid down by the Court in that judgment is still applicable, having been confirmed on numerous occasions, including in the judgments to which the applicant itself refers (see paragraph 38 above). Thus, given the general context of the contested decision and taking into account the factual background of which the applicant was aware, the absence of any statement of reasons relating to those aspects was logical (see, to that effect, Case T-57/91 *NALOO* v *Commission* [1996] ECR II-1019, paragraphs 298 to 300).

60 It follows that the contested decision is not vitiated by any inadequacy in its statement of reasons.

61 As regards the arguments concerning the lack of transparency for which the Commission is allegedly responsible, it should be borne in mind that the Commission's only obligation under Article 6 of Regulation No 99/63, where it proposes to take no further action on a complaint, is to put the complainant in a position to submit written observations. Furthermore, under Article 7 of Regulation No 99/63, there is no obligation to hear third parties, including complainants, except where they have a sufficient interest, the Commission enjoying a reasonable margin of discretion as regards the value of any such discussion in its conduct of the matter (Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 18; see also, to that effect, *NALOO* v *Commission*, cited in paragraph 59 above, paragraphs 275 and 276).

62 In the present case it is not in dispute that the Commission informed the applicant of its position on 2 December 1998, giving it the opportunity to lodge observations in reply, which the applicant did on 10 February 1999. Moreover,

it is clear from the contested decision (footnote 4) that the Commission's file contained only the applicant's complaint together with annexes. Lastly, the Commission confirmed before the Court, without being contradicted by the applicant, that it did not communicate the complaint to the organisations in question, which therefore never submitted any observations in reply.

63 It follows from the foregoing that the Commission discharged the only obligation upon it in this case in that it gave the applicant an opportunity to submit written observations on the position which it initially adopted. There can have been no infringement of the right of access to the Commission's file given that the applicant was apprised of all the documents contained in it.

64 For the sake of completeness the Court also observes that the applicant has not disputed the Commission's assertion, set out in its defence, that its officials met the applicant's representatives on 25 February 1998.

65 In light of the foregoing, it must be held that the Commission fully respected the applicant's rights as complainant.

66 The present plea must therefore be rejected.

67 Since all the pleas put forward by the applicant are unfounded, the present action must be dismissed in its entirety.

Costs

68 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful, it must, in accordance with the form of order sought by the Commission, be ordered to pay the costs.

On those grounds,

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

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs together with those incurred by the Commission.**

Vesterdorf Lenaerts Azizi

Forwood Legal

Delivered in open court in Luxembourg on 4 March 2003.

H. Jung B. Vesterdorf

Registrar President