JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
15 January 1997 *

In Case T-77/95,

Syndicat Français de l'Express International, an association of undertakings governed by French law, established in Roissy-en-France, France,

DHL International, a company incorporated under French law, established in Roissy-en-France,

Service CRIE, a company incorporated under French law, established in Paris,

May Courier, a company incorporated under French law, established in Paris,

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,

applicants,

* Language of the case: French.

Commission of the European Communities, represented initially by Francisco Enrique González Díaz, of its Legal Service, and Jean-Francis Pasquier, a national civil servant seconded to the Commission, and subsequently by Richard Lyal, of its Legal Service, and Jean-Francis Pasquier, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision SG (94) D/19144 of 30 December 1994 rejecting a complaint lodged on 21 December 1990 by Syndicat Français de l'Express International,

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

composed of: B. Vesterdorf, President, C. P. Briët and A. Potocki, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 14 November 1996,

gives the following

Judgment

Facts

1 On 21 December 1990 Syndicat Français de l'Express International (hereinafter 'SFEI'), an association of which the other three applicants are members, lodged a complaint with the Commission seeking a finding that the French State was in breach of Article 92 et seq. of the EEC Treaty (now the EC Treaty, hereinafter 'the Treaty').

2 On 18 March 1991 an informal meeting took place in Brussels between the representatives of the complainant and those of the Commission. On that date at the latest, the question was raised of possible infringements of Article 86 by La Poste, the French Post Office, as an undertaking, of Article 90 by the French State, and of Articles 3(g), 5 and 86 of the Treaty by the French State.

3 The views exchanged, as recalled by the applicants and not disputed by the Commission, may be summarized as follows.

4 With respect to Article 86, the applicants complained of the logistical and commercial assistance allegedly given by La Poste to its subsidiary Société Française de Messageries Internationales (GDEW France since 1992) (hereinafter 'SFMI'), which operated in the international express mail sector.

5 As to logistical assistance, the applicants challenged the making available of the infrastructure of La Poste for the collection, sorting, carriage, distribution and delivery of mail, the existence of a preferential customs clearance procedure

usually reserved for La Poste, and the granting of preferential financial terms. As to commercial assistance, the applicants pointed to the transfer of assets such as goodwill and stock, and promotion and advertising by La Poste in favour of SFMI.

6 The abuse was alleged to have consisted in La Poste allowing its subsidiary SFMI to make use of its infrastructure on unusually favourable terms in order to extend its dominant position on the basic mail market to the associated market in international express mail. That abuse was said to have resulted in cross-subsidies in favour of SFMI.

7 With respect to Article 90 and Articles 3(g), 5 and 86 of the Treaty, the applicants claimed that the unlawful actions of La Poste in giving assistance to its subsidiary originated in a series of instructions and directives from the French State.

8 On 10 March 1992 the Commission sent the complainant's representative a letter rejecting the complaint based on Article 86 of the Treaty.

9 On 16 May 1992 SFEI, DHL International, Service CRIE and May Courier brought an action for the annulment of that decision, which this Court declared inadmissible (order of 30 November 1992 in Case T-36/92 *SFEI and Others* v *Commission* [1992] ECR II-2479). On appeal, the Court of Justice annulled that order and referred the case back to this Court (Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR I-2681).

10 By letter of 4 August 1994 the Commission withdrew the decision which was the subject of Case T-36/92. This Court consequently ruled that there was no need to give judgment (order of 3 October 1994 in Case T-36/92 *SFEI and Others* v *Commission*, not reported in the ECR).

11 On 29 August 1994 SFEI called upon the Commission to act, in accordance with Article 175 of the Treaty.

12 On 28 October 1994 the Commission sent SFEI a letter pursuant to Article 6 of Regulation No 99/63/EEC of the Commission 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), informing it that it proposed to reject the complaint.

13 By letter of 28 November 1994 SFEI sent the Commission its observations and called upon the Commission to address a definitive decision to it.

14 On 30 December 1994 the Commission adopted the decision which is the subject of the present action (hereinafter 'the Decision'). SFEI received notification of it on 4 January 1995.

15 The Decision, which took the form of a letter signed by Mr Van Miert, a member of the Commission, reads as follows (omitting the paragraph numbering):

'The Commission refers to your complaint dated 21 December 1990, to which was annexed a copy of a separate complaint made to the French Conseil de la Concurrence (Competition Council) on 20 December 1990. Both complaints concerned the international express services of the French postal administration.

On 28 October 1994 the Commission sent you a letter under Article 6 of Regulation No 99/63 stating that the evidence collected in the investigation of the case did not enable the Commission to give a favourable answer to your complaint in so far as it concerned Article 86 of the Treaty, and inviting you to submit your comments on the point.

In your comments of 28 November 1994 you maintained your position with regard to the abuse of dominant position by La Poste and SFMI.

In the light of those comments, the Commission informs you by this letter of its final decision regarding your complaint of 21 December 1990 with respect to the initiation of proceedings under Article 86.

The Commission considers, for the reasons set out in its letter of 28 October 1994, that there is insufficient evidence in the present case showing that alleged infringements are continuing for it to be able to give a favourable answer to your complaint. In this respect, your comments of 28 November do not add any further evidence which might allow the Commission to alter that conclusion, which is supported by the grounds stated below.

First, the Green Paper on postal services in the single market and the Guidelines for the development of Community postal services (COM (93)247 final of 2 June 1993) address *inter alia* the principal problems raised in SFEI's complaint. Although those documents contain only proposals *de lege ferenda*, they must be taken into consideration in particular in assessing whether the Commission is making appropriate use of its limited resources, especially whether they are being put

to use in developing a regulatory framework concerning the future of the postal services market rather than investigating on its own initiative alleged infringements which have been reported to it.

Second, following an investigation carried out under Regulation No 4064/89 into the joint venture (GD Net) set up by TNT, La Poste and four other postal administrations, the Commission published its decision of 2 December 1991 in case IV/M.102. By its decision of 2 December 1991 the Commission decided not to oppose the concentration notified and to declare it compatible with the common market. It emphasized in particular that, with respect to the joint venture, the proposed transaction did not create or strengthen a dominant position which might significantly hinder competition within the common market or in a substantial part of it.

Some essential points of the decision related to the possible impact of the activities of the former SFMI on competitors: SFMI's exclusive access to La Poste's facilities had been reduced in scope and was to end two years after completion of the merger, thus distancing it from any subcontracting activity of La Poste. Any access facility lawfully granted by La Poste to SFMI had likewise to be offered to any other express operator with whom La Post signed a contract.

That outcome matches the proposed solutions for the future which you submitted on 21 December 1990. You asked for SFMI to be ordered to pay for PTT services at the same rate as if it was buying them from a private company, if SFMI chose to continue using those services; for "all aid and discrimination" to be put an end to; and for SFMI to "adjust its prices according to the real value of the services provided by La Poste".

Consequently, it is clear that the problems you refer to in relation to present and future competition in the international express mail sector have been adequately resolved by the measures taken so far by the Commission.

If you consider that the conditions imposed on La Poste in case IV/M.102 have not been complied with, in particular in the field of transport and advertising, it is then for you to provide — as far as possible — evidence, and possibly to bring a complaint on the basis of Article 3(2) of Regulation No 17. However, statements that "at present the tariffs (excluding possible rebates) applied by SFMI remain substantially lower than those of the members of SFEI" (page 3 of your letter of 28 November) or "Chronopost is advertised onP&Tlorries" (report annexed to your letter) must be supported by evidence to justify an investigation by the Commission.

The Commission's actions under Article 86 of the Treaty are aimed at maintaining genuine competition in the internal market. In the case of the Community market in international express services, having regard to the significant development described above, new information on any infringements of Article 86 would have to be supplied for the Commission to be able to justify investigating those activities.

Moreover, the Commission considers that it is not obliged to examine possible infringements of the competition rules which have taken place in the past, if the sole purpose or effect of such an investigation is to serve the individual interests of the parties. The Commission sees no interest in embarking on such an investigation under Article 86 of the Treaty.

For the above reasons, I inform you that your complaint is rejected.'

Procedure

16 By application lodged at the Registry of the Court of First Instance on 6 March 1995, the applicants brought the present action.

17 On 2 October 1996, in accordance with the provisions of Articles 14 and 51 of the Rules of Procedure of the Court of First Instance, the Court sitting in plenary session referred the case — which had originally been assigned to the Third Chamber, Extended Composition — to the Third Chamber.

18 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure without any preparatory measures of inquiry. However, as measures of organization of procedure, it requested the parties to reply to certain written questions, which they did by letters of 30 October 1996.

19 The parties presented oral argument and their replies to the Court's oral questions at the hearing in open court on 14 November 1996.

Forms of order sought by the parties

20 The applicants claim that the Court should:

— annul Commission Decision SG (94) D/19144 of 30 December 1994;

— order the Commission to pay the costs.

In the reply, the applicants further asked the Court to:

— order, if appropriate, the production of all documents which would show (a) that the undertakings given in the GD Net case have been complied with and that the cross-subsidies have been stopped and (b) that the Commission deliberately (in particular to help bring about a general political solution to the problem of liberalization of the postal sector) refused to take the appropriate action in relation to the breaches of the competition rules reported by the applicants and established by the Commission.

21 The Commission contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

The first plea in law: breach of Article 86 of the Treaty

Arguments of the parties

22 According to the applicants, it follows conclusively from the course of the procedure in this case, in particular the meeting of 18 March 1991, the Commission's letters of 10 March 1992, 4 August 1994, 28 October 1994 and 30 December 1994, an examination of the Commission's pleadings in Case T-36/92 and the judgment of the Court of Justice in Case C-39/93 P that the Commission carried out an examination of the allegations made by the applicants in their complaint from the point of view of Article 86 of the Treaty, and did not merely, as it now claims, examine whether there was any Community interest in launching an investigation. Having thus manifestly applied Article 86 of the Treaty, the Commission infringed that provision in two respects.

23 In the first limb of this plea in law, the applicants submit that by basing the rejection of the complaint on conclusions drawn from a decision taken under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentration between undertakings (Commission Decision 91/C 322/14 of 2 December 1991 in Case IV/M.102 — TNT/Canada Post, DBP Postdienst, La Poste, PTT Post and Sweden Post, OJ 1991 C 322, p. 19, hereinafter 'the GD Net decision'), the Commission infringed Article 86 for the following three reasons.

24 First, the Commission committed an error of law, because the methods and criteria of assessment of the facts before it differ, depending on whether the rule of law being applied is Article 86 or Regulation No 4064/89.

25 Second, it could not validly refer to the GD Net decision, because the parties and the facts were not the same as those referred to in the complaint.

26 Third, by failing to observe the principles it had itself laid down for assessing the lawfulness of cross-subsidies such as those complained of in the complaint with respect to Article 86 of the Treaty, and by following inappropriate legal reasoning, the Commission committed an error of law.

27 In the second limb of this plea in law, the applicants submit that despite having acknowledged the existence of various situations which were not compatible with Article 86 of the Treaty, the Commission decided, essentially for political reasons, not to impose penalties, thus granting an exemption to the infringement it should have established.

28 The Commission argues that this plea should be rejected, submitting in effect that it did not apply Article 86 but merely rejected the complaint because there was no sufficient Community interest in examining it.

Findings of the Court

29 It is settled case-law that Article 3 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) 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 as to the existence or otherwise of an infringement of Article 85 or Article 86 of the Treaty or of both (see, *inter alia*, Case T-114/92 *BEMIM* v *Commission* [1995] ECR II-147, paragraph 62). Moreover, the Commission is entitled to reject a complaint when it considers that the case does not display a sufficient Community interest to justify further investigation of the case (*BEMIM* v *Commission*, paragraph 80).

30 In the present case, the applicants' first plea in law is based on an interpretation of the Decision which the Commission disputes. The Commission submits that the rejection of the complaint was founded exclusively on the lack of a sufficient Community interest in the case. The Court must therefore determine the ground on which the rejection of the complaint was based.

31 The Court observes on this point that, as the applicants point out, the only reference to the Community interest — an implicit one, moreover, as it only refers to interest — appears in the penultimate paragraph of the Decision, concerning past infringements.

32 However, the Court considers that the lack of Community interest in continuing the investigation of the complaint underlies the whole Decision. The penultimate paragraph cannot be dissociated from the rest of the document. Thus the Decision notes first that the postal services sector has been analysed as a whole in the Green Paper on the development of the single market for postal services (COM (91) 476 final of 11 June 1992, hereinafter 'the Green Paper') and the Guidelines for the development of Community postal services (COM (93) 247 final of 2 June 1993, hereinafter 'the Guidelines'), which must be taken into account in assessing whether the Commission is making appropriate use of its limited resources. It then

notes that the infringements complained of with reference to Article 86 of the Treaty in the particular case of international express mail services have been examined and resolved by the Commission in the GD Net decision, which thus enabled the Commission to fulfil its function of upholding competition. The Decision observes, moreover, that the complainants have not produced evidence that the infringements are continuing, and that it is not for the Commission to concern itself with past infringements from the point of view solely of the individual interests of the parties. The Commission concludes that there is no interest in intervening. Consequently, the entire Decision rests on the consideration of whether it is appropriate to intervene in a field in which the Commission has already exercised its authority. In the Commission's opinion, and in the absence of evidence to the contrary from the complainants, the problems have been adequately resolved for the present and the future.

33 Moreover, the Court observes that the factors noted in the Decision would make no sense if they were to be regarded as a legal assessment under Article 86 of the Treaty, in the absence of any definition of the relevant market in geographical or material terms, any evaluation of La Poste's position on that market, or any assessment of the practices with respect to Article 86.

34 The Court concludes that the rejection of the complaint was based on the sole ground that in the circumstances of the case there was no sufficient Community interest in the matter.

35 That conclusion is not contradicted by the letters from the Commission cited above or by the judgment of the Court of Justice in Case C-39/93 P. Even if the Commission carried out a preliminary investigation of the acts complained of from the point of view of Article 86 of the Treaty, that cannot preclude the sole ground for the Decision being the lack of a sufficient Community interest (*BEMIM* v *Commission*, paragraph 81).

36 Since the Commission concluded that there was no sufficient Community interest in the case, and thus did not assess the practices complained of from the point of view of Article 86 of the Treaty, it follows that the plea alleging breach of that provision is misconceived.

37 In view of that conclusion, the Court considers it appropriate to change the order of the applicants' pleas in law, in order to examine first the plea alleging breach of the rules of law relating to the assessment of Community interest, which was put forward only as an alternative argument.

The second plea in law: breach of the rules of law on the assessment of Community interest

Arguments of the parties

38 The applicants submit, first, that the case-law has imposed strict conditions on the right to reject a complaint for lack of Community interest (Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 86), namely the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of the infringement, and the scope of the investigation required in order to fulfil, under the best possible conditions, the task of ensuring that Articles 85 and 86 of the Treaty are complied with. They submit that the Commission failed to take those factors into account; none of the conditions was complied with in this case.

39 Second, the applicants consider that documents such as the Green Paper and the Guidelines should not have been taken into consideration in assessing the Community interest, especially as no legislation has as yet followed from them. Moreover, the argument as to the optimum use of the Commission's limited resources is not acceptable, since the preparation of legislation and the investigation of complaints in competition matters come under two different directorates-general.

40 Similarly, the reference to the GD Net decision and the undertakings annexed to it in assessing the Community interest is wrong in law, since that decision was adopted on the basis of Regulation No 4064/89 and since the concept of a dominant position is an objective one whose application cannot depend on undertakings given by companies. In any event, the GD Net decision is not relevant in the present case. The undertakings relate only to the hypothetical situation of a request for access to the network being made to the postal authorities; in other words, in the absence of such a request, La Poste could continue to give special treatment to its subsidiary. Moreover, the undertakings do not cover all the alleged infringements and do not concern the same parties as those referred to in the complaint. Further, the Commission was wrong to consider that the evidence produced by the applicants to show that the infringements were continuing in the fields of advertising and transport was not sufficient. Finally, it did not explain how it could be certain that the practices had ceased, when it had not examined whether the undertakings were being complied with.

41 The applicants conclude that the Commission's conclusion that there was no Community interest was based solely on the fact that it is not obliged to investigate past infringements if the sole object or consequence of such an investigation is to serve the private interests of the complainants (penultimate paragraph of the Decision).

42 They consider that such an explanation cannot be accepted. The discretion which the Commission has under Article 3 of Regulation No 17 cannot allow it to act contrary to the aims set out in Articles 3(g), 89(1) and 155 of the Treaty. Moreover, inasmuch as Article 86 by definition penalizes past infringements, that is, infringements which have been committed, whether or not they have ceased, Article 86 would be deprived of its effectiveness if a complaint were to be rejected solely on the basis of a finding that an infringement of that article had ceased. The applicants refer here to the case-law on Article 169 of the Treaty to the effect that even if an infringement has ceased to have any consequences, there is an interest in establishing whether or not there has been a default. Finally, the fact that the Commission can initiate proceedings in the event of a breach of undertakings entered into by a company is not capable of justifying the rejection of a complaint based on Article 86 of the Treaty.

43 Third, the applicants submit that the only possible way to protect the Community interest effectively would have been to take a decision penalizing the practices which were the subject of the complaint.

44 The preparation of a legislative framework, which furthermore has still not yet been produced, cannot lead to the same result as proceedings on the basis of Regulation No 17, namely the termination of the infringements of Article 86 (judgment in Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraphs 50 to 61). Moreover, a national court before which the matter was brought would find itself faced with principles of Community law which have not yet been specifically applied. Their application would thus have constituted a significant development of the law on this point, altogether consistent with the Community interest.

45 The Commission contends that this plea should be rejected, and submits that it made correct use of its discretion to assess the Community interest.

Findings of the Court

46 While this Court has indeed listed the factors which the Commission must in particular balance when assessing the Community interest, it is nevertheless the case that the Commission is entitled to take other relevant factors into account in that assessment. Assessment of the Community interest is necessarily founded on an examination of the particular circumstances of each case, subject to review by the Court (judgment in *Automec* v *Commission*, paragraph 86).

47 In the present case, having regard to the Court's analysis with reference to the first plea in law, the examination of the assessment of the Community interest must relate to the Decision as a whole. Contrary to the applicants' assertions, that examination is not restricted to the penultimate paragraph of the Decision.

48 As stated above, the assessment made by the Commission in the Decision consists of two parts.

49 In the first part, the Commission refers to the Green Book and the Guidelines. It appears from the Decision that the purpose of that reference was to specify the general context of the present case by recalling the Commission's efforts to establish a legislative framework relating *inter alia* to the activity concerned in the present case. To that extent, that element of the Commission's reasoning, although placed formally at the beginning, is of a supplementary nature in the present case. The Commission did not claim that the practices complained of in the complaint had ceased because of the Green Paper and the Guidelines, which it emphasized were proposals *de lege ferenda*.

50 Moreover, since the Commission concluded elsewhere that the practices complained of had ceased, it was entitled to consider that the efforts to draw up legislation for the future, rather than the investigation of a complaint relating to past practices which had been dealt with, constituted an appropriate use of its limited resources, even if, as the applicants point out, such work is essentially handled by two different directorates-general.

51 The Court concludes that the applicants cannot gain anything from criticizing the Commission for referring to those two documents, in view of the purpose of that reference.

52 In the second part of the Decision the Commission states that the practices complained of in the complaint have ceased, as a result of the GD Net decision, and that the complainants have not produced evidence to the contrary. It concludes that the only purpose or effect of an investigation of the complaint, in relation to past actions, would be to serve the private interests of the complainants.

53 The Court must begin by considering whether the Commission is in principle entitled to reject a complaint of abuse of a dominant position, on the basis of lack of a Community interest, on the ground that the practices complained of in that complaint have since ceased, so that the sole purpose or consequence of an investigation would be to serve the individual interests of the complainants.

54 The Court notes that the extent of the Commission's obligations in matters of competition law must be considered in the light of Article 89(1) of the Treaty, which constitutes, with regard to those matters, the specific expression of the general supervisory role conferred on the Commission by Article 155 of the Treaty (judgment in Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 63).

55 Moreover, as already noted (see paragraph 29 above), 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 or of both. The Commission is thus entitled to give different degrees of priority to complaints made to it, and it is legitimate for it to refer to the Community interest presented by a case as a criterion of priority. It may reject a complaint for lack of a sufficient Community interest in continuing with the investigation of the matter.

56 Finally, the Court of Justice has held that Article 86 is an application of the general objective of the activities of the Community laid down by Article 3(g) of the Treaty, namely the institution of a system ensuring that competition in the common market is not distorted (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 38).

57 In view of that general objective and the functions conferred on the Commission, the Court considers that, provided it states the reasons for its decision, the Commission may lawfully decide that it is not appropriate to pursue a complaint

regarding practices which have since ceased, all the more so where, as in the present case, they have ceased as a result of action by the Commission. It is not important to know the legal basis for the adoption of a decision putting an end to the practices complained of, since it is only the effect of that decision which must be taken into account.

58 In such a case, investigating the matter and establishing that infringements have taken place in the past would no longer help to ensure undistorted competition in the common market and would thus not represent fulfilment of the functions conferred on the Commission by the Treaty. The essential object of pursuing the case would be to make it easier for the complainants to prove fault in an action for damages in the national courts.

59 Consequently, in the present case the Commission was entitled to consider that, having put an end to the practices complained of by adopting another decision and having thus exercised its function of ensuring that the Treaty is properly applied, it would not constitute an appropriate use of its limited resources to continue the procedure solely in order to assess past acts from the point of view of Article 86 of the Treaty, especially when it was otherwise making efforts to establish a legislative framework in the sector concerned. The Commission's analysis was all the more reasonable in that, given a definitive decision by it not to investigate a complaint of breach of Article 86, the national courts, in which the applicants might bring proceedings, have jurisdiction to rule on the alleged infringement.

60 Even supposing that the case-law of the Court of Justice on the application of Article 169 of the Treaty could be applied to the present case, as the applicants submit, this cannot alter that conclusion. The Court of Justice has indeed held that, even if a Member State's breach of obligations is remedied after the expiry of the time-limit prescribed by the second paragraph of Article 169, there is still an interest in pursuing the action in order to establish the basis for liability which a Member State may incur as a result of its breach of obligations (see, *inter alia*, Case C-280/89 *Commission* v *Ireland* [1992] ECR I-6185), yet the Commission is still not obliged to pursue such an action.

61 The next question which must be examined is whether the Commission was entitled to conclude that in the present case the practices alleged in the complaint had ceased as a result of the adoption of the GD Net decision.

62 In the GD Net decision the Commission began by finding that the agreements notified contained a clause under which a service subcontracted by the joint subsidiary to a postal administration was to be provided for payment under normal commercial conditions. However, the Commission noted that, as third-party competitors had maintained, the postal authorities had not set up, by the date of the decision, a mechanism by which the cost of each service provided could be calculated precisely. It therefore considered that distortions of competition could not be excluded. It nevertheless considered that there was no economic justification for the postal authorities to allow the subsidiary to receive cross-subsidies, since their individual shares of the joint subsidiary's profits could not be equal to the possible subsidies each might give. Moreover, the postal authorities taking part had undertaken to provide the same services to third parties under identical conditions, as long as they could not establish that there were no cross-subsidies.

63 In the light of those factors, the Court will examine the applicants' arguments that the GD Net decision did not put an end to the infringements complained of in the complaint.

64 In the first place, while it is indeed the case, as the applicants point out, that the complaint and the GD Net decision did not concern all the same parties, the complaint nevertheless, in so far as it related to breach of Article 86 of the Treaty, alleged abuse of La Poste's dominant position, as can be seen from the account of that complaint, which was not in writing (see paragraphs 1 and 2 above), given by the applicants in their pleadings in the present action. As to the GD Net decision, it involved La Poste among others; La Poste was thus legally bound not only by the provisions of the agreements notified, in particular the provisions relating to payment for services subcontracted to it, but also by the undertakings annexed to

the decision. It should also be pointed out that, by the operation of the concentration, La Poste withdrew from the market in international express mail services, not keeping any activities of its own in that sector which would allow it to evade the undertakings which had been given.

65 It follows that the Commission made no error in referring to the GD Net decision, even though the parties in that decision and the complaint were not the same.

66 In the second place, it appears from the GD Net decision that the joint subsidiary will decide alone which services it wishes to subcontract to the postal authorities, the parent companies having merely indicated the services which might be expected to be mainly concerned. In view of the expressions 'might be expected' and 'mainly' in the GD Net decision, the Court considers that no individual service is excluded, so that all services which the joint subsidiary actually decides to subcontract to the postal authorities, even in addition to those expressly listed, will be provided for payment, under normal commercial conditions, and subject to the undertaking annexed to the decision.

67 It follows that the Commission did not err in considering that the practices to which the complaint drew attention, in so far as they concerned transport and advertising services, were not outside the fields covered by the GD Net decision.

68 In the third place, with respect to the Commission's certainty that the practices had ceased, it should be observed that since La Poste is bound by the agreements notified and the undertakings given, the Commission was entitled to consider that, once the concentration had been implemented, in other words on 18 March 1992, according to the information provided to the Court, those provisions were being observed, in the absence of evidence to the contrary.

69 In the present case, the Court notes that the items of evidence produced by the applicants in their letter of 28 November 1994 in reply to the Commission's letter of 28 October 1994, in order to establish that the practices at issue were continuing, are two in number: a bailiff's report recording sight of a 'Chronopost' advertising poster on a La Poste vehicle, and a statement in the body of the applicants' letter that 'at present the tariffs (excluding possible rebates) applied by SFMI remain substantially lower than those of the members of SFEI', with nothing to support that statement. While that report and statement may be capable of establishing that services are indeed subcontracted, they do not, however, allow the existence of cross-subsidies to be presumed.

70 Consequently, the Court considers that the Commission made no error in finding that those two items of information were not sufficient to justify an investigation.

71 That conclusion cannot be affected by the fact, to which the applicants drew attention at the hearing, that in July 1996 the Commission decided to initiate the procedure provided for in Article 93(2) of the Treaty regarding aid allegedly granted by France to SFMI-Chronopost (OJ 1996 C 206, p. 3). The decision to initiate such proceedings does not show that at the time when the Decision was adopted the Commission had sufficient evidence to warrant starting an investigation under Article 86 of the Treaty in respect of the period after the adoption of the GD Net decision.

72 In the fourth place, the argument that the undertakings given by La Poste and others related only to a hypothetical situation, in that, in the absence of a request by a third party to join the postal administrations' network, nothing prevented La Poste from continuing to give its subsidiary cross-subsidies, is based on a partial reading of the GD Net decision. Regardless of the application of the undertakings, the parties to the concentration notified remain bound by the provisions of their contract, including the provision under which any service subcontracted is to be provided for payment under normal commercial conditions. Moreover, it appears from the GD Net decision that there would be no economic justification for the

postal administrations to cross-subsidize their joint subsidiary. That assessment, in the GD Net decision which has not been referred to the Court, is not challenged by the applicants in their pleadings. In fact, the undertakings constitute an additional burden on the postal administrations, under which they are obliged to grant identical terms for comparable services to other providers of international express mail services, as long as they cannot demonstrate the absence of cross-subsidies.

73 The Court therefore considers that the applicants are wrong in asserting that, in the absence of requests by third parties to join La Poste's network, there is nothing to prevent La Poste giving cross-subsidies to its subsidiary. In any event, as stated above, the applicants have been unable to produce the slightest evidence that cross-subsidies are continuing, sufficient to justify opening an investigation.

74 In the fifth place, replying to the Court's written questions, the applicants seek support for their case in the withdrawal of La Poste from GD Net, which took place after the Decision was adopted (Commission Decision of 24 July 1996 in Case IV/M.787 — PTT Post/TNT — GD Net). Their argument cannot be accepted. That new situation cannot affect the lawfulness of the Decision, which must be assessed at the time of its adoption (see, as the most recent authority, the judgment in Joined Cases T-79/95 and T-80/95 *SNCF and British Railways* v *Commission* [1996] ECR II-1491, paragraph 48).

75 In the light of all the considerations set forth above, the second plea in law must be dismissed.

76 Under these circumstances, there are no grounds for granting the applicants' claim for an order requiring the Commission to produce all documents which would show that the undertakings given in the GD Net case have been complied with and the cross-subsidies terminated.

The third plea in law: breach of Article 190 of the Treaty

Arguments of the parties

77 The first limb of this plea alleges that the grounds of the Decision contain two contradictions.

78 The applicants submit that it appears from the Decision both that the Commission decided not to launch an investigation under Article 86 of the Treaty (penultimate paragraph of the Decision) and that the evidence gathered in the investigation of the case did not enable the complaint to be upheld (second paragraph), which in the context of the present case means that the Commission carried out an investigation and decided to terminate it by rejecting the complaint. There is thus a contradiction in the grounds, which cannot be explained by the allegedly different meanings of the word 'investigation'.

79 They also argue that the Decision and the defence contradict one another on the question whether the undertakings given in the GD Net case cover the aspects of the complaint relating to advertising and transport.

80 In the second limb of the plea, the applicants submit that the Decision contains nothing to show whether the Commission examined the complaint of breach of Article 86 of the Treaty or why there had been no breach of that provision.

81 In the third limb, the applicants submit that the Decision states no reasons for the rejection of the complaint in so far as it concerned breach of Article 3(g), the second paragraph of Article 5 and Article 86, and breach of Article 90 of the Treaty.

82 In the fourth limb, the applicants submit that, if the Commission's argument based on the GD Net case cannot be upheld, the sole possible ground remaining for the rejection decision is the lack of Community interest. In the present state of the law, such a ground cannot be considered to fit into a consistent line of decision-making practice, so that a summary statement of reasons should be excluded, especially if, as in the present case, the interests involved are considerable.

83 The Commission submits that it stated its reasons for the Decision sufficiently clearly and coherently, and that this plea in law should therefore be rejected.

Findings of the Court

84 In the first limb of their plea, the applicants submit that there are two contradictions in the grounds of the Decision.

85 They argue, first, that it is contradictory to assert that an investigation will not be opened, when the Commission had already carried out an investigation into the practices complained of from the point of view of Article 86. However, even if the applicants' argument is correct, it would simply mean that the Commission, in concluding that it saw no interest in launching an investigation, was not precise, in that it should have stated that it saw no interest in continuing with the investigation. Such a terminological error is not enough to constitute a contradiction of grounds which could affect the understanding of the Commission's reasoning.

86 The applicants argue, second, that there is a contradiction between the reasons given in the Decision and the Commission's defence in the present case. However, only a contradiction in the actual grounds of the contested act could be capable of vitiating its lawfulness.

87 The first limb of the plea must consequently be dismissed.

88 As to the second limb of the plea, alleging a failure to state reasons with respect to Article 86 of the Treaty, it has been found that the rejection of the complaint was based solely on the lack of a Community interest; the Commission did not assess the practices from the point of view of that article. This limb of the plea is therefore unfounded.

89 As to the third limb of the plea, concerning the complaint of breach by the French State of Article 90 of the Treaty and of Articles 3(g), 5 and 86 of the Treaty, the Court finds that, as appears from its second, fourth and penultimate paragraphs, the Decision concerns only the part of the complaint relating to Article 86. The third limb of the plea need not therefore be examined.

90 As to the fourth limb of the plea, concerning the statement of reasons based on the Community interest, it is settled case-law that the obligation to state reasons is an obligation to disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the contested act, so as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and the Community judicature to exercise its review (judgment in Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraph 83). More particularly, in view of the requirement to state reasons, the Commission cannot merely refer to the Community interest in the abstract. It must set out the legal and factual considerations which led it to conclude that there was insufficient Community interest to justify investigating the case (judgment in *Automec* v *Commission*, paragraph 77).

91 It follows from the consideration of the first and second pleas in law, set out above, that the Decision states the Commission's reasoning in a clear and unequivocal fashion, thereby enabling the Court to exercise its power of review.

92 The fourth limb of the third plea must therefore be dismissed.

93 In the light of all those considerations, the third plea in law is dismissed.

The fourth plea in law: breach of general principles of Community law

Arguments of the parties

94 In the first limb of this plea, the applicants submit that the Commission infringed the principle of good administration, in that it did not examine or take into account one of the principal documents annexed to SFEI's complaint, namely an economic report drawn up by a firm of accountants (judgments in *Automec* v *Commission*, paragraph 79, and *Parker Pen* v *Commission*, paragraph 63).

95 In the second limb, the applicants argue that the Commission disregarded the fundamental principle of non-discrimination. Upon application of the principle of the hierarchy of rules of law, the Commission could not attempt to justify its action by referring to its discretion in the context of Regulation No 17.

96 They argue that in the present case the Commission took a different approach from that adopted in other cases, in two respects.

97 In the first place, the Commission decided to reject the complaint on the ground that it concerned only infringements which had been committed in the past and an investigation would have served only the individual interests of the parties. Such reasoning contradicts numerous previous decisions of the Commission, especially in cases where an infringement was established on the basis of a complaint by a competitor.

98 In the second place, the Commission failed to apply the principle, recognized by the Court of Justice, that there is an infringement of Article 86 if an undertaking holding a dominant position on a particular market extends its dominant position, without any objective justification, for the benefit of a subsidiary on a neighbouring but separate market, with the possibility of eliminating all competition from other undertakings operating on that market (judgment in Case C-18/88 *GB-Immo-BM* [1991] ECR I-5941), and failed to apply the principle that Article 86, in conjunction with Article 3(g) and the second paragraph of Article 5, requires Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings (judgment in Case 267/86 *Van Eycke* v *ASPA* [1988] ECR 4769).

99 The Commission denies any infringement of the principle of good administration or the principle of non-discrimination.

Findings of the Court

100 First, having regard to the fact that the Decision rejected the complaint on the ground of lack of a Community interest, essentially in that the practices had ceased

as a result of the GD Net decision of 2 December 1991, the Court considers that the failure to make use of an expert report of 6 December 1990, which was intended to demonstrate that the practices complained of existed up to 1989, in other words during a period prior to the adoption of the GD Net decision, cannot constitute an infringement of the principle of good administration.

101 Second, the Court notes that the principle of non-discrimination requires that comparable situations must not be treated differently unless such treatment is objectively justified (judgment in Case T-146/95 *Bernardi* v *Parliament* [1996] ECR II-769, paragraph 37).

102 On this point, the Court finds to begin with that the applicants have not shown that in a comparable situation to the present one, in which the contested practices had ceased as a result of an earlier decision of the Commission, the Commission would nevertheless have launched an investigation into the past events under Article 86 of the Treaty. Consequently, the applicants have not proved the alleged breach of the principle of non-discrimination.

103 Next, the Court considers that the applicants cannot plead discrimination in the application of Article 86 because the Decision is founded solely on the lack of a Community interest, so that the Commission did not assess the contested acts from the point of view of that article.

104 Finally, the applicants cannot plead discrimination in the application of Articles 3, 5 and 86 of the Treaty taken together, because, as stated above, only the part of the complaint relating to Article 86 was the subject of the Decision.

105 Accordingly, the fourth plea in law must also be dismissed.

The fifth plea in law: misuse of powers

Arguments of the parties

106 The applicants submit, in the first limb of this plea, that by basing its decision only on preparatory legislative work and a procedure in application of Regulation No 4064/89, the Commission avoided having to follow the procedure prescribed by Regulation No 17, thus committing a misuse of powers (judgment in Joined Cases 140/82, 146/82, 221/82 and 226/82 *Walzstahl-Vereinigung and Thyssen* v *Commission* [1984] ECR 951, paragraph 28).

107 In the second limb of the plea, the applicants make the following points in order to show that there was a misuse of powers.

108 First, the procedure carried out by the Commission consisted only of delaying letters and subterfuges.

109 Second, La Poste 'certainly' intervened in the examination of the present case, as it had intervened with the Commission to obtain substantial changes to the Green Paper.

110 Third, the effect, and no doubt the intention, of the Commission's changes of position was to delay the assessment of whether its choices were lawful.

111 Fourth, the statements by the members of the Commission successively responsible for competition illustrated the ambiguous attitude of the Commission, which, publicly, was concerned with respect for competition in the postal sector, but in reality yielded to pressure from certain States and postal institutions, as is shown by the handling of another complaint lodged in 1988 by the International Express Carrier Conference relating to remail.

112 Fifth, although the rules applicable to cross-subsidies are clearly established, the Commission refused to use the powers available to it under Regulation No 17.

113 Lastly, the applicants refer to a letter of 1 June 1995 from Member of the Commission Sir Leon Brittan to the President of the Commission, allegedly showing that the Commission decided not to prosecute the infringements raised in the complaint, in order to facilitate the establishment by the Council of a postal policy.

114 The Commission contends that this plea should be rejected as being devoid of any serious foundation.

Findings of the Court

115 On the first limb of the plea, alleging abuse of process, the Court observes that the Commission is not obliged to carry out an investigation when it receives an application under Article 3 of Regulation No 17; however, it must examine carefully the factual and legal particulars brought to its notice by the complainant (judgments in *Automec* v *Commission*, paragraph 79; *BEUC and NCC* v *Commission*, paragraph 45; and Case T-74/92 *Ladbroke Racing* v *Commission* [1995] ECR II-115, paragraph 58). In the present case, it follows from the examination of the second and

third pleas in law that the Commission rightly rejected the complaint for lack of Community interest. In those circumstances, the applicants have not established any abuse of process.

116 On the second limb of the plea, it must be noted that a decision is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, that it was adopted with the exclusive or main purpose of achieving ends other than those stated (see, as the most recent authority, Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 69).

117 In the present case, the Court considers that La Poste's alleged intervention with the Commission to have the case closed, the conjecture as to the purpose of the Commission's supposed changes of position, and the applicants' observations based on a letter allegedly sent by Sir Leon Brittan to the President of the Commission, which has not been produced and whose very existence is unconfirmed, rest solely on allegations which are unsubstantiated and hence not capable of constituting evidence from which the existence of a misuse of powers could be concluded.

118 Moreover, the allegation that the procedure consisted only of delaying letters is not supported by the facts. It should be noted here that the complaint of 21 December 1990 related only to Article 92 of the Treaty; it was only subsequently, by 18 March 1991 at the latest, that the facts raised in the complaint were examined under Article 86 of the Treaty. Furthermore, the Commission cannot be held to account in respect of the period from May 1992 to June 1994, during which the case was pending before this Court and the Court of Justice. Consequently, the Court considers that the Commission acted in the present case with the required diligence, even if it did not reach the conclusion the applicants wished.

119 The alleged ambiguous attitude of the Commission in the postal services sector is not supported either. The reference to the Commission's handling of another complaint, lodged by another party and relating to a different activity, is of no relevance in determining whether in the present case the adoption of the Decision was vitiated by a misuse of powers.

120 For the same reasons as those set out above, the fact that the Commission did not make use of the powers available to it under Regulation No 17, in particular by requiring information, is not capable of constituting objective evidence of a misuse of powers.

121 In the light of those considerations, the fifth plea in law must be dismissed.

122 In those circumstances, the Court considers that there are no grounds for granting the applicants' claim for an order requiring production of all documents which would show that the Commission deliberately, and in order, in particular, to help bring about a general political solution to the problem of liberalization of the postal sector, refused to take the appropriate action in relation to the breaches of the competition rules it allegedly found.

123 It follows that the application must be dismissed in its entirety.

Costs

124 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in

the successful party's pleadings. Since the applicants have been unsuccessful and the Commission has applied for costs, the applicants must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicants to pay the costs.

Vesterdorf Briët Potocki

Delivered in open court in Luxembourg on 15 January 1997.

H. Jung B. Vesterdorf

Registrar President