JUDGMENT OF THE COURT

17 May 2001 *

In Case C-449/98 P,

International Express Carriers Conference (IECC), established in Geneva (Switzerland), represented by E. Morgan de Rivery, J. Derenne and M. Cunningham, avocats, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber, Extended Composition) of 16 September 1998 in Case T-110/95 *IECC* v *Commission* [1998] ECR II-3605, seeking to have that judgment set aside,

the other parties to the proceedings being:

Commission of the European Communities, represented by K. Wiedner, acting as Agent, and N. Forwood QC, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: English.

La Poste, represented by H. Lehman, avocat, with an address for service in Luxembourg,

United Kingdom of Great Britain and Northern Ireland,

and

The Post Office,

interveners at first instance,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, A. La Pergola and M. Wathelet (Presidents of Chambers), J.-P. Puissochet, P. Jann, L. Sevón, N. Colneric, S. von Bahr and C.W.A. Timmermans (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: D. Louterman-Hubeau, Head of Division,

having regard to the Report for the Hearing,

after hearing oral argument from International Express Carriers Conference (IECC), represented by E. Morgan de Rivery, J. Derenne and M. Cunningham,

from the Commission, represented by K. Wiedner and C. Quigley, Barrister, and from La Poste, represented by C. Massa, avocat, at the hearing on 14 November 2000,

after hearing the Opinion of the Advocate General at the sitting on 11 January 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 8 December 1998, International Express Carriers Conference ('the IECC') brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance in Case T-110/95 *IECC* v *Commission* [1998] ECR II-3605 ('the contested judgment'), whereby the Court of First Instance dismissed as unfounded the IECC's application for annulment of the Commission Decision of 17 February 1995 rejecting its complaint in respect of the application of Article 85 of the EC Treaty (now Article 81 EC) to the CEPT Agreement ('the contested decision').

Facts of the case

2 The IECC is an organisation representing the interests of certain undertakings which provide express mail services. Its members, who are private operators,

offer, *inter alia*, 'remail' services, consisting in the transportation of mail originating in Country A to the territory of Country B to be placed there with the local public postal operator ('public postal operator') for final transmission by the latter on its own territory ('ABB remail') or to Country A ('ABA remail') or Country C ('ABC remail').

3 Remail allows large-scale senders of crossborder mail to select the national postal administration or administrations which offer the best service at the best price for the distribution of crossborder mail. It follows that, by using private operators, remail causes the public postal operators to compete for the distribution of international mail.

4 On 13 July 1988, the IECC lodged a complaint with the Commission under Article 3(2) of Council Regulation No 17 of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty) (OJ, English Special Edition 1959-1962, p. 87).

5 The complaint consisted of two parts based, first, on Article 85 of the EC Treaty and, second, on Article 86 of the Treaty (now Article 82 EC). In the first part of the complaint, the only part relevant to the present appeal, the IECC alleged that a number of public postal operators established in the European Community and in non-member countries, meeting in Berne in October 1987, had concluded a price-fixing agreement in regard to terminal dues, called 'the CEPT Agreement'.

6 The IECC stated, more specifically, that in April 1987 a large number of public postal operators in the Community had, during a meeting held in the United

Kingdom, considered whether a common policy ought to be adopted to face the challenge of competition from private companies offering remail services. A working party established within the European Conference of Postal and Telecommunications Administrations had subsequently proposed, in substance, an increase in terminal dues, the adoption of a code of conduct and improvements in customer services. The IECC claimed that in October 1987 this working party had accordingly adopted a new terminal dues arrangement, the CEPT Agreement, which proposed a new fixed rate which was in fact higher than the previous rate but which did not reflect the differences in distribution costs borne by the receiving postal administrations.

7 The public postal operators parties to the CEPT Agreement agreed to increase the rates of terminal dues by 10% in 1991, 5% in 1992 and a further 5% in 1993. Following the last increase, the CEPT rate was established at 1.491 DTS (droits de tirage spéciaux — special sorting dues) per kilogramme and 0.147 DTS per item.

8 The CEPT agreement on terminal dues remained in force until 31 December 1995.

9 On 17 January 1995, 14 public postal operators, 12 of them from the European Community, signed a preliminary agreement on terminal dues designed to replace the 1987 CEPT Agreement. The new agreement, referred to as the 'REIMS Agreement' (System for the Remuneration of Exchanges of International Mails between Public Postal Operators with a Universal Service Obligation) ('the preliminary REIMS Agreement'), essentially provides for a system whereby the receiving post office would charge the originating post office a fixed percentage of the former's domestic tariff for any post received. A definitive version of this agreement was signed on 13 December 1995 and notified to the Commission on 19 January 1996 for exemption under Article 85(3) of the Treaty (OJ 1996 C 42, p. 7). The agreement entered into force on 1 January 1996.

Procedure before the Commission and the contested decision

10 By its complaint of 13 July 1988, the IECC essentially sought to have the Commission adopt a decision prohibiting the actions of the public postal operators which would have allowed the latter, and in reality would have required them, to eliminate the cost advantages that remailing derives from the fact that terminal dues overcompensate or undercompensate the postal administrations for the actual costs of distributing crossborder mail but which, at the same time, would have prohibited the public postal operators from restricting or distorting the competition created by remailing, which offers other advantages in terms of costs or services.

11 The public postal operators cited in the IECC's complaint submitted their answers to the questions put by the Commission in November 1988. Between June 1989 and February 1991, copious correspondence was exchanged between, on the one hand, the IECC and, on the other, various officials in the Directorate-General for Competition (DG IV) and the cabinets of Commission Members Bangemann and Brittan.

12 On 18 April 1991, the Commission informed the IECC that it 'had decided to initiate proceedings under the provisions of Council Regulation 17/62... on the basis of Articles 85(1) and 86 of the EC Treaty'. On 7 April 1993, the Commission informed the IECC that it had adopted a statement of objections on 5 April 1993, which was to be sent to the public postal operators concerned.

13 On 26 July 1994 the IECC called on the Commission, pursuant to Article 175 of the Treaty (now Article 232 EC), to send it a letter under Article 6 of Commission Regulation No 99/63/EEC 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, hereinafter 'Regulation No 99/63'), in the event that the Commission considered it unnecessary to adopt a decision prohibiting the actions of the public postal operators.

14 On 23 September 1994, the Commission sent a letter to the IECC in which it stated its intention to reject the first part of its complaint relating to the application of Article 85 of the Treaty to the CEPT Agreement and requested the IECC to submit its observations pursuant to Article 6 of Regulation No 99/63. By letter of 23 November 1994, the IECC submitted its observations on the Commission's letter and called on the Commission to define its position on the complaint.

15 On 17 February 1995, the Commission notified the IECC of the contested decision, which definitively rejected its complaint relating to the application of Article 85 of the Treaty to the CEPT Agreement.

16 In the contested decision, the Commission stated:

'5.... Our key objection to the system of terminal dues outlined in the 1987 CEPT Agreement was that it was not based on the costs incurred by a postal administration in processing incoming international mail. ... Therefore, the Statement of Objections emphasised that charges levied by postal administrations for processing incoming international mail should be based on their costs.

6. The Commission accepted that these costs could be difficult to calculate precisely and stated that domestic letter tariffs could be deemed an adequate indication of these costs....

...

8. ... The Commission has been kept informed of progress towards the proposed new "System for the Remuneration of Exchanges of International Mails between Public Postal Operators with a Universal Service Obligation" (the "REIMS scheme"). On 17 January 1995, 14 public postal operators ... signed a draft agreement on terminal dues with a view to implementation on 1 January 1996. According to information provided on an informal basis by the International Post Corporation, the recently signed draft envisages a system whereby the receiving PPO [public postal operator] would charge the originating PPO a fixed percentage of the former's domestic tariff for any post received. ...

9. The Commission thus notes that the PPOs are actively working towards a system of new charges and at this stage believes that the parties are endeavouring to address the Commission's concerns under competition law shared by your complaint against the old system. It is the Commission's view that pursuing the infringement procedure with respect to the soon to be defunct 1987 CEPT scheme would hardly bring about a more favourable result for your clients. Indeed, the likely result of a prohibition decision would merely be to delay if not disrupt the wide-ranging reform and restructuring of the terminal dues system currently taking place, whereas the revised system should be implemented in the near future. In the light of the... judgment in [Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223], the Commission considers that it would not be in the interest of the public of the Community to devote its scarce resources to moving, at this stage, towards resolving the terminal dues related aspect of your complaint by means of a prohibition decision.

...

12. ... Nevertheless, the REIMS scheme appears to provide at least for a transitional period alternatives to the formerly restrictive clauses which were of concern to the Commission. Notably, the REIMS scheme, despite possible imperfections, provides a link between terminal dues and the domestic tariff structure ...

13. There is no doubt that the Commission shall thoroughly analyse the future REIMS scheme and its implementation under the competition rules. It shall notably examine the issue of Community interest both in terms of the substance of the reforms and the pace of their introduction...'.

Proceedings before the Court of First Instance and the contested judgment

17 By application lodged at the Registry of the Court of First Instance on 28 April 1995 and registered as Case T-110/95, the IECC brought an action pursuant to Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for annulment of the contested decision.

18 In support of its action, the IECC set out six pleas in law, the third alleging, essentially, an error of law and a manifest error in the Commission's assessment of the Community interest in the case, the first and third alleging infringement of Article 85(1) and (3) of the Treaty and of Article 4(1) of Regulation No 17, the fourth alleging misuse of powers, the fifth alleging infringement of Article 190 of the EC Treaty (now Article 253 EC) and the sixth alleging infringement of a number of general principles of law.

19 By the contested judgment, the Court of First Instance dismissed the action for annulment as unfounded and thus upheld the contested decision to the effect that, since the CEPT Agreement would soon no longer be current, as it was to be replaced by a new scheme (the REIMS scheme) in which terminal dues would be

more closely linked to costs, there was no Community interest in resolving the 'terminal dues' part of the IECC's complaint by adopting a prohibition decision.

20 In doing so, the Court of First Instance first of all rejected the arguments advanced by the IECC to show that the Commission had made an error of law and manifest errors of assessment of the facts in assessing the Community interest (paragraphs 46 to 69 of the contested judgment).

21 The Court of First Instance then rejected the IECC's complaints about the failure to reprehend the public postal operators concerned over the CEPT Agreement, in breach of Article 85(1) of the Treaty, and, second, about the alleged *de facto* exemption of the CEPT Agreement which, according to the IECC, resulted from the failure to adopt a decision prohibiting that agreement, contrary to Article 85(3) of the Treaty (paragraphs 74 to 77 of the contested judgment).

22 Last, it rejected the IECC's claims that the Commission had committed a misuse of powers (paragraphs 83 to 89 of the contested judgment), infringed Article 190 of the Treaty (paragraphs 94 to 101 of the contested judgment) and infringed a number of general principles of Community law (paragraphs 107 to 111 of the contested judgment).

23 The IECC was ordered to bear its own costs, as well as those of the Commission and La Poste, while the United Kingdom and The Post Office were ordered to bear their own costs.

The appeal

24 By its appeal, the IECC claims that the Court should:

— set aside the contested judgment;

— itself give judgment in the matter, pursuant to Article 54 of the EC Statute of the Court of Justice, and annul the contested decision;

— order the Commission to bear the costs incurred before the Court of First Instance and also those of the present proceedings;

— order the interveners before the Court of First Instance to pay the costs borne by the IECC before that Court and those incurred in connection with the interventions in these proceedings;

— in the alternative, in the event that the Court should not itself give judgment in the matter, reserve the decision as to costs and refer the case back to a Chamber of the Court of First Instance composed of judges different from those who dealt with Case T-110/95.

25 The IECC puts forward nine pleas in law in support of its appeal. The first plea alleges that certain findings made by the Court of First Instance were factually incorrect. By the second plea, which consists of four limbs, the IECC submits in substance that the Court of First Instance erred in law in defining the legal concept of Community interest and in examining the lawfulness of the application of that concept by the Commission. The third plea alleges infringement of Article 85 of the Treaty, read in conjunction with Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article 89 of the EC Treaty (now, after amendment, Article 85 EC) and Article 155 of the EC Treaty (now Article 211 EC). The fourth plea alleges breach of the principle that the lawfulness of a contested decision can be assessed only in the light of the elements of law and of fact in existence on the date of adoption of the decision. By the fifth plea, which consists of three limbs, the IECC criticises the inconsistency and inadequacy of the legal reasoning followed by the Court of First Instance, which is tantamount to a failure to state the full reasons for the contested judgment. The sixth plea alleges a breach of the general principle of non-discrimination. The seventh plea relies on a breach of the general principle of legal certainty. The eighth plea alleges a breach of the legal concept of misuse of powers. Last, by the ninth plea the IECC alleges that there has been an infringement of Article 62 of the Rules of Procedure of the Court of First Instance.

26 The Commission and La Poste contend that the Court should dismiss the appeal and order the IECC to pay the costs.

First plea in law

27 By its first plea in law, the IECC claims that the Court of First Instance distorted the evidence adduced before it. It observes that, in paragraph 63 of the contested judgment, the Court of First Instance held that the Commission had not committed any error in forming the view that the draft REIMS Agreement provided sufficient guarantees for the overall success of the process of negotiations being conducted among the public postal operators. By 'draft

REIMS Agreement' the Court was referring to the preliminary REIMS Agreement of 17 January 1995. It thus confused the preliminary agreement, which was not in the Commission's possession on the date of adoption of the contested decision, with an earlier briefing note on the REIMS system, sent to the Commission by the International Post Corporation on 4 February 1994. The Court of First Instance thus relied on a materially incorrect finding.

28 It is clear from paragraph 63 of the contested judgment that the reference to the draft REIMS Agreement is not to a text or a specific document actually in the Commission's possession but to the content of that draft, which was brought to the Commission's knowledge by means of information provided informally by the International Post Corporation, as the contested decision, to which paragraph 63 of the contested judgment expressly refers, also states. The Court of First Instance therefore did not rely, in that regard, on a materially incorrect finding.

29 Accordingly, the first plea in law is not well founded.

Second plea in law

30 By its second plea in law, which consists of four limbs, the IECC maintains that the Court of First Instance committed an error of law as regards the scope, the definition and the application of Article 3 of Regulation No 17 and the legal concept of Community interest.

First limb

31 In the first limb of this plea, the IECC maintains that the Court of First Instance erred in relying on Article 3 of Regulation No 17 in order to justify the Commission's rejection of its complaint for lack of Community interest when the complaint had already been thoroughly examined.

32 The IECC submits, first, that, in accordance with Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, it is with a view to determining whether or not it is necessary to investigate a complaint that the Commission may consider it appropriate to assess whether or not a Community interest exists. Article 3 of Regulation No 17 does not deal with the Commission's obligations in relation to the investigation of a complaint. The Court of First Instance therefore erred in paragraph 49 of the contested judgment in relying on that provision in order to reject the IECC's argument based on the advanced state of the investigation.

33 Second, Article 3 of Regulation No 17 does not confer on the Commission an unlimited discretion not to adopt a decision on whether or not there is an infringement of Article 85 or 86 of the Treaty. Having regard to the existence of a restriction on competition as manifest as a price-fixing agreement — in this case the CEPT Agreement —, the Commission had exclusive power to deal with the matter, the exercise of which could not involve the use of any discretion.

34 In that regard, it should be pointed out that, according to the actual wording of Article 3(1) of Regulation No 17, where the Commission finds that there is infringement of Article 85 or Article 86 of the Treaty, it 'may' by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

35 Admittedly, it is settled case-law that a complainant is entitled to have any uncertainty as to the outcome of his complaint dispelled by means of a Commission decision, which may be the subject-matter of an application for judicial review (Case C-282/95 P *Guérin automobiles* v *Commission* [1997] ECR I-1503, paragraph 36). However, Article 3 of Regulation No 17 does not give a person making an application under that article the right to insist that the Commission take a final decision as to the existence or non-existence of the alleged infringement and does not oblige the Commission to continue the proceedings, whatever the circumstances, right up to the stage of a final decision (Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraph 18, and Case C-119/97/P *Ufex and Others* v *Commission* [1999] ECR I-1341, paragraph 87).

36 The Commission, entrusted by Article 89(1) of the Treaty with the task of ensuring application of the principles laid down in Articles 85 and 86, is responsible for defining and implementing the orientation of Community competition policy. In order to perform that task effectively, it is entitled to give differing degrees of priority to the complaints brought before it (*Ufex and Others* v *Commission*, paragraphs 88 and 89).

37 The existence of that discretion does not depend on the more or less advanced stage of the investigation of a case. However, that element forms part of the circumstances of the case which the Commission is required to take into consideration when exercising its discretion.

38 In those circumstances, the Court of First Instance did not err in law when, in paragraph 49 of the contested judgment, it relied on Article 3 of Regulation No 17 in dismissing the plea that the Commission was not entitled to reject IECC's complaint on the ground of insufficient Community interest.

39 Nor did the Court of First Instance, in following such an interpretation, confer unlimited discretion on the Commission, as the IECC claims. In the contested

judgment, the Court of First Instance properly drew attention to the existence and scope of the review of the legality of a decision rejecting a complaint which it must undertake.

40 As regards the IECC's argument that the Commission has no discretion in the matter and is required to take a final decision as to the existence or otherwise of an alleged infringement of Article 85 of the Treaty in a case such as the present, where there was a manifest restriction of competition following a price-fixing agreement, it is sufficient to observe, as the Advocate General has done in points 44 to 47 of his Opinion, that, contrary to what the IECC claims, the existence of such an agreement was not established by the Commission in the contested decision.

41 The first limb of the second plea in law is therefore unfounded.

Second limb

42 By the second limb of the second plea in law, the IECC again maintains that the Commission is not entitled to rely on the absence of Community interest in order to reject a complaint which has been fully investigated and is ready for final legal assessment.

43 That argument, which is similar to the first part of the first limb of the second plea in law, must be rejected for the reasons already stated in paragraphs 34 to 38 of this judgment.

Third and fourth limbs

44 By the third and fourth limbs of the second plea in law, which can be examined together, the IECC claims essentially that the Court of First Instance infringed the concept of Community interest in limiting its review of the Commission's assessment of the Community interest to a single, and not entirely clear, criterion, relating to the amendment 'in a manner conducive to the general interest' of the anti-competitive conduct of the undertakings to which the complaint was addressed, instead of verifying the criteria for assessment of the Community interest set out in paragraph 86 of *Automec* v *Commission*, cited above, and referred to by the Court of First Instance itself in paragraph 51 of the contested judgment. The Court of First Instance also failed to fulfil its obligation to review the Commission's application of the concept of Community interest and, more particularly, to ascertain whether the impugned anti-competitive conduct had actually been brought to an end and whether the effects of the anti-competitive agreement forming the subject-matter of the complaint were continuing.

45 In that regard, it should first be observed that the Commission, in the exercise of its discretion, must take into consideration all the relevant matters of law and of fact in order to decide what action to take in response to a complaint. More particularly, it must consider attentively all the matters of fact and of law which the complainant brings to its attention (Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045, paragraph 19; Case 298/83 *CICCE* v *Commission* [1985] ECR 1105, paragraph 18; Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 20; and *Ufex and Others* v *Commission*, cited above, paragraph 86).

46 However, in view of the fact that the assessment of the Community interest raised by a complaint depends on the circumstances of each case, the number of criteria of assessment to which the Commission may refer should not be limited nor, conversely, should it be required to have recourse exclusively to certain criteria (*Ufex and Others* v *Commission*, paragraph 79).

47 Consequently, in considering that the Commission was correct to give priority to a single criterion for assessing the Community interest instead of specifically examining the criteria referred to in *Automec* v *Commission*, the Court of First Instance did not err in law.

48 Next, it should be pointed out that, in paragraph 57 of the contested judgment, the Court of First Instance considered that, 'subject to the requirement that it give reasons for such a decision, the Commission may decide that it is not appropriate to investigate a complaint alleging practices contrary to Article 85(1) of the Treaty where the facts under examination give it proper cause to assume that the conduct of the undertakings concerned will be amended in a manner conducive to the general interest'.

49 In the circumstances of the present case, the Court of First Instance was able, without erring in law, to take the view that such a criterion, which is in itself sufficiently clear and complete, could serve as a valid basis for the Commission's assessment of the Community interest, subject to the express reservation that it give reasons for applying it.

50 Last, the IECC is wrong to criticise the Court of First Instance for having failed to fulfil its obligation to check the application of that criterion, more particularly as regards the end of the anti-competitive conduct forming the subject-matter of the complaint and the effects thereof.

51 In that regard, it should first of all be stated that the chosen criterion required that the facts under examination allowed the Commission to found a legitimate belief that the conduct of the undertakings concerned would be amended. It was not therefore necessary for the amendment of that conduct to be fully completed by the time of the contested decision.

52 Second, in paragraph 63 of the contested judgment the Court of First Instance considered whether the Commission had complied with that condition when examining and rejecting the IECC's complaint alleging a manifest error of assessment by the Commission in that regard. The finding made by the Court of First Instance on that point was a finding of fact and cannot therefore be challenged in an appeal.

53 The third and fourth limbs of the second plea in law are accordingly unfounded in part and inadmissible in part.

54 In those circumstances, the second plea in law must be dismissed in its entirety.

Third plea in law

55 By its third plea in law, the IECC complains, first, that the Court of First Instance made an error of law in considering that the mere assumption that the practices complained of would be amended in the future was sufficient for the Commission to ensure that the general objective laid down in Article 3(g) of the Treaty would be achieved, whereas, on the date on which the contested decision was adopted, it was clear that all the anti-competitive practices referred to in the complaint were continuing and that they would do so for a long time. Second, the Court of First Instance erred in rejecting the IECC's argument that the Commission had infringed Article 85 by rejecting the complaint in spite of having found that the CEPT Agreement was contrary to that article, and had done so notwithstanding the fact that the Community institutions are prohibited from encouraging the adoption of agreements or practices contrary to Community competition law (see Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803, paragraphs 51 and 52).

56 The first complaint is confused with some of the complaints which the IECC has already put forward in the context of the third and fourth limbs of the second plea in law. Accordingly, it must be rejected for the reasons stated in paragraphs 48 to 52 above.

57 The second complaint is based on the premiss that a complainant is entitled to require that the Commission take a decision on the existence or otherwise of an infringement of Articles 85 and 86 of the Treaty. As stated in paragraph 35 above, however, that premiss is contrary to the settled case-law of the Court of Justice. Furthermore, as already held in paragraph 40 above, it is wrong to claim, as the IECC does, that the Commission had already made a finding of infringement of Article 85 of the Treaty by classifying the CEPT Agreement as a price-fixing agreement, since the Commission had made no such finding.

58 The third plea in law is therefore unfounded.

Fourth plea in law

59 By its fourth plea in law, the IECC criticises the Court of First Instance for having infringed, in paragraph 64 of the contested judgment, the principle that the lawfulness of a contested decision is to be assessed solely in the light of the elements of law and of fact in existence on the date of its adoption.

60 In that regard, it should be observed that, in paragraph 64 of the contested judgment, the Court of First Instance, which, moreover, was answering an

argument raised by the IECC itself, refused, in the context of its review of the lawfulness of the contested decision, to examine in detail all of the provisions of the draft REIMS Agreement, as subsequently notified to the Commission. Such a refusal is strictly consistent with the principle on which the IECC relies in its fourth plea in law.

61 This plea in law is therefore manifestly unfounded.

Fifth plea in law

62 By the first limb of its fifth plea in law, the IECC points to contradictions between what the Court of First Instance says in paragraphs 58, 98 and 61 and what it says in paragraphs 63, 65 and 68 of the contested judgment. It maintains that those contradictions amount to a failure to state reasons and, in addition, indicate an error of reasoning, having regard to paragraph 57 of the contested judgment.

63 In that regard, it should be pointed out that, for the reasons stated by the Advocate General in points 84 and 85 of his Opinion, the impugned paragraphs of the contested judgment, which set out the Court of First Instance's reasoning in relation to the acceptability of the criterion applied by the Commission to provide reasons for rejecting the complaint for lack of Community interest, do not disclose any contradictions of such a kind as to affect the coherence of the reasoning of the Court of First Instance.

64 The first limb of the fifth plea in law is therefore unfounded.

65 By the second limb of the fifth plea in law, the IECC maintains that the contested judgment does not contain an adequate statement of grounds in so far as the Court of First Instance did not explain why it concluded that the Commission could be regarded as having lawfully assessed the Community interest in the present case, having regard, in particular, to the three criteria of Community interest set out in *Automec* v *Commission*.

66 As already stated in paragraphs 45 to 47 above, in the present case the Commission was not obliged to apply the three criteria defined in *Automec* v *Commission*.

67 This limb of the fifth plea in law must therefore be rejected as unfounded.

68 Last, by the third limb of the fifth plea in law, the IECC alleges a lack of reasoning in that the Court of First Instance refused to grant its requests to re-open the oral procedure pursuant to Article 62 of the Rules of Procedure of the Court of First Instance.

69 In paragraph 25 of the contested judgment, the Court of First Instance gave its reasons for its decision not to grant the requests in question when it stated that '[t]he new factors on which the IECC relies in support of those requests either do not contain any element decisive for the outcome of the present dispute or are limited to establishing the existence of facts which clearly postdated the contested decision and which cannot therefore affect that decision's validity'.

70 Those reasons are sufficiently clear and complete to enable the IECC to ascertain their content and to consider, where necessary, whether it is appropriate to challenge the lawfulness of the decision based on those reasons, as, moreover, it has done by its ninth plea in law.

71 The third limb of the fifth plea in law is therefore unfounded.

72 It follows that the fifth plea in law must be rejected in its entirety.

Sixth plea in law

73 By its sixth plea in law, the IECC maintains that, by rejecting, in paragraph 109 of the contested judgment, the complaint alleging a breach of the principle of non-discrimination on the ground that the IECC had not established that, in a situation identical to that of the present case, the Commission would, in contrast to its position in this case, have taken a decision against the undertakings in question, the Court of First Instance committed a double error.

74 First, by comparing the Commission's conduct in the present case with what it would have been in an 'identical' situation, and not in a 'comparable' situation, it extended to the extreme the concept of the principle of non-discrimination.

75 Second, both the Commission and the Court of First Instance, in paragraphs 99 and 100 of the judgment in Joined Cases T-133/95 and T-204/95 *IECC* v *Commission* [1998] ECR II-3645, delivered on the same day as the contested judgment, expressly recognised that the CEPT Agreement was a price-fixing agreement. Such agreements are generally regarded as void. Since the draft REIMS Agreement belonged to the same category of agreements, it too should have been regarded as void. The Commission, in adopting the contested decision, and then the Court of First Instance, in upholding it, therefore discriminated against the IECC by weighing the allegedly pro-competitive effects of that draft agreement.

76 In that regard, while the adjective 'comparable' would admittedly have been more appropriate than the adjective 'identical' in paragraph 109 of the contested judgment, the IECC's arguments are not of such a kind as to call into question the validity of the Court of First Instance's conclusion that the IECC had not established that the Commission would have taken a different approach in comparable cases. The IECC's argument that the CEPT Agreement was expressly recognised by the Commission as a price-fixing agreement, and as thus coming within a category of agreements that are automatically void, cannot be upheld. As already stated in paragraph 40 above, the Commission did not make such a finding.

77 The sixth plea in law must therefore be rejected as unfounded.

Seventh plea in law

78 By its seventh plea in law, which is based on the same arguments as those raised in connection with the sixth plea, the IECC claims that the Court of First Instance infringed the principle of legal certainty, since it agreed to weigh the breach of

competition law represented by the draft REIMS Agreement against the allegedly pro-competitive effect of that agreement, and did so outside the context of Article 85(3) of the Treaty, thus departing from settled case-law.

79 The ground on which the sixth plea in law was rejected must also prevent the seventh plea from being upheld. Neither the CEPT Agreement nor the draft REIMS Agreement was definitively assessed by the Commission for the purposes of application of Article 85 of the Treaty.

80 Furthermore, the argument put forward in connection with the seventh plea is implicitly based on an interpretation of Article 3 of Regulation No 17 to the effect that a person lodging a complaint is entitled to require that a decision be taken as to the application of Article 85 of the Treaty to the case forming the subject-matter of the complaint. As stated in paragraph 35 above, such an interpretation is contrary to the settled case-law of the Court of Justice.

81 The seventh plea in law must therefore be rejected as unfounded.

Eighth plea in law

82 By its eighth plea in law, the IECC maintains that the Court of First Instance erred in law in applying the legal concept of misuse of powers, in that it refused to appraise globally all the factors raised by the IECC in order to establish the existence of misuse of powers in the present case, and confined itself to appreciating each of those factors separately and failed to examine other factors.

83 In that regard, its is sufficient to state, first, that it is apparent from paragraph 84 and the first sentence of paragraph 88 of the contested judgment that the Court of First Instance undertook a global assessment of all the factors raised by the IECC and, second, that the IECC has not shown that that Court erred in law in applying the concept of misuse of powers in paragraphs 83 to 89 of the contested judgment.

84 The eighth plea in law must therefore be rejected as unfounded.

Ninth plea in law

85 By its final plea in law, the IECC criticises the Court of First Instance for having rejected, in paragraph 25 of the contested judgment, its requests that the oral procedure be re-opened pursuant to Article 62 of the Rules of Procedure of the Court of First Instance on the ground, in particular, that certain documents produced in support of those requests 'are limited to establishing the existence of facts which clearly postdated the contested decision and... cannot therefore affect that decision's validity'. The IECC claims that the refusal to take those documents into consideration, on the sole ground that they postdated the contested decision and without have sought to establish whether any developments subsequent to that decision were capable of shedding light on the factual and/or legal situation existing when it was adopted, was contrary to Article 62 of the Rules of Procedure.

86 In that regard, it should be pointed out that the Court of First Instance, in the part of its reasoning challenged by this plea in law, referred to evidence produced by the IECC which merely showed the existence of facts which clearly postdated the adoption of the contested decision. Thus, the IECC, by criticising the Court of First Instance for having refused to take into consideration the documents produced by the IECC on the sole ground that they postdated the contested decision, has misread paragraph 25 of the contested judgment.

87 Furthermore, in the context of an application for annulment under Article 173 of the Treaty the legality of a Community measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7), and cannot depend on retrospective considerations of its efficacy (see Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 43, and Case C-375/96 *Zaninotto* [1998] ECR I-6629, paragraph 66).

88 In the present case, the Court of First Instance's finding that the documents produced by the IECC related to facts which clearly postdated the contested decision was made in the context of a purely factual assessment that cannot be challenged in an appeal and, having regard to what is stated in the preceding paragraph of this judgment, the Court of First Instance did not err in law in excluding such documents from consideration.

89 The ninth plea in law must therefore be rejected as unfounded.

90 Since the IECC has been unsuccessful in its pleas in law, the appeal must be dismissed in its entirety.

Costs

91 Under Article 69(2) of the Rules of Procedure, which applies to the appeal procedure by virtue of Article 118, 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 Commission and La Poste have requested that the IECC be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT,

hereby:

1. Dismisses the appeal;

2. Orders International Express Carriers Conference (IECC) to pay the costs.

Rodríguez Iglesias	La Pergola	Wathelet
Puissochet	Jann	Sevón
Colneric	von Bahr	Timmermans

Delivered in open court in Luxembourg on 17 May 2001.

R. Grass
Registrar

G.C. Rodríguez Iglesias
President