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

In Case T-110/95,

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

applicant,

v

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

defendant,

* Language of the case: English.

supported by

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

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

and

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

interveners,

APPLICATION for the annulment of the Commission decision of 17 February 1995 definitively rejecting that part of the complaint filed by the applicant on 13 July 1988 denouncing a price-fixing agreement concluded in October 1987 by a number of public postal operators,

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

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

Registrar: J. Palacio González, Administrator,

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

gives the following

Judgment

The facts

The International Express Carriers Conference (IECC) and remail

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

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

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

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

— 'ABA remail', where mail originating in Country A is transported by private companies to Country B and put into the postal system there in order to be sent via the traditional international postal system back to Country A, where the final addressee resides.

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

Terminal dues and the Universal Postal Union Convention

4 The Universal Postal Union (UPU) Convention, adopted on 10 July 1964 under the aegis of the United Nations Organisation and to which all Member States of

the European Community have acceded, provides the framework for relations between all postal administrations worldwide. It was also within this framework that the European Conference of Postal and Telecommunications Administrations ('CEPT') was established, to which all the European postal administrations against which the applicant has complained belong.

5 In any postal system, the sorting of 'inward' mail and its delivery to final addressees involve significant costs for public postal operators. For that reason, UPU members adopted in 1969 a system of fixed compensation rates for each type of mail, referred to as 'terminal dues', thereby reversing a principle in force since the UPU was founded, under which each public postal operator bore the costs involved in sorting and delivering inward mail without passing on such costs to the public postal operators of the countries in which that mail originated. The economic value of the delivery service provided by the various postal administrations, their cost structures and the charges invoiced to customers might vary widely. The difference between the prices charged for the delivery of national and international mail in the various Member States and the level of terminal dues in relation to the various prices in force at national level lie at the root of the remail phenomenon. Remail operators seek, *inter alia*, to take advantage of those price differences by proposing to commercial companies to transport their mail to the public postal operators which offer the best quality/price ratio for a particular destination.

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

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

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

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

4. A member country shall not be bound to accept, forward or deliver to the addressees letter-post items which senders post or cause to be posted in large quantities in a country other than the country in which they reside. The administration concerned may send back such items to origin or return them to the senders without repaying the prepaid charge.'

The IECC's complaint and the 1987 CEPT Agreement

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

8 In that part of its complaint relating to the CEPT Agreement, 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 CEPT had subsequently proposed, in substance, an increase in terminal dues, the adoption of a code of conduct and improvements in customer services. The applicant 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 in fact higher than the previous rate.

9 In addition, it is not disputed that, on 17 January 1995, 14 public postal operators, 12 of them from the European Community, signed a preliminary agreement on terminal dues designed to replace the 1987 CEPT Agreement. The new agreement, referred to as the 'REIMS Agreement' (System for the Remuneration of Exchanges of International Mails between Public Postal Operators with a Universal Service Obligation), 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 (OJ 1996 C 42, p. 7).

The Commission's handling of the complaint

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

11 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'.

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

14 On 23 September 1994 the Commission sent a letter to the IECC in which it stated its intention to reject that 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.

15 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.

16 As it took the view that the Commission had not defined its position within the meaning of Article 175 of the Treaty, the IECC, on 15 February 1995, lodged an action for failure to act, registered as Case T-28/95. Two days later, on 17 February 1995, the Commission sent to the IECC the final decision rejecting its complaint as regards application of Article 85 of the Treaty to the CEPT Agreement. That decision forms the subject-matter of the present action ('the decision of 17 February 1995').

17 In its decision of 17 February 1995, the Commission stated as follows:

'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 the *Automec II* case, 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 [...]'.

18 On 6 April 1995 the Commission addressed to the applicant a decision rejecting the second part of its complaint, in so far as it concerned the interception of ABA remail. That decision forms the subject-matter of Case T-133/95.

19 On 14 August 1995 the Commission adopted a decision concerning the application of competition rules to the use of Article 23 of the UPU Convention for the interception of ABC remail. That decision forms the subject-matter of Case T-204/95.

Procedure

20 The applicant brought the present action by way of application lodged at the Registry of the Court of First Instance on 28 April 1995.

21 By orders dated 6 February 1996, the President of the Third Chamber (Extended Composition) of the Court of First Instance granted leave to the United Kingdom, the Post Office and La Poste to intervene in support of the form of order sought by the Commission.

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

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

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

25 On 26 September 1997 the applicant requested that the oral procedure be re-opened pursuant to Article 62 of the Rules of Procedure. At the Court's request, the Commission, the Post Office and La Poste expressed their view that it was unnecessary to reopen the oral procedure. On 26 February 1998 the applicant

sought once again to have the oral procedure reopened. The Court takes the view that, in the light of the documents produced by the applicant, it is not appropriate to accede to those requests. The new factors on which the applicant relies in support of those requests either do not contain any 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.

Forms of order sought by the parties

26 The applicant claims that the Court should:

— annul the decision of 17 February 1995;

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

— order the Commission to pay the costs.

27 In its observations on the statements in intervention, the applicant also requests the Court to:

— declare the Post Office's statement in intervention to be inadmissible;

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

— order production of the draft REIMS Agreement.

28 The Commission claims that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

29 The United Kingdom and the Post Office claim that the application should be dismissed.

30 La Poste contends that the Court should:

— dismiss the application;

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

Admissibility of the Post Office's statement in intervention

31 In the applicant's view, the Post Office's statement in intervention does not comply with Article 116(4)(a) of the Rules of Procedure since it does not indicate in support of which party it was made and must for that reason be declared inadmissible.

32 Under the third paragraph of Article 37 of the EC Statute of the Court of Justice and Article 116(4)(a) of the Rules of Procedure of the Court of First Instance, the

form of order sought in a statement in intervention may have no other purpose than to support the form of order sought by one of the main parties. It is clear from the Post Office's statement in intervention that its purpose was to support the form of order sought by the Commission, notwithstanding the fact that there was no formal submission to that effect. The applicant could not therefore have been in any serious doubt as to the scope or purpose of the statement in intervention. It should also be noted that the Post Office's application to intervene contained, in accordance with Article 115(2)(e) of the Rules of Procedure, an indication of the form of order sought in support of which leave to intervene was being applied for, and that the abovementioned order of 6 February 1996, in paragraph (1) of its operative part, granted leave to the Post Office to intervene 'in support of the form of order sought by the defendant'. In those circumstances, the submission of the applicant must be rejected.

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

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

34 This claim is consequently inadmissible.

Substance

35 In support of its action for annulment, the IECC sets out six pleas in law: the first is based on infringement of Article 85(1) of the Treaty; the second is based on infringement of Article 4(1) of Regulation No 17 and Article 85(3) of the Treaty; the third is based on an error of law and a manifest error in the assessment of the

facts; the fourth is based on misuse of powers; the fifth is based on infringement of Article 190 of the Treaty; the sixth, finally, is based on infringement of a number of general principles of law.

36 It is appropriate in this case to examine first the third plea raised by the applicant.

The third plea in law: error of law and manifest error in the Commission's assessment of the Community interest in the case

Arguments of the parties

37 In the first part of this plea, the applicant takes the view that the Commission was no longer entitled to plead an absence of 'Community interest' for the purpose of rejecting its complaint, in so far as that complaint had been definitively investigated and the Commission had acknowledged that there was a breach of Article 85 of the Treaty (Opinion of Judge Edward, acting as Advocate General, in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223 (*'Automec II'*), at point 105). Only in two situations may the Commission decide not to carry out a full investigation of a case: either where it considers that Articles 85 and 86 have not been infringed or where, on the basis of a preliminary investigation, it considers that the case does not merit priority treatment for lack of sufficient Community interest (Case T-114/92 *BEMIM* v *Commission* [1995] ECR II-147). Once those preliminary procedural stages have been passed, the Commission may no longer invoke the concept of Community interest.

38 In the second part of this plea, the applicant claims that the Commission erred in law and erred manifestly in its assessment of the Community interest. It submits that, in this case, there was a Community interest in further investigation of the

matter in view of the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of that infringement and the scope of the investigation required (*Automec II*, paragraph 86). The applicant also argues that there was no alternative solution to the adoption of a decision by the Commission prohibiting the conduct in question, legal action at national level being inappropriate by reason of the international character of the CEPT Agreement. In such circumstances, the rejection of a complaint constitutes a denial of justice. The applicant concludes by pointing out that the Commission declared in its statement of objections to the public postal operators that 'there is a real danger of a resumption of the practice which the undertaking has terminated' and that 'consequently it is necessary to clarify the legal position'. That finding ought to have led the Commission to adopt a decision holding that there had been a breach of competition law, *a fortiori* because that breach had not yet been brought to an end.

39 In the third part of this plea, the applicant claims that the Commission committed an error of law and a manifest error in its assessment of the facts by referring to the draft REIMS Agreement for the purpose of rejecting the complaint.

40 The applicant argues, first, that the Commission erred in law by looking to a proposed draft successor agreement in order to justify refusal to adopt a decision prohibiting the CEPT Agreement. The Commission, it submits, also manifestly erred in its appraisal of the facts by stating that the consequence of a decision prohibiting the CEPT Agreement would 'merely be to delay if not disrupt the wide-ranging reform and restructuring of the terminal dues system', whereas the documents before the Court show that it was only because of pressure from the Commission that the public postal operators agreed to reform the CEPT system. The applicant considers that a prohibition decision would therefore have forced the public postal operators to adopt a new system immediately.

41 Next, the applicant takes the view that the Commission's appraisal of the draft REIMS Agreement was erroneous inasmuch as, at the time when the Commission adopted the contested decision, the agreement had not yet been finalised or signed

by the parties involved, and the press was reporting that certain parties did not intend to sign it. The Commission thereby committed a manifest error of assessment in its appraisal of the facts (see, to this effect, Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 59), since it did not establish that the draft REIMS Agreement would necessarily put an end to the infringement which had been established.

42 Finally, the applicant submits that the REIMS Agreement provides for an excessively long transitional period and is discriminatory in some respects. The agreement, it is argued, also maintains in force a number of unlawful provisions of the CEPT Agreement, without proposing any solution to the problems raised in the complaint (*BEUC and NCC*, cited above, paragraph 54).

43 In reply to the first part of the plea, the Commission states that, in accordance with the judgment in Case T-5/93 *Tremblay and Others* v *Commission* [1995] ECR II-185, it cannot be required to adopt a decision imposing a prohibition, even if it has concluded that certain conduct constitutes an infringement of the rules governing competition.

44 With regard to the second part of the plea, the Commission takes the view that the list of criteria set out in paragraph 86 of the judgment in *Automec II*, cited above, is not exhaustive and that it was entitled to take account of the decision of the public postal operators to move to the REIMS system.

45 Finally, the Commission denies ever having committed any error of assessment or error of law when examining the REIMS Agreement.

Findings of the Court

46 According to settled case-law, Article 3 of Regulation No 17 does not confer on 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 or of both

(see, in particular, *BEMIM*, cited above, paragraph 62). Further, 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*, paragraph 80).

47 Where the Commission rejects a complaint for lack of Community interest, the review of legality which the Court must undertake focuses on whether or not the contested decision is based on materially incorrect facts, or is vitiated by an error of law, a manifest error of appraisal or misuse of powers (*Automec II*, paragraph 80).

48 In the present case, the applicant submits, in the first part of its plea, that the Commission could not reject its complaint on the ground of insufficient Community interest without thereby committing an error of law, given the advanced stage reached in the investigation. That argument cannot be accepted.

49 Such an interpretation would not only be contrary to the actual wording of Article 3(1) of Regulation No 17, under which the Commission 'may' adopt a decision as to whether the alleged infringement exists, but would also be at variance with settled case-law (see, in particular, Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraph 17), according to which the party making a complaint is not entitled to obtain a decision from the Commission within the meaning of Article 189 of the Treaty. In this connection, the Court held in *BEMIM* that the Commission may take a decision to close its file on a complaint for lack of sufficient Community interest not only before commencing an investigation of the case but also after taking investigative measures, if that course seems appropriate to it at that stage of the procedure (paragraph 81).

50 In the second part of its plea in law, the applicant argues essentially that the Commission breached the legal rules concerning assessment of the Community interest.

51 In order to assess the Community interest in further investigation of a case, the Commission must take account of the circumstances of the case, and especially of the legal and factual particulars set out in the complaint referred to it. The Commission should, in particular, after assessing with all due care the legal and factual particulars submitted by the complainant, balance 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, its task of ensuring that Articles 85 and 86 of the Treaty are complied with (*Automec II*, paragraph 86).

52 When assessing the Community interest, however, the Commission is not required to balance solely those matters which the Court listed in its judgment in *Automec II*. It is thus entitled to take account of other relevant factors when making its assessment. The assessment of the Community interest is necessarily based on an examination of the circumstances particular to each case, carried out subject to review by the Court.

53 In the present case, it is clear from an overall reading of the contested decision that the Commission rejected the complaint, in regard to the alleged infringement of Article 85(1) of the Treaty, on the basis that there was no Community interest, on the ground that the undertakings against which the complaint had been directed were to change the conduct complained of in the manner it recommended.

54 The Court points out in this regard 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 such matters, the specific expression of the general supervisory role conferred on the Commission by Article 155 of the Treaty (Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 63).

55 The task of supervision conferred on the Commission in competition-law matters includes the duty to investigate and punish individual infringements, but also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles (Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 105).

56 Furthermore, Article 85 of the Treaty 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 (see, to the same effect, Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 38).

57 In view of this general objective and the task entrusted to the Commission, the Court considers 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.

58 In such a situation, it is for the Commission, as part of its task to ensure that the Treaty is properly applied, to decide whether it is in the Community interest to encourage undertakings challenged in administrative proceedings to change their conduct in view of the complaints made against them (see, to this effect, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraph 15) and to require from them assurances that such conduct will in fact be altered along the lines recommended by the Commission, rather than formally holding in a decision that such conduct by undertakings is contrary to the Treaty rules on competition.

59 The Commission was therefore entitled to take the view that, in the circumstances of this case, it was preferable, given its limited resources, to promote the ongoing reform of the terminal dues system rather than penalising that system by a decision prohibiting the CEPT Agreement.

60 So far as concerns the alleged contradiction between the statement of objections and the decision of 17 February 1995 in regard to the risk that the public postal operators might re-offend, the Commission's statement reproduced by the applicant (see paragraph 38 above) referred to interception practices developed by the public postal operators on the basis of Article 23 of the UPU Convention, which forms the subject-matter of Cases T-133/95 and T-204/95. That argument is thus irrelevant within the context of the present case.

61 Since the Commission chose to encourage the undertakings concerned to alter the behaviour in question along the lines advocated in the statement of objections, the applicant cannot rely on the lack of a national judicial alternative to the adoption of a prohibition decision since, by adopting this line of conduct consistent with its policy towards the postal sector, the Commission has, in this case, also met the objections raised by the applicant in its complaint and in its subsequent correspondence regarding the former pricing system.

62 Finally, the applicant submits, in the third part of its plea, that the Commission committed a manifest error of assessment in referring to the draft REIMS Agreement for the purpose of rejecting the complaint.

63 That assertion cannot be accepted. The Commission did not commit any error in forming the view that, when the decision was adopted, the draft REIMS Agreement provided sufficient guarantees for the overall success of the process of negotiations being conducted among the public postal operators and seeking to establish a system based on the actual costs incurred when handling mail at national level. Notwithstanding the transitional and potentially flawed nature of the draft REIMS Agreement, which was, moreover, recognised by the Commission, the

document on which the Commission relied in the contested decision already described in detail the new system based on national postal rates to be introduced with effect from 1 January 1996. That document described the intermediate but certain state of the process of negotiations among all the public postal operators concerned. In that context, it should also be stressed that the Commission never claimed that the existence of the draft REIMS Agreement had in itself put an end to the anti-competitive aspects of the CEPT Agreement alleged by the applicant.

64 Furthermore, the applicant's argument that the draft REIMS Agreement provided for an excessively long transitional period and was in some respects discriminatory cannot affect the legality of the contested decision. The Court cannot examine in detail all of the provisions of the draft REIMS Agreement, as subsequently notified to the Commission, without prejudging the analysis of that agreement which the Commission must still provide under Article 85(1) and (3) of the Treaty within the context of that notification.

65 The facts underlying the present case are, moreover, distinguishable from those examined by the Court in the abovementioned case of *BEUC and NCC* v *Commission*. There, the Court had annulled the Commission decision on grounds of error in the assessment of the facts relating to cessation of the infringement in question. That assessment of facts, specific to that case, cannot therefore be transposed to the present dispute. It has, furthermore, already been pointed out in paragraph 63 above that the Commission had in no way claimed in the contested decision that the draft REIMS Agreement had in itself put an end to the CEPT Agreement.

66 As regards the applicant's argument that the Commission was mistaken in forming the view that the adoption of a prohibition decision risked impeding the negotiations on the draft REIMS Agreement, it has been consistently held that the Court must confine itself to verifying that there are no manifest errors of appraisal when examining the consequences which the Commission draws from the facts submitted for its assessment (*BEMIM*, paragraph 72). The Court cannot, when carrying out such a review, substitute its own evaluation of the precise scope of the specific consequences of complex facts for that of the Commission (Case 78/74 *Deuka* v

Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1975] ECR 421, paragraphs 9 and 10). In the present case, the Commission could reasonably take the view that the adoption of a prohibition decision would substantially complicate the process for the adoption of the draft REIMS Agreement. It did not therefore commit any manifest error in assessing the consequences which adoption of a prohibition decision might have. The applicant's argument that in the past the public postal operators had changed their position on remail only under pressure from the Commission does not affect the reasonableness of that assessment.

67 The applicant's argument that the draft REIMS Agreement maintains in force a number of prohibited provisions of the CEPT Agreement, whereas the renewal of a similar anti-competitive agreement was condemned in paragraph 54 of the judgment in *BEUC and NCC* v *Commission*, must also be rejected. In that case, the mere renewal of the informal agreement in question meant that it would continue to exist as such, without subsequent monitoring by the Commission, whereas in the present case the draft REIMS Agreement, formally signed by the public postal operators and substantially altering the previous factual position, was analysed in detail by the Commission as to its compatibility with Article 85 of the Treaty in the context of the notification.

68 As regards the argument that the replies provided by the public postal operators to the statement of objections must be regarded as reflecting a refusal on their part to bow to the Commission's wishes, an undertaking to which a statement of objections has been addressed cannot, when drafting its reply to that statement, be required simply to indicate its intention to adhere to the Commission's position. Such an undertaking must be allowed to contest the legal and factual assertions of the Commission. Any other interpretation would render nugatory the right to reply to the statement of objections provided for in Article 3 of Regulation No 99/63 (Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 35).

69 In the light of all the foregoing, the plea must be dismissed in its entirety.

The first and second pleas in law: infringement of Article 85(1) of the Treaty and infringement of Article 4(1) of Regulation No 17 and of Article 85(3) of the Treaty

Arguments of the parties

70 In its first plea, the applicant argues, in substance, that the Commission stated in its statement of objections, and subsequently in the decision of 17 February 1995, that the CEPT Agreement infringed Article 85 of the Treaty. The Commission, it claims, therefore breached that provision by not taking to task the public postal operators concerned and by rejecting the applicant's complaint. It refers, in that regard, to Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803, paragraphs 51 and 52, in which the Court of Justice prohibited the Community institutions from encouraging the adoption of agreements or practices contrary to competition law.

71 In its second plea, the applicant submits that, in failing to require the public postal operators to bring to an end the CEPT Agreement, the restrictive nature of which it had recognised, the Commission granted a *de facto* exemption to that agreement, despite the absence of prior notification and although the substantive conditions laid down by Article 85(3) of the Treaty were not satisfied. The applicant also maintains that the Commission cannot, in its decision of rejection, rely on the complexity of the matter at issue in order to refrain from acting against the infringements by the public postal operators of the competition rules.

72 For its part, the Commission states that it follows from Article 3 of Regulation No 17 that a complainant is not entitled to obtain a decision finding that there has been an infringement and that it is not required to prosecute proceedings right through to the adoption of a final decision.

73 According to the United Kingdom, the possible existence of an error of law in the interpretation of Article 85(1) of the Treaty could not, in any event, affect the lawfulness of the contested decision, in so far as that decision was not based on any infringement of that provision.

Findings of the Court

74 The first and second pleas in law of the applicant rest, in substance, on the assumption that, in its decision of 17 February 1995, the Commission established that the CEPT Agreement infringed Article 85(1) of the Treaty. However, that fact alone would not suffice to support a finding that the Commission committed an error of law in this case by not prohibiting, by way of a formal decision, the practices criticised. As is clear from an examination of the previous plea, even if it is assumed that the conditions for the application of Article 85(1) of the Treaty are regarded as being met by the Commission, the latter is not under any obligation to adopt a decision confirming the infringement in question and may, in a decision rejecting the complaint which led to the investigation, take the view that it is not in the Community interest to confirm that infringement.

75 Furthermore, the applicant's argument that, in adopting its decision to reject the complaint, the Commission 'favoured' the adoption or maintenance of an anti-competitive agreement within the meaning of *Ahmed Saeed Flugreisen and Silver Line Reisebüro*, cited above, cannot be upheld. The rejection of a complaint based, in substance, on the adoption of the REIMS Agreement addressing the main objections raised by the Commission and by the complainant cannot be treated as being tantamount to a 'favour' granted by the Commission to the CEPT Agreement which was thus replaced.

76 The argument that the Commission cannot rely on the complexity of an anti-competitive practice in rejecting a complaint is misplaced. In confining itself to relying on the complexity of the case at issue, in paragraphs 6 and 10 of the decision of 17 February 1995, in order to explain why it considered that the problems

linked to the existence of the CEPT Agreement were more likely to be resolved by the draft REIMS Agreement than by a prohibition decision, the Commission acted within the law. In any event, the contested decision cannot be construed as being based, as such, on the complexity of the case in question in its rejection of the applicant's complaint.

77 The first and second pleas in law must therefore be dismissed in their entirety.

The fourth plea in law: misuse of powers

Arguments of the parties

78 The applicant considers that the Commission committed a misuse of power by using its powers in the field of competition for the purpose of achieving political objectives, namely 'ensuring a good political climate in the relationships between the Commission and the post offices (and thus their Member States)'.

79 The applicant points out that it was repeatedly forced to urge the Commission to take action under Article 175 of the Treaty, and that the Commission's inaction forced it to send numerous letters to a variety of persons responsible within that institution. The applicant also considers that evidence of political pressure is furnished by, *inter alia*, the reply of the German postal administration to the statement of objections, in which it is stated that 'the complaint is at odds with this climate of constructive cooperation between European postal authorities and the Commission [...] In order to mitigate political damage, we would suggest that the proceedings not be continued for the foreseeable future'. Evidence of such political pressure is also provided by the dichotomy between, on the one hand, the various

public announcements by Commission officials promising strict application of the competition rules and, on the other, the considerable delay by the Commission in dealing with the matter subsequently, and, finally, by the anonymous statement of a Commission official, reported in *The Economist*, to the effect that: 'There is nobody dealing with that file [...]'.

80 The applicant takes the view that it was also for political reasons that the Commission sought to link the handling of its complaint with the adoption of the Green Paper on postal services in 1992.

81 Finally, the applicant considers that the Commission's attitude in this case, at variance with its consistent practice of taking action against price-fixing agreements, can be explained only by the considerable political pressure exerted upon it.

82 The Commission denies that the rejection of the complaint was motivated by political objectives and contends that the applicant has produced no tangible evidence that it misused its powers in any way.

Findings of the Court

83 According to settled case-law, a decision is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken for the purpose of achieving ends other than those stated (Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 69, and *Tremblay and Others*, cited above, paragraph 87 et seq.).

84 It does not appear from the facts, the documents submitted or from the applicant's arguments that the Commission diverted the administrative procedure concerned from its avowed object, as expressed in its decision of 17 February 1995.

85 The relatively long period of time taken by the Commission in order to adopt the decision of 17 February 1995 rejecting the complaint and, before that, the time taken in adopting the statement of objections in 1993 can be justified to a large degree by the complexity of the economic aspects of the issues raised, the number of public postal operators involved in the negotiations on the draft REIMS Agreement, the parallel adoption of the Green Paper on postal services, and the time needed for implementing a replacement system, such as the draft REIMS Agreement.

86 As far as the various requests for action made by the applicant to the Commission are concerned, either the Commission defined its position subsequently, in accordance with Article 175 of the Treaty, or the applicant did not follow up these requests by bringing proceedings for failure to act.

87 As for the unattributed statements allegedly made by Community officials, published by a magazine such as *The Economist*, they must be regarded as mere allegations and not as evidence, or prima facie evidence, of misuse of powers.

88 As it is apparent from the Court's examination that the Commission properly formed the view that there was no Community interest in continuing its investigation, it does not appear that that institution improperly gave preference to the efforts to establish a regulatory framework to the detriment of the application of the competition rules. Finally, it must be observed that the contested decision refers to the Green Paper on postal services only as a means of demonstrating that the draft REIMS Agreement would resolve the objections raised in relation to the CEPT Agreement, and does not reject the complaint simply on the ground that the Green Paper had been issued.

89 In light of the foregoing, the plea in law must be dismissed.

The fifth plea in law: infringement of Article 190 of the Treaty

Arguments of the parties

90 The applicant takes the view that, after almost seven years of procedure, including the adoption of a statement of objections, the Commission was obliged to address comprehensively and with particular care the issues which the applicant had raised. It considers that the contested decision fails completely to meet those high standards. The contested decision, it claims, does not state why there was no Community interest in adopting a prohibition decision, fails to show how the positive effects of the REIMS Agreement would be compromised by such a decision, and does not explain why it should be necessary to refer to the REIMS Agreement in order to resolve the problems raised in the complaint. The applicant also points out that if a decision departs from a well-established line of decisions, the Commission cannot merely adopt a summary decision but must give an explicit account of its reasoning (Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 71).

91 The applicant also refers to paragraph 86 of the judgment in *Automec II* and maintains that the Commission has not met any of the criteria set out in that judgment regarding assessment of the Community interest.

92 Finally, the applicant takes the view that it could not be regarded as having been adequately informed of the reasons for the adoption of the decision because it had obtained only a copy of the preliminary draft outline of the REIMS Agreement dated 4 February 1994, and not a copy of the provisional agreement signed on 17 January 1995.

93 The Commission maintains that it did give sufficient reasons for its rejection decision, in so far as that decision states clearly that its main objection to the CEPT Agreement was that it was not based on the actual costs of the public postal operators, and that the REIMS Agreement was intended precisely to create a link between terminal dues and the domestic tariff structure.

Findings of the Court

94 It has been consistently held that the statement of reasons on which an individual decision is based must, first, be such as to enable the person concerned to ascertain the matters justifying the measure adopted so that, if necessary, he can defend his rights and verify whether the decision is well founded, and, secondly, enable the Community judicature to exercise its power of review of the legality of the decision (*Tremblay and Others*, cited above, paragraph 29, Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraphs 75 and 76, and Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraphs 103 and 104).

95 It also follows from the case-law that the extent of the duty to state reasons depends on the nature of the act in question and on the circumstances in which it was adopted (Case 819/79 *Germany* v *Commission* [1981] ECR 21, paragraph 19). In particular, in paragraph 85 of its judgment in *Automec II* the Court explained that the obligation to provide a statement of reasons under Article 190 of the Treaty is essential for the exercise of judicial review of the way in which the Commission uses the concept of Community interest in rejecting certain complaints.

96 The Court considers that, in the present case, the Commission met its obligation to state reasons. The decision of 17 February 1995 sets out in detail the specific reasons for rejecting the complaint, referring specifically to the context of the case. Far from referring to the concept of Community interest in the abstract, the decision clearly states in paragraph 12 that the complaint had to be rejected by reason

of the fact that the draft REIMS Agreement met the Commission's main objection to the CEPT Agreement.

97 The argument that the Commission failed to justify its decision in regard to the three criteria set out in paragraph 86 of the *Automec II* judgment must also be rejected. It has been held above, during the examination of the third plea in law, that the Commission was not under an obligation to examine whether it was appropriate to reject the complaint in question solely in the light of those criteria. The Commission cannot therefore be obliged to set out reasons for its decision of rejection in relation to those criteria alone.

98 Furthermore, in the abovementioned judgment in *BAT and Reynolds* v *Commission* (paragraphs 23 and 24), the Court of Justice held that the administrative procedure provides, *inter alia*, an opportunity for the companies concerned to bring the agreements or practices complained of into conformity with the rules laid down in the Treaty, and that this possibility presupposes that the companies and the Commission can enter into confidential negotiations in order to determine which alterations are necessary to satisfy the Commission's objections. The legitimate interests of complainants are thus fully protected where they are informed of the outcome of the negotiations in the light of which the Commission proposes to close its file on their complaints, without their having the right as such to access to the specific documents which were the subject of those negotiations. The applicant still has, in any event, the opportunity to submit its observations on the draft REIMS Agreement when this is examined under Article 85(1) and (3) of the Treaty in the context of the abovementioned notification of that agreement.

99 Since the Commission provided proper reasons for its decision, to the effect that the existence of the draft REIMS Agreement accounted for the lack of any Community interest in pursuing its investigation, the Court takes the view that the Commission has also adequately explained how the adoption of a prohibition decision would have lessened the determination of the public postal operators to participate together in the negotiating procedure on the draft REIMS Agreement.

100 Furthermore, paragraph 12 of the contested decision provides sufficient explanation as regards the speculative nature of the information which the Commission possessed regarding the draft REIMS Agreement. The extent to which the Commission could lawfully rely on that allegedly speculative information has been considered in the context of the examination of the third plea in law, which has been dismissed above.

101 For all of those reasons, the fifth plea in law must be dismissed.

The sixth plea in law: infringement of certain general principles of law

Arguments of the parties

102 In the first part of this plea, the applicant claims that the Commission infringed the principles of legal certainty and of the protection of legitimate expectations in that it did not enforce the rules of competition law, although it had given reason to believe that it would. It points out that in Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, at paragraph 29, the Commission is recorded as stating that 'no legitimate expectation of escaping the consequences of past actions can arise merely because of a change of conduct for the future'.

103 In the second part of its plea, the applicant claims that the Commission infringed the principle of proportionality in closing the procedure. The inadequacy of the measures taken and the uncertain character of the REIMS Agreement were, the applicant argues, out of proportion to the blatant infringement of competition law constituted by the CEPT Agreement.

104 In the third part of its plea, the applicant claims that the Commission infringed the principle of non-discrimination in that it treated the applicant's complaint differently from other cases raising similar issues.

105 Finally, in the fourth part of its plea, the applicant takes the view that the Commission infringed the principle of sound administration by forcing it repeatedly to take the appropriate legal measures to compel it to act.

106 The Commission confines its response to pointing out that, according to the judgment in *Tremblay and Others*, cited above, a complainant has no right to obtain a decision establishing the existence of an infringement and cannot therefore have any legitimate expectation that it will obtain such a decision. The Commission also denies that it failed to respect the general principles invoked by the applicant.

Findings of the Court

107 With regard to the first part of this plea in law, the Commission cannot be treated as having infringed the principles of legal certainty or of the protection of legitimate expectations since a complainant, as is clear from the case-law cited by the Commission, cannot be regarded as having a right to obtain from the Commission a decision finding against a practice complained of. It also follows from the Court's examination of the third plea that, in adopting the decision of 17 February 1995, the Commission lawfully relied on the concept of Community interest for the purpose of rejecting the complaint, without wrongfully exercising its margin of discretion.

108 The criticism made in the second part of the plea refers, in fact, to the question of the extent to which the Commission was entitled to rely on the existence of the draft REIMS Agreement in order to reject the applicant's complaint. That criticism

must, therefore, be rejected on the same grounds as those set out above in the assessment of the third part of the third plea in law.

109 So far as the third part of the present plea is concerned, the applicant has 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 applicant has therefore failed to establish the alleged infringement of the principle of non-discrimination.

110 Finally, it follows from the foregoing and from the fact that the Commission lawfully relied on the lack of any Community interest that the Commission did not infringe the principle of sound administration.

111 For all of those reasons, the sixth plea in law must be dismissed.

The request for production of documents

112 In its observations on the statements in intervention, the applicant called on the Court to order that the draft REIMS Agreement be produced.

113 As one of the measures of procedural organisation, the Court requested that document to be produced. That request was complied with.

Costs

114 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's submissions. Since the applicant has been unsuccessful in its submissions and the Commission and the intervening party La Poste have asked that costs be awarded against the applicant, the applicant must be ordered to pay those costs. The Post Office, which did not make any application for costs, shall bear its own costs.

115 The United Kingdom shall bear its own costs, in accordance with the first subparagraph of Article 87(4) of the Rules of Procedure.

On those grounds,

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

hereby:

1. Dismisses the action for annulment as unfounded;

2. Orders the applicant to bear its own costs, as well as those of the Commission and La Poste;

3. Orders the United Kingdom of Great Britain and Northern Ireland and the Post Office to bear their own costs.

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 16 September 1998.

H. Jung B. Vesterdorf

Registrar President