JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
27 February 1997 *

In Case T-106/95,

Fédération Française des Sociétés d'Assurances (FFSA), an association governed by French law, established in Paris,

Union des Sociétés Étrangères d'Assurances (USEA), an association governed by French law, established in Paris,

Groupe des Assurances Mutuelles Agricoles (Groupama), an association governed by French law, established in Noisy-le-Grand (France),

Fédération Nationale des Syndicats d'Agents Généraux d'Assurances (FNSAGA), an association governed by French law, established in Paris,

Fédération Française des Courtiers d'Assurances et de Réassurances (FCA), an association governed by French law, established in Paris,

Bureau International des Producteurs d'Assurances et de Réassurances (BIPAR), an association governed by French law, established in Paris,

* Language of the case: French.

represented by Dominique Voillemot and Marie-Pia Hutin, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 11 Rue Goethe,

applicants,

v

Commission of the European Communities, represented by Gérard Rozet, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, ;1Wagner Centre, Kirchberg,

defendant,

supported by

French Republic, represented by Catherine de Salins, Deputy Director at the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Jean-Marc Belorgey, Special Adviser in the same directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

and

La Poste, a public-law corporation, established in Boulogne-Billancourt (France), represented by Hervé Lehman, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

interveners,

APPLICATION for annulment of the Commission Decision of 8 February 1995, notified to the applicants by letter of 21 February 1995, relating to a procedure implementing Article 93 of the EC Treaty (State aid NN 135/92: competitive activities of the French Post Office), published in the *Official Journal of the European Communities* of 7 October 1995 (OJ C 262, p. 11),

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

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

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 8 October 1996,

gives the following

Judgment

Facts

1 On 11 April 1990 the French Government submitted to the Assemblée Nationale (National Assembly) a draft Law on the principles and basic measures for the reform of post and telecommunications services.

2 On 4 May 1990 three of the applicants in this case, Fédération Française des Sociétés d'Assurance (FFSA), acting together with Union des Sociétés Étrangères d'Assurances (USEA) and the Groupe des Assurances Mutuelles Agricoles (Groupama), three associations representing insurance undertakings, lodged a complaint with the Commission concerning that draft Law to the effect that it was liable to create distortions of competition in the insurance sector, contrary to Articles 85, 86 and 92 of the EC Treaty (hereinafter 'the Treaty').

3 In their complaint, the complainants pointed out in particular that the French State intended to grant, in breach of Article 92 of the Treaty, State aid to the French Post Office, La Poste, in the form of tax concessions. According to the applicants, the illegal State aid was to take the form of the following advantages: special tax arrangements under which La Poste would, until 1 January 1994, be subject, in relation to activities which would be transferred to it, to only taxes and charges levied by the State as of the date of publication of the Law; the application, as from 1 January 1994, of a wages tax of 4.25% instead of the average rate of about 10% applicable to insurance companies; an 85% reduction in the basis of assessment to local taxation and application of a weighting in relation to communal tax rates. The complainants further asserted that the future transfer to La Poste, free of cost, of immovable and movable property, the tax exemptions for insurance services and other direct and indirect 'hidden' aids were also contrary to Article 92 of the Treaty.

4 On 2 July 1990 Law No 90-568 on the organization of the public postal and telecommunications services, published in the *Journal Officiel de la République Française* ('JORF') of 8 July 1990, was enacted (hereinafter 'the 1990 Law'). Under Article 1 of the 1990 Law, La Poste is, as from 1 January 1991, converted into a public-law corporation under the authority of the Minister for Posts and Telecommunications.

5 Article 2 of the 1990 Law states that among the functions conferred on La Poste is that of offering 'services relating to means of payment and transfer of funds, investment and savings products, administration of assets, housing loans and all

types of insurance products'. Article 7 provides that La Poste 'shall have the power to carry on, in France and abroad, all activities relating directly or indirectly to its object. For this purpose, and under the conditions laid down in its terms of reference, [it] may establish subsidiaries and take holdings in companies, groups or bodies having a related or complementary object'. Finally, Article 21 of the 1990 Law provides in particular that 'the bases of assessment [to local taxes] of La Poste shall be reduced by 85% owing to the constraints imposed on the operator of serving the entire national territory and of participating in regional development'.

6 After the complaint had been lodged, the complainants and the Commission exchanged correspondence. By letter of 2 August 1990 in particular, the Commission informed the complainants that, in its view, the pursuit of insurance activities should be governed by the same conditions imposed on private insurance undertakings and that public-undertaking status, as opposed to private undertaking status, could not affect the right to receive State aid, whether direct or indirect.

7 On 12 December 1990 the Bureau International des Producteurs d'Assurances et de Réassurances (BIPAR), the Fédération Nationale des Syndicats d'Agents Généraux d'Assurances (FNSAGA) and the Fédération Française des Courtiers d'Assurances et de Réassurances (FCA) lodged a complaint with the Commission concerning the aids which, in their view, had been granted to La Poste by the 1990 Law.

8 By letter of 18 February 1992 the Commission informed the complainants that it had asked the French authorities to make certain changes to the 1990 Law in order to ensure that it was compatible with Community law.

9 On 23 September 1992 a meeting took place between the Commission and the complainants. By letter of 5 October 1992 the complainants BIPAR, FNSAGA and FCA submitted observations on the tax concessions granted to La Poste. By

letter of 3 November 1992 the complainants FFSA, Groupama and USEA submitted supplementary observations and, in particular, withdrew their complaints concerning the temporary exemption from corporation tax enjoyed by La Poste and the placing of immovable and movable State property at its disposal for no cost.

10 By letter of 29 March 1994 the Commission informed the complainants that, as regards the reduced rate of wages tax, which was one of the complaints directed against the 1990 Law, the French authorities had informed it that, under Law No 93-1352 of 30 December 1993 published in the JORF of 31 December 1993, La Poste would be assessed at the ordinary rate as from 1 September 1994.

11 By letter of 7 June 1994, the complainants FFSA, Groupama and USEA clarified the scope of their complaint. In particular, they withdrew the complaint concerning the application of a reduced rate of wages tax, in view of the fact that Article 42 of the Finance Law for 1994 had, with effect from 1 September 1994, abolished the tax concession enjoyed by La Poste in this regard. The complainants reaffirmed the other complaints submitted previously, including the complaint concerning the conditions of use, for commercial activities, of files kept for public-service purposes.

12 By letter of 26 December 1994, the complainants FFSA, Groupama and USEA called upon the Commission, pursuant to Article 175 of the Treaty, 'to adopt a definitive position on the action to be taken on [their] complaint as regards the following two points:

the infringements of Articles 85 and 86 [...],

the continuing infringement of Article 92, namely the reductions enjoyed by La Poste in the matter of local taxation'.

13 By letter of 21 February 1995, the Commission informed the French Government that it had decided, on 8 February 1995, not to treat the tax concession which La Poste may enjoy under Article 21 of the 1990 Law, amounting in 1994 to FF 1.196 billion, as State aid within the meaning of Article 92(1) of the Treaty [decision published in the *Official Journal of the European Communities* of 7 October 1995 (State aid NN 135/92, France), OJ 1995 C 262, p. 11, hereinafter 'the contested decision'].

14 Since the complainants' letter of formal notice also referred to a breach of Articles 85 and 86 of the Treaty, the Commission replied that it reserved the right to adopt appropriate measures in relation to those provisions as a separate matter.

15 By letter of 21 February 1995, the Commission sent a copy of the contested decision to the complainants FFSA, Groupama and USEA for information purposes.

The contested decision

16 As regards the legal characterization of the State measures in question in the light of the applicable rules on State aid, the contested decision is worded as follows:

'The following conclusions may be drawn after examination, of the data collected on the case in the light of the contents of Article 90(2) and 92(1) of the Treaty:

The reduction in the basis of assessment for local taxation [provided for by Article 21 of the 1990 Law] represents a definite financial advantage for the postal administration [La Poste]; in order to qualify for the derogation laid down in

Article 90(2), this advantage must not go beyond what is necessary for the postal administration to perform its public-interest tasks; in other words, Community law requires that this advantage does not benefit the competitive activities of the public operator.

According to the French authorities, the tax concession is less than the economic burden of the public-service constraints, such as the obligation to ensure the presence of post offices throughout the national territory and the loss on a number of postal services imposed by the postal administration's terms of reference [...].

In order to take account of the advantages enjoyed by the postal administration's competitive services and stemming from the existence of the postal network in rural areas, the additional cost of FF 2.782 billion notified by the French authorities should, however, be reduced by a percentage equal to the share of competitive services in the postal administration's turnover. In this respect, the French authorities take the view that all the competitive activities [...] should not be included in the turnover for the competitive sector because, among other things, management of the accounts of the State is remunerated only on a flat-rate basis and delivery of newspapers and periodicals is remunerated only in part by publishers and by the State. However, the details provided by the French authorities indicate that the postal administration will set up an analytical accounts system during the reference period of the agreement with the State covering the years 1995-1997. At present, the additional public-service costs are calculated on all postal services since they are related to the obligation to maintain a universal presence throughout the country and not to the different types of postal activity. The same post offices and staff are called on to provide public-interest services and competitive services. In addition, the distinction between public services and competitive services depends on the national legal framework and is not yet the subject in the postal sector of uniform provisions at Community level.

Since the postal administration's analytical accounts system is not yet fully in place and given the lack of Community criteria defining the nature of the different activities, it seems advisable not to make any deduction from total postal income attributable to these competitive activities.

It follows that the reference value to be used should be 34.7% of turnover, corresponding to all competitive activities. Consequently, the additional costs of the public service (FF 2.782 billion) less the factor of 34.7% (proportion of turnover accounted for by competitive activities) can be put at FF 1.82 billion (the same operation applied to the outside consultant's minimum estimate of FF 2.02 billion produces a turnover figure of FF 1.32 billion).

[These] amount[s] (like the minimum estimate) [are] higher than the tax concession for the postal administration (FF 1.196 billion), which does not, therefore, exceed what is justified in order to ensure performance of the public-interest tasks which the postal administration is required to undertake in its capacity as public operator. Accordingly, there are no grounds for concluding that there has been a transfer of resources from the State to the postal administration's competitive activities. Thus, pursuant to Article 90(2), the measures in question do not constitute State aid within the meaning of Article 92(1) of the EC Treaty.

Having regard to the above, the Commission has decided not to regard the provisions in question as State aid within the meaning of Article 92(1) of the EC Treaty.'

17 As regards the additional costs linked to La Poste's public service obligations to serve the entire national territory and to participate in regional development, two studies were carried out, one by La Poste itself and the other by outside consultants.

18 As regards the additional costs study carried out by La Poste, the contested decision states that:

'The postal administration carried out an analysis of all the post offices in [...] the Mediterranean region. The cost of the post offices was analysed by stratum, a concept which allows them to be classified according to the size of the built-up area and the number of delivery rounds. The cost of the post offices by stratum was then extrapolated to the whole of France on the basis of the number of post offices per stratum and the average cost per stratum of a post office in the Mediterranean region. The sample chosen [...] included urban areas and scattered rural areas. Finally, a comparison with costs at national level was made in order to confirm the reliability of the analysis.

By leaving out post offices in "difficult" urban areas and declining industrial areas, the analysis focused on rural post offices. These are delivery offices located in municipalities with fewer than 2 000 inhabitants, rural post offices, and third and fourth-tier post offices with no delivery services in municipalities with fewer than 2 000 inhabitants.'

19 The study concluded that the additional public-service costs were FF 2.782 billion.

20 As regards the study carried out by the outside consultants, the contested decision states that:

'The performance of each post office is assessed using the difference in profit margin. Three main activities are distinguished for each post office: outgoing mail [...], incoming mail [...], and financial services [...]. For each activity, the difference in

performance is measured by item handled or account administered, on the basis of the difference between the margin for the individual post office and the average national margin: where performance is negative, there is an additional cost; otherwise there is a positive contribution.

The additional cost is measured at district (*canton*) level. According to the latest work by DATAR [Délegation à l'Aménagement du Territoire et à l'Action Régionale], the *canton* is the most appropriate level at which the territorial impact can be assessed. The additional costs associated with territorial tasks (rural areas, declining industrial areas) are therefore measured at this level. The performance of a *canton* is the sum of the contributions measured at individual post office level and not the sum of loss-making offices only [...]'.

21 The average margin for the country was established by including (1) average income [mail per item and financial income, excluding insurance, per account], (2) average costs per item [of outgoing mail and incoming mail activity in post offices and of sorting/forwarding outside post offices] and (3) the average costs per account [of financial services activity in post offices and processing outside post offices].

22 As regards the contribution of each post office, the study calculated, for each activity, the gross unit margin by taking (1) the actual data for all activities in the post office [counter, back-office services, delivery] broken down by incoming mail, outgoing mail and financial services, and (2) the data produced by the national reference system for other activities [for incoming mail: average receipts less the average cost of outgoing mail and of sorting/forwarding; for outgoing mail: cost of sorting/forwarding and of incoming mail; for financial services, costs of processing outside the post office].

23 The gross unit margin was then compared with the average gross margin for the country as a whole. According to the contested decision, the difference represents a post office's performance differential for everything done inside the office. The additional cost is then extrapolated to the whole of France.

24 In their study the outside consultants concluded that the total additional costs for the rural areas was FF 4.86 billion, less FF 2.84 billion corresponding to the additional cost of delivery, giving an effective additional cost of FF 2.02 billion. Taking into account the additional costs of offices in 'difficult' urban areas and declining industrial areas would produce a total of FF 2.83 billion.

Procedure and forms of order sought by the parties

25 By application lodged at the Registry of the Court on 24 April 1995 the applicants brought this action.

26 By application lodged at the Registry of the Court on 25 September 1995 the French Republic sought leave to intervene in support of the Commission. By order of 24 October 1995 the President of the Third Chamber, Extended Composition, of the Court granted the French Government leave to intervene.

27 By application lodged at the Registry of the Court on 29 September 1995, La Poste sought leave to intervene in support of the Commission. By order of 24 October 1995 the President of the Third Chamber, Extended Composition, of the Court granted La Poste leave to intervene.

28 Upon hearing the Report of the Judge-Rapporteur, the Court (Third Chamber, Extended Composition) decided to open the procedure without any measures of enquiry. However, the Court adopted measures of organization of procedure requesting the defendant, by letter of 25 September 1996, to reply to certain questions in writing and at the hearing. The Commission responded to that request.

29 The parties presented oral argument and replied to the questions of the Court at the hearing on 8 October 1996.

30 The applicants claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

31 The Commission contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

32 The French Republic, as intervener, submits that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

33 La Poste, as intervener, submits that the Court should:

— dismiss the application;

— order the applicants to pay the costs of intervention.

Subject-matter of the proceedings

34 It is necessary first to determine the subject-matter of the proceedings since, in their originating application and again at the hearing, the applicants have referred to a number of advantages allegedly granted to La Poste which the Commission did not examine in the contested decision.

35 According to the documents before the Court, after submitting complaints to the Commission drawing the Commission's attention to a number of advantages allegedly granted to La Poste which they considered to be State aid within the meaning of Article 92 of the Treaty (see paragraph 3 above), the applicants called upon the Commission, by letter of 26 December 1994, 'to adopt a definitive position on the action to be taken on [their] complaint as regards the following two points:

the infringements of Articles 85 and 86 [...],

the continuing infringement of Article 92, namely the reductions which La Poste enjoys in the matter of local taxation'.

36 It should also be noted in this regard that prior to sending their letter of formal notice the applicants had initially, by letter of 3 November 1992, withdrawn their complaint relating to the temporary exemption from corporation tax enjoyed by La Poste and the complaint relating to the transfer to it free of cost of State immovable and movable property and then, by letter of 7 June 1994, their complaint relating to the application of a reduced rate of wages tax, in view of the fact that Article 42 of the 1994 Finance Law had abolished this tax concession as from 1 September 1994.

37 Having regard to the letter of formal notice, the Commission, in the contested decision, examined only the complaint relating to the reduction in local taxation provided for by Article 21 of the 1990 Law in order to assess whether that advantage granted to La Poste was compatible with the provisions of the Treaty concerning State aid. It appears from the contested decision that the Commission reserved the right to address the issue of a possible infringement of Articles 85 and 86 in a separate case (see paragraph 14 above).

38 The Court accordingly considers that the Commission acted correctly in the contested decision in confining its investigation to the question whether the 85% reduction in the basis of assessment to local taxation provided for by Article 21 of the 1990 Law and available to La Poste was compatible with the rules on State aid. It was reasonable for the Commission to consider that the complainants had abandoned their complaints relating to the other advantages allegedly granted to La Poste.

39 It follows that the complaints other than the complaint relating to the reduction in taxation provided for by Article 21 of the 1990 Law must be regarded as being redundant in these proceedings. Consequently, the Court does not have to consider those complaints.

40 It follows that these proceedings are directed at obtaining annulment of the contested decision only in so far as it finds that the grant to La Poste of the reduction in the basis of assessment to local taxation provided for by Article 21 of the 1990 Law does not constitute State aid within the meaning of Article 92(1) of the Treaty (see paragraph 13 above).

Pleas in law and arguments of the parties

41 The applicants put forward, in effect, four pleas in support of their application. The first plea alleges infringements of the rights of the defence in that the Commission did not communicate to the applicants the correspondence mentioned in the contested decision which it had exchanged with the French Government during the administrative procedure. The second plea alleges breach of the obligation to state reasons for the contested decision. The third plea is that the Commission committed an error of assessment in that it used an inappropriate method for assessing the additional costs linked to La Poste's public service obligations. Finally, in their fourth plea, the applicants allege infringement of Articles 92 and 90(2) of the Treaty. This plea is in two parts: (i) that Article 90(2) does not permit the tax concession in question to be removed from the scope of the prohibition laid down by Article 92; and (ii) that the Commission failed to assess the effect which the tax concession has on competition.

1. *First plea: infringement of the rights of the defence*

Admissibility of the plea

Arguments of the parties

42 The Commission contends that this plea is inadmissible given that, contrary to Article 48(2) of the Rules of Procedure of the Court, it was advanced only in the reply. Nor, in its view, can the plea be regarded as a matter of public policy.

43 The applicants consider that this objection of inadmissibility should be dismissed because, in their view, the Community court ought not only to reject excessive formalism (judgment of the Court of First Instance in Case T-167/89 *De Rijk* v *Commission* [1991] ECR II-91) but also to raise of its own motion any issue of public interest (judgment of the Court of First Instance in Case T-16/90 *Panagiotopoulou* v *Parliament* [1992] ECR II-89).

44 The French Government observes that no new matter of law or of fact has come to light in the course of the procedure to justify the introduction of the plea at the reply stage.

45 The intervener, La Poste, agrees, in effect, with the Commission's argument. As regards the disallowing of new pleas during the course of proceedings, it refers also to the judgment of the Court of Justice in Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187) and to the judgment of the Court of First Instance in Case T-16/91 *Rendo and Others* v *Commission* [1992] ECR II-2417). Given that the letters whose alleged non-communication is put in issue by the applicants were referred to in the contested decision, the applicants were not prevented from raising this plea in the application itself.

Findings of the Court

46 The Court finds that this plea was raised for the first time in the reply.

47 Article 48(2) of the Rules of Procedure provides that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

48 In the present case, no new matter has come to light in the course of the procedure which would justify the late introduction of this plea. The correspondence referred to was mentioned in the contested decision. The applicants were not therefore prevented from raising the plea in their originating application. Consequently, under Article 48(2) of the Rules of Procedure, they may not raise the plea at the reply stage.

49 Nor does the Court consider it necessary, in the circumstances of this case, for it to raise the issue of its own motion. The plea must therefore be dismissed as inadmissible.

2. *The second plea: insufficient reasoning*

Admissibility of the plea

Arguments of the parties

50 The Commission argues that this plea, too, is inadmissible on the ground that it was raised only in the reply. The Commission maintains that the judgment of 28 September 1995 in Case T-95/94 *Sytraval and Brink's France* v *Commission* [1995] ECR II-2651, delivered by the Court after the application had been lodged and relied on by the applicants in their reply and currently under appeal to the Court of Justice in Case C-367/95 P, cannot in any event constitute a new matter within the meaning of Article 48 of the Rules of Procedure (judgment of the Court of Justice in Case C-403/85 Rev *Ferrandi* v *Commission* [1991] ECR I-1215).

51 The applicants consider that this objection of inadmissibility must be dismissed on the ground that their plea raises a matter of public interest. They also claim that the judgment in *Sytraval and Brink's France* v *Commission* must be regarded as a new matter allowing the plea to be raised. They reiterate their arguments as set out above in paragraph 43.

52 The French Government agrees in effect with the Commission's arguments.

53 The intervener, La Poste, also agrees with the Commission's arguments. It too submits that the plea may be based only on matters of fact or of law which came to light during the procedure and refers further to the judgments mentioned above in paragraph 45.

Findings of the Court

54 As the Court has pointed out in paragraph 47 above, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

55 Since this plea was raised for the first time in the reply, the question arises as to whether the applicants may, as they contend, rely on the judgment in *Sytraval and Brink's France* v *Commission* as constituting a new matter of law or of fact within the meaning of Article 48(2) of the Rules of Procedure.

56 According to the applicants, this judgment, which was pronounced after their application had been lodged, widened in two respects the Commission's duty to state reasons owed to a person objecting to State aid. They say that this has two consequences for this case. First, given the circumstances, the Commission's reasoning cannot be sufficient to support the conclusion that the State measure complained of by the applicants did not constitute State aid within the meaning of Article 92 of the Treaty. Secondly, they argue that the Commission did not fulfil its obligation to exchange views with complainants, which, in their view, is incumbent

on it where, in order to provide sufficient justification for its assessment, it must ascertain the complainant's position on the matters which it has discovered in its investigation.

57 The Court finds that the judgment in *Sytraval and Brink's France* v *Commission* cannot be relied on as a new matter within the meaning of Article 48(2) of the Rules of Procedure since that judgment gives only an interpretation *ex tunc* and in principle of the scope of the Community institutions' obligation to state reasons. According to the case-law, a judgment which merely confirms the law which was in principle known to the applicant when it brought an action cannot be regarded as a new matter allowing a fresh plea to be raised (judgment of the Court of Justice in Case 11/81 *Dürbeck* v *Commission* [1982] ECR 1251, paragraph 17).

58 This is borne out by the judgment in *Ferrandi* v *Commission*, relied on by the Commission. In an action for revision of a judgment of the Court of Justice, that Court held that a judgment given in the meantime by the Court of First Instance and containing a legal determination in relation to facts which might be categorized as new could never, by itself, constitute a new fact.

59 In any event, the applicants were not prevented, by reason of unknown facts, from raising the plea in the originating application.

60 It follows that the applicants were not entitled to raise the plea for the first time in the reply.

61 The plea is accordingly inadmissible.

62 It is true that, in view of the general importance of the Community institutions' duty under Article 190 of the Treaty to state reasons for decisions taken in the exercise of their powers, the Court could raise this issue of its own motion, as it involves a matter of public policy (judgment in Case T-45/90 *Speybrouck* v *Parliament* [1992] ECR II-33, paragraph 89). However, given the circumstances of this case, the Court considers that it is not necessary for it to do so.

3. *The third and fourth pleas: foundation of the contested decision*

63 Before considering whether the pleas in relation to the ;1substance of the contested decision are well founded, it is appropriate to consider briefly the basic scope of the decision.

64 The Commission decided not to treat the tax concession in question as State aid within the meaning of Article 92(1) of the Treaty on the ground that the amount of the concession does not exceed what is justified in order to ensure that the public interest tasks conferred on La Poste as a public operator are performed. The tax concession was estimated to be less than the additional costs arising from the constraints of serving the entire national territory consisting, in particular, of the provision of postal services in rural areas and participation in regional development (hereinafter 'the additional public service costs').

65 In arriving at that conclusion the Commission worked in effect from three assumptions. First, La Poste is a public undertaking entrusted with the operation of a service of general economic interest within the meaning of Article 90(2) of the Treaty. Second, the performance of public service obligations laid down by French legislation and the French Government's policy on regional planning generates additional costs for La Poste. Third, by virtue of Article 90(2) of the Treaty, the

grant of tax concessions to offset those additional costs is not caught by Article 92(1) of the Treaty and is therefore permissible on condition that the amount of aid never exceeds the amount of the additional costs.

66 As regards the first assumption, it is not contested that La Poste has been entrusted with the operation of a service of general economic interest within the meaning of Article 90(2) of the Treaty.

67 According to Article 2 of the 1990 Law, La Poste's duties are 'to provide, in domestic and international relations, the public mail service in all its forms and the service of carrying and delivering newspapers and periodicals to which the special rules laid down by the *Code des Postes et Télécommunications* apply'. It must be reiterated here that the public mail service comprises the obligation to collect, carry and distribute mail on behalf of all users throughout the territory of a Member State, at uniform tariffs and on similar quality conditions, irrespective of the specific situations or the degree of economic profitability of each individual operation (judgment of the Court of Justice in Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 15).

68 As regards the tasks of general economic interest with which La Poste is entrusted, it must be observed that at the relevant time these were laid down in particular by the 1990 Law and by La Poste's terms of reference, approved by Decree No 90-1214 of 29 December 1990, published in the JORF of 30 December 1990.

69 Article 8 of the 1990 Law provides that terms of reference are to lay down La Poste's rights and obligations, the general framework of its activities, the principles and procedures by which tariffs are set and the conditions for the performance of the public services with which it is entrusted. The terms of reference must in particular lay down the conditions under which La Poste is to 'serve the entire national territory; [and...] the operator is to participate in regional development ...'.

70 The terms of reference provide that 'the public mail service offered by La Poste is to cover the entire country taking into account the general trends of government policy, particularly in the matter of regional development' (Article 3) and that 'La Poste shall establish, develop and operate throughout the country a network of installations and services for providing all of its services ...' (Article 21). Finally, Article 24 of the terms of reference provides that 'in drawing up its equipment programs, La Poste shall take into consideration the general trends of regional development policy laid down by the government and the factors and aims of economic and social development of the regions, departments and communes', and that 'La Poste shall define its local presence policy after consultation with the *préfet* concerned'.

71 It also appears that, as part of its regional development policy, the French Government has, since the end of 1991, adopted measures requiring La Poste to maintain its reception points and services in rural areas.

72 These constraints imposed on La Poste, consisting of the obligation to provide a service throughout the country and to participate in regional development, and particularly the obligation to maintain a presence and unprofitable public services in rural areas, must be regarded as particular tasks within the meaning of Article 90(2) of the Treaty.

73 As regards the two other assumptions from which the Commission proceeded, the Court will examine, first, the appropriateness of the analyses carried out by the Commission with regard to the evaluation of the additional public service costs and then the way in which it applied Articles 92 and 90(2) of the Treaty in the contested decision.

The third plea: the method used by the Commission for evaluating the additional public service costs was inappropriate

Arguments of the parties

74 The applicants claim that the method used by the Commission for calculating the additional public service costs which must be borne by La Poste is inappropriate. They also claim that the method used is vitiated by a number of errors and may result in an overestimate of those costs. As regards the concept of public service, the applicants maintain that in the present case this comprises only the forwarding of mail in all its forms and delivery of newspapers and periodicals.

75 As regards the study of additional costs carried out by La Poste itself, the applicants consider that, instead of comparing the costs of rural offices in relation to a national average, the 'opportunity cost' should have been used as a reference instead. By 'opportunity cost' they mean the real economic cost which La Poste must pay in order to maintain its unprofitable post offices in order to fulfil its public service task.

76 At the hearing the applicants further stated that if Law No 82-213 of 2 March 1982 on the rights and freedoms of the communes, departments and regions, published in the JORF of 3 March 1982, as later supplemented and amended ('the 1982 Law'), and providing for direct negotiations on the extent of public services between the undertakings entrusted with providing such services and the communes or departments concerned, had been applied, those bodies, by balancing the necessity of the services provided and the costs entailed, could have examined the expediency of closing certain unprofitable post offices.

77 The applicants contend that the study undertaken by outside consultants and taken into account by the Commission contains an overestimate of the costs for a number of reasons.

78 First, the margins of certain offices should be taken into account only in relation to a 'reference margin' below which the closing of an office is preferable for La Poste, that reference margin being comparable to the abovementioned 'opportunity cost'. In particular, they should not be related to a national 'average margin', as was done in the contested decision. Comparing the margins of certain offices with an average margin is even less justified in the case of an undertaking having a monopoly in public service activities.

79 Second, the additional costs study wrongly takes no account of 'network externalities', that is to say the effect which rural offices have on the operating costs of the other offices, on the volume of postal traffic, on delivery costs etc. Indeed, the existence of rural offices, even if unprofitable, allows the operating costs of other offices to be reduced.

80 Third, the applicants consider that the evaluation of the additional costs ought to have been carried out on a 'minimum costs' basis, which any private undertaking will aim for, and not on the basis of 'achieved costs'. In the applicants' view, the method used can encourage the undertakings under consideration to inflate their costs in order to receive an increased subsidy and then exploit the advantage acquired, on the insurance market for example.

81 Fourth, the applicants point out that the additional costs were evaluated before La Poste entered the insurance market. As a result, their evaluation is excessive because activity on the insurance market should have the effect of increasing the profitability of post offices and thereby reducing the additional costs linked to the provision of a public service. In the applicants' view, it follows that any comparison is misconceived.

82 Referring to Opinion No 96-A-10 of 25 June 1996 of the French Competition Council relating to an application for an opinion from the French Banking Association concerning the operation of La Poste's financial services in the light of competition law (published in the *Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes* of 3 September 1996, hereinafter 'the Opinion of the Competition Council'), the applicants stated at the hearing that La Poste's financial activity represents nearly three-quarters of all its activities. The Commission was therefore wrong, in determining the amount of additional costs arising from the provision of a public service, to have subtracted only 34.7% from the additional costs for all activities. If, in accordance with that opinion, it had made that calculation on the basis of a percentage of 75%, it would have reached the conclusion that the additional public service costs amounted to only FF 696 million, that is to say an amount approximately FF 500 million less than the amount of the aid in question.

83 Finally, since they claim that they are unable to verify the data on which the studies carried out by La Poste and the outside consultants are based, the applicants ask the Court, in accordance with Article 70 of the Rules of Procedure, to order that an expert's report be obtained in order to determine whether the method used and the evaluations made were appropriate and, should that prove not to be the case, to find an alternative method whereby legally sound conclusions could be drawn.

84 The Commission maintains that the method used to estimate the additional public-service costs and which it adopted in the exercise of its discretion in such matters, is appropriate. Referring to both Article 8 of the 1990 Law and Articles 21 and 24 of La Poste's terms of reference, the Commission states that the additional costs involved arise from performance of public-interest tasks laid down specifically in those provisions.

85 It observes, first, that the method which it chose was the most rational and the most objective for evaluating the additional costs, the reference to 'opportunity cost' being inappropriate since La Poste is not able to regulate the allocation of the public funds made available to it. Second, contrary to what the appellants believe,

the Commission should not exclude from its calculations certain actual public-service costs which are considered too high, since the aim of Article 92 of the Treaty is not to limit the absolute level of public service costs but to prevent resources from being transferred to competitive activities.

86 Thirdly, as regards the complaint that it did not base its calculations on minimum costs rather than on actual costs, the Commission replies that its role is not to improve the efficiency of the public postal service in France.

87 Fourthly, the Commission maintains that, contrary to what the applicants state, it did take into account 'network externalities' since it deducted the indirect advantages which La Poste's competitive activities derive from the public service network.

88 The Commission reiterates here that the purpose of the method used was to prevent any subsidy increase resulting from an increase in the additional public service costs from affording advantages on the commercial markets. It explains that in order to do this, it reduced, in the contested decision, the total additional costs assumed by La Poste by a percentage (34.7%) equal to the contribution which competitive services make to its turnover. This reduction allows account to be taken of the advantages which La Poste's competitive services enjoy as a result of the existence of the rural postal network.

89 Furthermore, the 34.7% reduction answers the applicants' contention that the additional costs were evaluated before La Poste entered the insurance market.

90 Finally, as regards the opinion of the French Competition Council referred to by the applicants, the Commission replies that the allocation made in the opinion refers to activity of post offices and not to turnover, which was used as a reference in the contested decision.

91 The French Government submits that the calculation of the additional costs incurred by La Poste as a result of its public service obligations is well founded. It points out that, of the loss-making post offices concerned, approximately 58% are located in communes having less than 2 000 inhabitants. In most of these offices, the person in charge is quite often busy each day for little more than one hour out of eight. The additional cost of this inactivity or non-productivity can only be put down to the general task of maintaining a postal service throughout the country — an unprofitable public service task going beyond the strict domain of the public postal service.

92 The French Government then points out that, year on year, La Poste on the whole breaks even. Consequently, it can be said that the average cost of all post offices is substantially equivalent to that needed to break even. Therefore, the reference to the average cost does not, in its view, 'inflate' the additional costs of unprofitable offices in relation to offices which are breaking even. At the hearing the French Government stated that a break-even point is reached only by taking account of the tax concession.

93 As regards the complaint that no account was taken of 'network externalities', the French Government replies that if the cost of the offices remaining after excluding all unprofitable offices were taken as the average cost reference, this average cost would be much lower than it actually is, even taking account of an increase in the costs of the remaining offices. Consequently, the additional costs of unprofitable offices are bound to go up, which is not what the applicants would wish.

94 As regards the argument that the reference costs ought to have been calculated on the basis of minimum costs, the French Government points out that, as far as the application of Article 90(2) of the Treaty is concerned, it is the appropriate balancing of the additional public service costs which matters and not the absolute value of those costs.

95 In any event, the costs of offices located in rural areas or in poor urban areas would fall very little if such a basis of calculation were used. On the other hand, the technical and human resources of offices situated 'in town' could theoretically be reduced so as to arrive at a lower operating cost. However, in that case, the additional costs of unprofitable offices would still be higher than the average, contrary to what the applicants seek to demonstrate.

96 As intervener La Poste submits that, because of its public service obligations, particularly those relating to regional development, it is obliged to maintain an unprofitable postal network. The presence of offices in rural areas is a burden which shows up not as an activity but as a lack of activity, as the French Government explains.

Findings of the Court

97 The applicants do not contest that additional costs are generated by the public-service obligations of La Poste. All they seek to do, however, is to show that the Commission manifestly overestimated these additional costs of La Poste by using the wrong methods of calculation.

98 In examining the merits of the submissions supporting this plea, it must be borne in mind that it is clear from Article 90(3) and from the entire scheme of that article that the Commission's power of supervision *vis-à-vis* Member States liable for infringing the rules of the Treaty, and particularly those relating to competition, necessarily entails the exercise of a discretion on that institution's part.

99 That discretion is notably wider in relation to compliance by Member States with the competition rules because, in the first place, Article 90(2) requires the Commission to take account, in exercising that discretion, of the demands inherent in the particular tasks of the undertakings concerned and, secondly, because the authorities of the Member States may in some instances have a sufficient degree of latitude in regulating certain matters, such as, in the present case, the organization of public services in the postal sector (judgment of the Court of First Instance in Case T-32/93 *Ladbroke Racing* v *Commission* [1994] ECR II-1015, paragraph 37).

100 Since the present case involves an assessment of complex economic facts, the discretion exercised in evaluating additional public service costs is all the more wide, since it is comparable to that exercised by the Commission when applying Article 92(3) of the Treaty (judgments of the Court of Justice in Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 49, in Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 56, and in Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 34).

101 Furthermore, as the case-law makes clear, the Community court's function in an action for annulment is solely to determine whether the contested decision is vitiated by one of the grounds of illegality set out in Article 173 of the Treaty; it cannot substitute its own assessment of the facts for that of the deciding authority especially in the economic sphere (judgment of the Court of Justice in Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 23). It follows that

the review which this Court is called upon to perform in the present case in relation to the Commission's assessment must be confined to verifying the accuracy of the facts found and establishing that there is no manifest error of assessment.

102 It appears from the documents before the Court that in order to calculate La Poste's additional costs produced by its public service obligations, the Commission carried out a complex economic analysis on the basis of two studies carried out by La Poste itself and by outside consultants.

103 According to the contested decision (see paragraph 18 above) and the pleadings before the Court, La Poste, in its study, examined the activities of 617 rural offices located in communes of less than 2 000 inhabitants in the Mediterranean region. The study involved comparing the costs incurred, excluding delivery, by those rural offices with the standard costs linked to their activity, in order to determine both the existence and the amount of any additional cost. The result of that analysis was then extrapolated to the whole of the country and demonstrated the existence of additional public service costs amounting to FF 2.782 billion.

104 The study carried out by the outside consultants was conducted in three French *départements*, the Jura, the Marne and the Saône, which were regarded as a representative sample. The additional costs were calculated by comparing the difference in profit margin between each rural office with the average national profit margin, calculated according to specific criteria (see, in this regard, paragraphs 20 to 23 above), a negative performance leading to the recording of an additional cost. All the offices located in a single district *canton* were studied and the performance of a *canton* was calculated as the sum of the contributions measured at individual post office level. The results were then extrapolated to the whole country. The study carried out by the outside consultants concluded that the total additional costs for rural areas was at least FF 2.02 billion. If further account was taken of the additional costs of offices located in 'difficult' urban areas and declining industrial areas, that total came to FF 2.83 billion.

105 The contested decision shows that, in the absence of analytical accounts permitting distinction between charges and expenditure relating to public service activities and those relating to competitive activities, the additional public service costs were calculated on the basis of all of La Poste's activities. Thus, in order to take account of the advantages which La Poste's competitive services derive from the existence of the postal network in rural areas, the Commission reduced, quite rightly, the abovementioned results by 34.7%. This percentage corresponds to the proportion of turnover represented by La Poste's competitive activities for 1993, including activities in the insurance sector, a proportion not contested by the applicants. In view of the data available, the Court considers that the allocation of the total additional costs between La Poste's various activities according to the proportion of turnover which they represent was the most objective method for evaluating the additional costs which might be linked to its public service activities. Following the abovementioned reduction, the additional public service costs were evaluated at FF 1.82 billion. If the minimum estimate of the additional costs (see paragraph 104 above) is taken as a basis, those relating to the public service amount to FF 1.32 billion.

106 The Court finds that, in basing its assessment on such an analysis of the facts, the Commission established with sufficient certainty that La Poste has additional costs amounting to — at least — FF 1.32 billion. Those additional costs, generated primarily by its maintenance of an unprofitable presence in rural areas, are linked to performance of services of general economic interest within the meaning of Article 90(2) of the Treaty, which La Poste is required to provide, namely the obligations of having to serve the entire national territory and to participate in regional development. In employing the methods of calculation explained above, the Commission's approach was to compare the costs generated by unprofitable offices situated in rural areas with the average costs of French post offices.

107 The Court finds that the applicants' submissions alleging defects in the methods of calculation are not such as to disturb the Commission's evaluation.

108 First, the references to 'opportunity costs', 'minimum costs' or 'reference margin', below which it would be preferable for La Poste to close a post office, are inappropriate. In the absence of Community rules governing the matter, the Commission is not entitled to rule on the basis of public service tasks assigned to the public operator, such as the level of costs linked to that service, or the expediency of the political choices made in this regard by the national authorities, or La Poste's economic efficiency in the sector reserved to it (see, on this last point, the Opinion of Advocate General Tesauro in the *Corbeau* case, cited above, ECR [1993] I-2548, paragraph 16).

109 Second, as regards the submission that 'network externalities' were not taken into account, the applicants have advanced no factual evidence or arguments to support this submission. In these circumstances, and in view of the fact that the applicants have not responded to the arguments submitted by the French Government on this point (see paragraph 93 above), this submission must be dismissed.

110 Third, the fact that the Commission reduced the total additional costs by 34.7%, a percentage equal to the proportion of La Poste's turnover in 1993 generated by its competitive activities, including insurance business (see paragraph 105 above), shows that the applicants' contention that the additional public service costs were evaluated before La Poste entered the insurance market is unfounded.

111 Finally, as regards the Opinion delivered by the French Competition Council, on which the applicants rely, the Court holds that this cannot call in question the correctness of the 34.7% reduction carried out by the Commission (see paragraph 105 above) since that opinion concerns the breakdown of activities at the counter and not the breakdown of turnover ascribable to the various activities in which La Poste is engaged.

112 Nor have the applicants demonstrated that an alternative, more accurate method for calculating the additional costs on the basis of the information available at the time could have been used.

113 Since the applicants contest the assessments made by the Commission in a general way only and without producing any specific evidence or arguments to call those assessments into question, it must be concluded, in view of the foregoing considerations, that the applicants have not demonstrated that the Commission based its decision on factually incorrect data or exceeded its power of assessment in the matter when evaluating the additional public service costs.

114 It is not contested that the tax concession in question enjoyed by La Poste under Article 21 of the 1990 Law, namely the 85% reduction in the basis of assessment to local taxation, amounted in 1994 to FF 1.196 billion. The Court therefore finds that the Commission was correct to consider that the amount of that tax concession did not exceed the additional public service costs, even if the minimum estimate was taken into account, that is to say additional costs of FF 1.32 billion (see paragraph 106 above).

115 As regards the claim for an order pursuant to Articles 66 and 70 of the Rules of Procedure directing that an expert's report be obtained in order to determine whether the method used by the Commission and the evaluations made were appropriate, the applicants have produced no evidence or arguments to suggest that the Commission might have committed manifest errors of assessment in determining the additional costs in question. In those circumstances, and given that in challenging the assessment of economic facts carried out by the Commission in the exercise of its power of assessment the burden of proof rests on the applicant, there are no grounds for ordering that an expert's report be obtained.

116 It follows from all the foregoing that this plea must be dismissed.

The fourth plea: breach of Articles 90(2) and 92 of the Treaty

117 This plea is in two parts. First, the applicants maintain that Article 90(2) does not permit the tax concession in question, granted without distinction to all of La Poste's activities, to escape the prohibition laid down by Article 92 of the Treaty. Second, they contend that the Commission infringed Article 92 by failing to assess the effect on competition of the grant of the tax concession in question.

Admissibility of the first part of the plea

— Arguments of the parties

118 The intervener La Poste submits that, pursuant to Article 48(2) of the Rules of Procedure, the first part of the plea must be dismissed as inadmissible since it was raised only in the reply. In its view, the points made in the reply concerning an alleged breach of Article 90(2) of the Treaty are not merely fresh arguments. The argument in the application originating the proceedings relates solely to the distinction to be drawn between the purpose of the tax concession in question and its effects and not to the specific provisions of Article 90 in relation to an undertaking entrusted with performing a task of general economic interest nor to the conditions for the application of Article 90(2).

119 The applicants deny that they are raising a new plea. In their application, they also alleged infringement of Article 90(2) of the Treaty.

120 First, the applicants point out that it is their submission that, because in the contested decision it was by virtue of Article 90(2) that the Commission concluded that the aid in question was not caught by the prohibition laid down in Article 92, the Commission's misapplication of the provisions of the Treaty must include that article. Second, the applicants say that in their application they referred not only to the provisions of Article 92(1) but also to those of Article 90(2).

121 They also argue that those articles are closely linked in the present case. In this regard, they rely on the judgment of this Court in Case T-37/89 *Hanning* v *Parliament* [1990] ECR II-463 to support their argument that this part of the plea does not constitute mere amplification of the other part of the plea alleging breach of Article 92 of the Treaty.

— Findings of the Court

122 The admissibility of this part of the plea is not contested by the Commission.

123 However, since it may involve an absolute bar to proceeding, the issue may be raised by the Court of its own motion pursuant to Article 113 of the Rules of Procedure. It is therefore unnecessary to examine the question whether the intervener may raise an objection of inadmissibility which has not been raised by the party whose case it is supporting.

124 In examining the admissibility of this part of the plea it must be borne in mind that, under Article 44(1)(c) of the Rules of Procedure of this Court, an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. The information given must be sufficiently clear

and precise to enable the defendant to prepare his defence and the Court to give a ruling, if necessary without other supporting information (judgment in Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraph 106; order of 29 November 1993 in Case T-56/92 *Koelman* v *Commission* [1993] ECR II-1267, paragraph 21).

125 However, the Community court will allow submission at the reply stage of a plea which is really only an amplification of a submission previously made, either expressly or by implication, in the original application and which is closely linked to it (judgment in Case T-37/89 *Hanning* v *Parliament*, cited above, paragraph 38, and judgment of the Court of Justice in Case 306/81 *Verros* v *Parliament* [1983] ECR 1755, paragraph 9).

126 That is the situation in the present case. The applicants did indeed refer to Article 90(2) of the Treaty in their application. For example, they state there that 'it is [...] accepted that the aims of State aid are not sufficient to justify the grant of such aid to an undertaking even if "entrusted with the operation of services of general interest" (Article 90(2) of the Treaty)'. Moreover, in so far as the applicants state that only the effect of the aid in question must be examined and not its purpose, the Court considers that they are contending — at least by implication — that the constraints of having to serve the entire country and participate in regional development bearing upon La Poste cannot, by application of Article 90(2), justify the grant of the tax concession in question.

127 In the present case, Articles 90 and 92 of the Treaty are indeed closely linked, since the Commission decided, pursuant to Article 90(2) of the Treaty, not to classify the State measure in question as aid within the meaning of Article 92.

128 In those circumstances, the Court considers that the arguments put forward in the reply concerning breach of Article 90(2) of the Treaty must be regarded as simply amplifying a previous submission alleging breach of Article 92 of the Treaty. The

applicant is advancing a single plea split into two distinct parts. The Court accordingly considers that the arguments put forward in the reply concerning application of Article 90(2) of the Treaty do not go beyond the scope of the dispute as defined in the application.

129 It follows that the first part of the plea is admissible.

Merits of the plea

— Arguments of the parties

130 The first part of the plea is that the exception provided for by Article 90(2) of the Treaty does not preclude application of the principle, laid down by Article 92(1) of the Treaty, that State aid is prohibited.

131 The applicants argue that Article 90(2) of the Treaty lays down an exception to the application of the rules on competition so that it must be interpreted restrictively. Aid can be maintained only if its abolition would prevent public service tasks from being performed. Contrary to what the interveners suggest, the only public service tasks assigned to La Poste are, according to Article 2 of the 1990 Law, to provide the public postal service in all its forms and to carry and deliver newspapers and periodicals.

132 At the hearing the applicants stated that the three conditions must be fulfilled before the derogation provided for by Article 90(2) of the Treaty may be applied. First, the aid in question must be necessary for the performance of a public service

task. Second, the aid must be appropriate and restrict competition as little as possible. Third, the aid must be earmarked for public service activities and in particular it must not benefit La Poste's competitive activities under any circumstances.

133 In the applicants' view, none of those three conditions is fulfilled in this case. First, the tax concession in question is not necessary for performance of the public service task of delivering mail, newspapers and periodicals. Second, an 85% reduction in the basis of assessment to local taxation is likewise not the best way of promoting regional development, that reduction having the effect of reducing the receipts of local authorities which are potential beneficiaries of regional development policy. There are more appropriate, better targeted measures for meeting the needs of regional development and maintaining the postal service in rural areas. It would have been possible, under the 1982 Law, to put in place a system of aid for La Poste whilst avoiding discriminatory, anti-competitive tax measures.

134 As regards the third condition, the applicants contend that when adopting its decision the Commission was not in a position to satisfy itself that there was no cross-subsidy for La Poste's competitive activities. In their view, the very principle of the method of comparison used by the Commission, that of investigating whether or not the amount of tax advantage enjoyed by La Poste exceeds its additional public service costs, is open to challenge. There are two main aspects to this argument.

135 First, in the absence of any analytical accounts at La Poste, it is impossible to assert, as does the Commission, that the tax concession does no more than balance the additional public service costs: it benefits the undertaking 'La Poste', that is to say all the activities of La Poste including activities it also pursues in the insurance sector, something which is contrary to the competition rules. In this regard, the applicants point out that the same offices and staff are simultaneously assigned to

the public interest services and competitive services. They also point out that the Court of Justice has held that aid granted to an undertaking like La Poste in order to offset additional public service costs enables it to release other resources for competitive activities or, at least, to promote the development of those activities at less cost (judgment of the Court of Justice in Case 303/88 *Italy* v *Commission*, cited above, paragraph 14).

136 Still on this aspect, the applicants assert that the aid in question is not strictly targeted at public service activities as Community law requires because, according to Article 21 of the 1990 Law, the 85% reduction in the bases for assessing La Poste to local taxation includes La Poste's total costs and turnover, including the proportion represented by competitive activities.

137 Furthermore, the data compared by the Commission is not genuinely comparable because post offices are maintained in rural areas not out of concern for profitability but owing to the need to maintain an 'administrative base' in rural areas as part of regional planning. Consequently, the cost of a public service depends only on political decisions and is nothing other than the cost which the public at large wishes to devote to it.

138 As regards the second part of the plea, the applicants contend first of all that the tax concession in question constitutes aid within the meaning of Article 92 of the Treaty (judgment of the Court of Justice in Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1).

139 In order to classify aid for the purpose of Article 92(1) of the Treaty, all that needs to be determined is the effect of the aid on competition and not its purpose or its form. The purpose assigned to it cannot be sufficient to declare the prohibition of State aid laid down in Article 92 inapplicable since the Court of Justice has held that Article 92 'does not distinguish between the measures of State intervention ...

by reference to their causes or aims but defines them in relation to their effects' and that 'consequently, the alleged fiscal nature or social aim of the measure in issue cannot suffice to shield it from the application of Article 92' (judgment of the Court of Justice in Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 13). The same applies to aid granted to an undertaking entrusted with the management of services of general economic interest. In this regard the applicants also refer to the Commission's administrative practice and to the judgment of the Court of Justice in Case 57/86 *Greece* v *Commission* [1988] ECR 2855).

140 As a result, the contested decision is wrong in finding that the tax concession granted to La Poste is justified by the fact that La Poste is subject to 'constraints implicit in serving the entire national territory and in participating in regional development'.

141 The applicants point out that, in their view, the activities which La Poste is developing in the insurance sector also benefit from the aid in question (see paragraph 135 above). The same applies if the tax reduction is smaller because, in order for aid to be caught by Article 92(1) of the Treaty, it is not necessary to prove that there is a 'substantial' effect on competition or on trade between Member States (judgments of the Court of Justice in Case C-142/87 *Belgium* v *Commission*, cited above, and Case 102/87 *France* v *Commission* [1988] ECR 4067). They also state that the Court has held that when State financial aid strengthens the position of an undertaking in relation to other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (judgment of the Court of Justice in Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11).

142 Finally, the applicants point out that when urging the French authorities 'to ensure that La Poste's accounting system include compliance with the rules of Community law, in particular so that no subsidies are provided to activities which do not

constitute public service tasks', the Commission acknowledged that the lack of accounting transparency could lead to cross-subsidization of competitive activities and that these activities could also contribute to the financing of La Poste's public service.

143 The Commission points out first of all that, save for the reservation in Article 90(2), Article 92 covers all private and public undertakings and all their production (judgments of the Court of Justice in Case 78/76 *Steinike & Weinlig* [1977] ECR 595 and Case C-387/92 *Banco Exterior de España* [1994] ECR I-877).

144 As a further preliminary point, the Commission submits that the decision-making power which it has in the procedure provided for by Article 93 necessarily entails the exercise of a wide power of assessment. The applicants have not shown, however, that it exceeded the limits of that power in the present case.

145 Since La Poste is entrusted with the management of a service of general economic interest, the financial means made available to it in order to allow it to perform that task does not, according to the case-law on Articles 92 and 90(2) of the Treaty, constitute State aid within the meaning of the Treaty.

146 Whilst sharing the applicants' opinion that in principle the classification of a measure with reference to Article 92 must be based on the effects which the measure has on competition, the Commission nevertheless considers that it abided by that principle in the present case.

147 It found that the overall amount of the concession granted to La Poste was lower than the additional costs which it bears in performing its public service activities so that the concession does not produce any cross-subsidy effect. Its only duty was to determine that La Poste's competitive activities did not receive any public financing.

148 It points out in this context that the total additional costs involved in providing the public service were calculated on the basis of their real amount, after deducting from the total sum of additional costs the fraction which had to be regarded as having a favourable effect on La Poste's competitive activities.

149 The applicants' argument that the tax concession of FF 1.196 billion granted to La Poste benefits all of its activities is unfounded since the amount of the additional public service costs is in any event higher, namely, FF 2.8 billion.

150 In so far as the applicants contest the actual principle of the comparative method which was used on the ground that there is no analytical accounts system which would allow public service activities to be clearly distinguished from competitive activities, the Commission points out that it has no power, under Articles 92 and 93 of the Treaty, to make it compulsory for Member States to ensure accounting transparency. Besides, the method adopted was the only reasonable method by which it could reach a decision reasonably quickly on the complaints which had been submitted to it on the basis of the information available at the time.

151 In response to the applicants' argument that the cost of the public service depends on political decisions, the Commission replies that, in the absence of Community harmonization in this area, it must not and cannot take a view on the expediency of the political choices made by the French authorities in the matter of public services. If, for the sake of argument, the French authorities had decided that it was

necessary to increase the number of rural post offices for regional development reasons, they could also have correspondingly adapted the public financing arrangements in order to cover those additional costs and such an increase would not be caught by Article 92.

152 As regards the applicants' contention that more appropriate and targeted measures could be used for meeting the needs of regional development and of maintaining a postal service in rural areas, the Commission replies that it is not for it to express a view on the best way of financing the public services and thereby assume the role of the competent national authorities.

153 The Commission denies that its call to the French authorities for greater accounting transparency at La Poste in the future leads to the conclusion that it had identified a cross-subsidy.

154 Finally, the Commission observes that the applicants' reference to the judgment of the Court of Justice in Case C-303/88 *Italy* v *Commission*, cited above, is irrelevant because in that case the recipient of the aid did not have to assume public service obligations which could offset the public financing.

155 Whilst, according to the French Government, it is undoubtedly necessary to consider any effects which aid may have on competition, it is above all essential to consider the reasons for, and thus the purpose of, the aid. Referring to paragraph 19 of the judgment in *Corbeau*, the French Government submits that in the present case it is all the more important to determine the purpose of the State measure in question and that it may be justified under Article 90(2) of the Treaty. In this regard it observes that La Poste is entrusted with a public service task in France's regional development policy.

156 In such a situation it is for the Commission, after confirming that the purpose of the measure properly matches the aims covered by Article 90(2), to analyse the effects of the measure so as to satisfy itself that the measure is genuinely necessary for the performance of the general interest task in question and that any impact which it may have on competition will not affect the development of trade to such an extent as would be contrary to the Community's interests. In the French Government's view, the Commission's approach looked at both those questions.

157 As regards the analysis of its effects on competition, the French Government submits that having found that the tax concession in question is lower than La Poste's additional costs entailed by its public service constraints, such as the obligation to maintain post offices throughout the country, the Commission rightly concluded that no State resources were transferred to competitive activities as a result of the grant of the tax concession.

158 Finally, the French Government observes that the applicants commit an error of reasoning in asserting that the tax concession in question is bound to benefit La Poste's competitive activities because it comes from a reduction on all its activities. As long as the amount of the tax concession is lower than, or equal to, the amount of the additional costs of maintaining non-competitive postal activities, it does not benefit competitive activities whatever the bases of the tax reduction.

159 La Poste effectively agrees with the Commission's and the French Government's arguments regarding the application of Article 90(2) of the Treaty. It points out that the Commission found that the tax abatement in question is not higher than the costs of performing its task of participating in regional development.

160 In so finding the Commission applied the rules of competition correctly. Moreover, the concept of regional development is not unfamiliar in Community law given that Article 92(3) of the Treaty provides that certain aids may be considered to be compatible with the common market, such as aid to promote the economic development of areas where the standard of living is abnormally low, aid where there is serious underemployment or aid to facilitate the development of certain economic areas.

161 As regards the tax exemption available to it, La Poste considers it helpful to point out that before the 1990 Law was enacted, it was subject to the tax regime of the State administration. Consequently, contrary to what the applicants suggest, the 1990 Law had the effect of making it subject, for the most part, to the ordinary tax regime.

162 Finally, La Poste points out that the applicants admit that it is quite conceivable for it to receive advantages, whether or not in the form of financial aid, if they are strictly targeted on public service activities. It was precisely after having found that the tax exemption granted to it made up for the additional costs produced by its public service obligations that the Commission rejected the applicants' complaint.

— Findings of the Court

163 Faced with this plea in law, the Court's task is to examine the applicants' submissions concerning (i) the basis of the Commission's finding that, upon application of Article 90(2) of the Treaty, the tax concession in question granted to La Poste, being less than its additional public service costs, does not constitute State aid within the meaning of Article 92(1) of the Treaty, (ii) the question whether the aid is necessary for the performance of La Poste's particular tasks and, finally, (iii) the

question as to whether the Commission, in proceeding on the assumption that the tax concession was less than the additional public service costs, could reasonably arrive at the view that there were no grounds for concluding that a transfer of State resources to La Poste's competitive activities was involved.

164 Article 92(1) of the Treaty provides: 'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

165 It is clear from Article 90 of the Treaty that, save only for the reservation in Article 90(2), Article 92 covers all undertakings, private or public, and all their production (judgment in Case 78/76 *Steinike & Weinlig*, cited above, paragraph 18). Thus, the Commission's power, under Article 93 of the Treaty, to assess the compatibility of aid with the common market also extends to State aid granted to the undertakings referred to in Article 90(2), in particular those which the Member States have entrusted with the management of services of general economic interest (judgment in Case C-387/92 *Banco Exterior de España*, cited above, paragraph 17). Furthermore, the Court of Justice has held that the rules of competition also apply to the postal sector (judgments in Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565 and in Case C-320/91 *Corbeau*, cited above).

166 As stated in paragraph 114 above, it is not disputed that the tax concession enjoyed by La Poste amounted to FF 1.196 billion for 1994.

167 In principle, that tax concession constitutes State aid within the meaning of Article 92(1) since, although not taking the form of a transfer of state resources, it places La Poste in a more favourable financial situation than other taxpayers, including the companies represented by the applicants (judgment in Case C-387/92 *Banco Exterior de España*, cited above, paragraph 14).

168 It has been consistently held that aid within the meaning of Article 92(1) of the Treaty covers advantages granted by the public authorities which, in various forms, mitigate the charges normally included in an undertaking's budget (judgments of the Court of Justice in Case C-241/94 *France* v *Commission* [1996] I-4551, paragraph 34, in Case C-39/94 *SFEI and Others* [1996] I-3547, paragraph 58, and in Case C-387/92 *Banco Exterior de España*, cited above, paragraph 13).

169 In so far as aid is capable of affecting trade between Member States and distorting competition, it is incompatible with the common market, save where otherwise provided for by the Treaty (judgment in Case C-387/92 *Banco Exterior de España*, cited above, paragraph 15).

170 Article 90(2) of the Treaty provides for such a derogation where the aid involved is granted to an undertaking entrusted with the operation of a service of general economic interest (see paragraphs 66 to 72 above).

171 Article 90(2) provides: 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'.

172 It follows from the wording of that provision, in particular from the words 'in so far as the *application* of such rules [which are those contained in Article 92 of the Treaty] does not obstruct the performance [...] of the particular tasks', that, where Article 90(2) may be relied upon, a State measure caught by Article 92(1) may nevertheless be considered to be compatible with the common market (judgment in Case C-387/92 *Banco Exterior de España*, cited above, paragraphs 14 and 15, and see, to the same effect, the Opinion of Advocate General Lenz in that case, ECR [1994] I-879, paragraph 66). Although the aid involved is still State aid within the meaning of the latter provision, the effect of the competition rules may nevertheless be curtailed in such a case (judgment of the Court of Justice in Case 66/86 *Ahmed Saeed Flugreisen and Others* [1989] ECR 803, paragraph 56), so that a prohibition on giving effect to new aid, inferred from Articles 92 and 93(2) and (3) read together, may be declared inapplicable.

173 Because Article 90(2) of the Treaty lays down a derogating rule, it must be interpreted restrictively. So, in order that the derogation from the application of the rules of the Treaty provided for by that provision may apply, it is not sufficient that the undertaking in question has been entrusted by the public authorities with the operation of a service of general economic interest: the application of the rules of the Treaty, specifically those of Article 92, must also obstruct the performance of the particular tasks assigned to the undertaking and the interests of the Community must not be affected (judgment of the Court of Justice in Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 26).

174 In examining the question whether Community law precludes a Member State from granting State aid to offset the additional costs assumed by an undertaking entrusted with the operation of a service of general economic interest within the meaning of Article 90(2) of the Treaty where those additional costs arise from performance of the particular task assigned to it, reference must be made to the case-law on the combined application of Articles 85 and 86 and Article 90(2) of the Treaty.

175 In its judgment in Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 46, the Court of Justice held that restrictions on competition from other economic operators may be permissible pursuant to Article 90(2) in so far as they are necessary to

enable the undertaking to perform a task of general interest assigned to it. In particular, the Court held in this regard that 'it is necessary to take into consideration the economic conditions in which the undertaking operates, in particular the costs which it has to bear and the legislation, particularly concerning the environment to which it is subject' (paragraph 49). In that case, the Court thus found that the application of an exclusive purchasing clause could escape the prohibitions laid down in Articles 85 and 86 to the extent that the restriction on competition entailed by the clause was necessary in order to enable the undertaking in question to perform its task of general interest.

176 In its judgment in Case C-320/91 *Corbeau*, cited above, the Court similarly held that the grant of exclusive rights as regards the collection, carriage, and distribution of mail to the Belgian Régie des Postes, which were capable of entailing restrictions on competition, could be justified to the extent that those restrictions were necessary to ensure performance of the particular task assigned to that undertaking.

177 In that case, the Court examined the question as to whether the exclusion of competition was necessary in order to provide the holder of the exclusive rights with economically acceptable conditions. It considered that the starting point for such an examination must be 'the premiss that the obligation [...] to perform [the] services in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors...' (paragraph 17). According to the Court of Justice, this is possible only if one accepts that competition by private undertakings in the economically profitable sectors can be curtailed (paragraphs 17 and 18).

178 This Court considers that that case-law on the application of Articles 85 and 86, can be applied, *mutatis mutandis*, to the field of State aid, so that the grant of State aid may, under Article 90(2) of the Treaty, escape the prohibition laid down in Article 92 of that Treaty provided that the sole purpose of the aid in question is to

offset the additional costs incurred in performing the particular task assigned to the undertaking entrusted with the operation of a service of general economic interest and that the grant of the aid is necessary in order for that undertaking to be able to perform its public service obligations under conditions of economic equilibrium (*Corbeau*, paragraphs 17 to 19). Determining whether the aid is necessary entails a general assessment of the economic conditions in which the undertaking in question performs the activities in the reserved sector, without taking account of any benefits it may draw from the sectors open to competition.

179 It is clear from the written evidence and from the oral argument presented to the Court that on average over the first three years following the adoption of the 1990 Law, La Poste has achieved a broadly breakeven position on an after-tax basis only, that is to say, only after the tax concession in question has been taken into account.

180 In those circumstances, even though the financial results from those years cover all La Poste's activities, there being no analytical accounts permitting La Poste's performance in its different sectors of activity to be distinguished, the Court considers that the Commission was entitled to take the view, without breaching the limits of its power of assessment, that in the present case the tax concession in question was not greater than was necessary to ensure that the tasks of public interest assigned to La Poste are performed, namely in particular the obligation to maintain a postal presence in rural areas, as it can be assumed that the resulting additional costs correspond to equivalent losses for La Poste. The fact of having authorized State aid which stayed below those additional costs cannot therefore render Article 90(2) of the Treaty inapplicable in this case and, accordingly, it cannot constitute an infringement of Article 92 of the Treaty.

181 The Court also considers that the applicants have not produced any evidence or arguments to support their assertion that the aid in question is not necessary for the performance of the public service obligations assigned to La Poste. The submission challenging the necessity for the aid in question must therefore be dismissed.

182 The applicants' submissions to the effect that the methods used by the Commission were inappropriate must now be examined. According to them, because La Poste has no analytical accounts, it is impossible to say that the tax concession in question does not, contrary to Community law, benefit its competitive activities.

183 The Court must therefore examine whether the method of comparison used, consisting in assessing the amount of the State aid (FF 1.196 billion) in relation to the amount of La Poste's additional costs (FF 1.32 billion, according to the minimum estimate — see paragraphs 105 and 106 above), is an appropriate method capable of reasonably ensuring that the grant of that aid does not involve any cross-subsidy for La Poste's competitive activities. As the Commission rightly points out in the contested decision, Community law requires that the State aid in question should not benefit the public operator's competitive activities.

184 The documents before the Court show that, when it adopted the contested decision, La Poste did not maintain, in its internal accounting system, separate accounts for services falling within the reserved sector and for non-reserved services. This in fact is the reason why the additional public service costs were calculated in the contested decision on the basis of all postal activities (see paragraph 105 above).

185 It is undeniable that if La Poste had established such an analytical accounts system at the time, the Commission would have had a surer basis for satisfying itself that there was no cross-subsidy.

186 However, there is as yet no Community legislation providing for the introduction of an analytical accounts system for undertakings which, whilst entrusted with public service tasks, engage in activities in competitive sectors.

187 Secondly, the actual application of the competition rules in circumstances such as those existing in the present case necessarily involves complex economic and legal assessments which must be made within a Community context (see, for example, the judgment of the Court of Justice in Case C-303/88 *Italy* v *Commission*, cited above, paragraph 34). Consequently, the Commission must be allowed a certain discretion in deciding on the most appropriate method for making sure that the competitive activities do not receive any cross-subsidy.

188 Whilst it is true that the grant of State aid to an undertaking may allow the undertaking to release other resources for other activities (judgment in Case C-303/88 *Italy* v *Commission*), the Court nevertheless considers that where the aid concerned is granted to an undertaking of the kind contemplated in Article 90(2) of the Treaty, the possibility of a cross-subsidy taking place is excluded to the extent to which the aid in question remains lower than the additional costs generated by the particular task referred to in that provision.

189 Moreover, as was held in paragraph 178 above, Community law does not preclude a Member State from granting State aid to an undertaking entrusted with the management of a service of general economic interest in order to offset the additional costs of the particular task assigned to it, provided that the aid is necessary in order for that undertaking to be able to perform its public service obligations under conditions of economic equilibrium. Consequently, unless Article 90(2) of the Treaty is to be rendered entirely ineffective, the Court considers that it must be acknowledged that the method of comparison used by the Commission in the present case was appropriate for making reasonably sure that the grant of State aid in question involved no cross-subsidy contrary to Community law.

190 On the question of the appropriate method, the applicants have not attempted to show that, given both the information available at the time and the state of

Community law, there was an alternative, more suitable method for making sure that La Poste's tax advantage did not benefit its competitive activities. Nor have they produced any evidence or arguments to show that the Commission exceeded the bounds of its discretion in the matter.

191 The applicants' complaint concerning the basis of the tax abatement in question must be regarded as unfounded since they do not dispute the total amount entailed by the concession.

192 As regards the applicants' arguments that the cost of a public service is nothing other than the cost which the public at large is willing to devote to it and that it would have been preferable to apply the 1982 Law, it suffices to observe that, as stated in paragraph 108 above, in the absence of Community rules governing the matter, the Commission has no power to take a position on the organization and scale of the public service tasks assigned to a public undertaking or on the expediency of political choices made in this regard by the competent national authorities, provided that the aid in question does not benefit the activities pursued in competitive sectors or exceed what is necessary to enable the undertaking concerned to perform the particular task assigned to it.

193 Contrary to what the applicants maintain, the fact that the Commission has urged the French Government to ensure that La Poste's accounting system is improved in the future provides no ground for inferring that in adopting the contested decision the Commission recognized that a cross-subsidy existed. Even if La Poste's accounting system may be improved in the future so as to afford greater

transparency in the breakdown of costs, the Commission was nevertheless entitled, as held in paragraphs 183 to 189 above, to find, on the basis of the information available at the time, that the grant of the tax concession in question entailed no risk of a cross-subsidy.

194 It follows from all the foregoing considerations that the first part of the plea must be dismissed.

195 As regards the second part of the plea, alleging breach of Article 92 of the Treaty, it is indeed the case, as the applicants have argued, that under Article 92 of the Treaty a State measure must be judged on the basis of its effects on competition, the Court of Justice having held that Article 92 does not make any distinction according to the causes or aims of the aid in question but defines them in relation to their effects (judgment in Case 173/73 *Italy* v *Commission*, cited above, paragraph 13).

196 That principle was adequately adhered to in the present case. As the Commission has rightly pointed out, it did not simply look at the aim of the tax concession in question in finding that it was not caught by Article 92 of the Treaty. On the contrary, it made sure that the total amount of the tax concession was less than the additional costs borne in the performance of the public service activities so that the grant of the concession was to be considered to be unlikely to have a cross-subsidizing effect on competitive activities.

197 It follows that the second part of the plea, alleging breach of Article 92 of the Treaty, cannot be upheld either.

198 The plea of breach of Article 90(2) and Article 92 of the Treaty must therefore be dismissed.

199 Although the Commission found in the contested decision that, by virtue of Article 90(2) of the Treaty, the State measure in question does not constitute State aid within the meaning of Article 92(1) of the Treaty, contrary to what is held above in paragraphs 167 to 172, the Court considers that such an assessment, which had no effect on the outcome of the examination of the aid in question, should not entail annulment of the contested decision (see, to the same effect, the judgment of the Court of First Instance in Case T-75/95 *Günzler Aluminium* v *Commission* [1996] ECR II-497, paragraph 55).

200 Since none of the applicants' pleas in law has been upheld, the application must be dismissed as unfounded.

Costs

201 Under Article 87(2) of the Rules of Procedure, an unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the applicants have been unsuccessful in their submissions and since the Commission and La Poste, as intervener, have applied for costs, the applicants must be ordered to pay the costs.

202 However, the French Republic, which has intervened in the case, must 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 application;

2. Orders the applicants to pay the costs of the proceedings, including the costs incurred by the intervener La Poste;

3. Orders the French Republic to bear its own costs.

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 27 February 1997.

H. Jung B. Vesterdorf

Registrar President