OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 26 May 1998 *

1. This appeal has been lodged by Union Française de l'Express (UFEX, formerly Syndicat Français de l'Express International, SFEI), DHL International and CRIE against the judgment given on 15 January 1997 by the Court of First Instance in Case T-77/95. [1]

2. The judgment dismissed an application for the annulment of the Commission Decision of 30 December 1994 which, in turn, had rejected a complaint lodged on 21 December 1990 by certain undertakings seeking an investigation into the practices of the French postal administration ('La Poste') in relation to the international express mail services of one its subsidiary companies. In particular, the issue was whether such practices were contrary to the articles of the EC Treaty concerning freedom of competition.

Facts

3. The facts as set out in the judgment of the Court of First Instance are as follows:

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

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

* Original language: Spanish.

1 — *SFEI and Others* v *Commission* [1997] ECR II-1.

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

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

As to logistical assistance, the applicants challenged the making available of the infrastructure of La Poste for the collection, sorting, carriage, distribution and delivery of mail, the existence of a preferential customs clearance procedure usually reserved for La Poste, and the granting of preferential financial terms. As to commercial assistance, the applicants pointed to the transfer of assets such as goodwill and stock, and promotion and advertising by La Poste in favour of SFMI.

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

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

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

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

By letter of 4 August 1994 the Commission withdrew the decision which was the subject of Case T-36/92. The Court of First Instance consequently ruled that there was no need to

give judgment (order of 3 October 1994 in Case T-36/92 *SFEI and Others* v *Commission*, not reported in the ECR).

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

On 28 October 1994 the Commission sent SFEI a letter pursuant to Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), informing it that it proposed to reject the complaint.

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

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

The contested decision

4. The Decision reads as follows (omitting the paragraph numbering):

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

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

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

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

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

First, the Green Paper on postal services in the single market and the Guidelines for the development of Community postal services (COM (93)247 final of 2 June 1993) address *inter alia* the principal problems raised in SFEI's complaint. Although those documents contain only proposals *de lege ferenda*, they must be taken into consideration in particular in assessing whether the Commission is making appropriate use of its limited resources, especially whether they are being put to use in developing a regulatory framework concerning the future of the postal services market rather than investigating on its own initiative alleged infringements which have been reported to it.

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

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

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

"adjust its prices according to the real value of the services provided by La Poste".

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

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

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

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

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

The contested judgment

5. The Court of First Instance dismissed the application for annulment in its entirety, rejecting one by one the five pleas on which it was based.

6. In essence, the Court of First Instance took the view that the Commission Decision rejecting the complaint was based on the

sole ground that in the circumstances of the case there was no sufficient Community interest in the matter (paragraph 34). The Court observed that this conclusion was lawfully reached in the present case because the Commission was justified in finding that, as the complainants had not furnished proof to the contrary, the practices in question had ceased after the adoption of the concomitant decision (the GD Net decision mentioned above).

7. The Court of First Instance also considered that the Decision did not infringe Article 190 of the Treaty because it sets out clearly and unequivocally the Commission's reasoning. Furthermore, the Decision does not contradict itself.

8. Likewise the Court dismissed the plea that the Commission infringed the principle of good administration by not taking account of an expert report of 6 December 1990 because it referred to a period prior to the adoption of the GD Net decision. With regard to the supposed breach of the principle of non-discrimination, the situations alleged by the complainants were not comparable with the present case.

9. Finally, the Court of First Instance found that the applicants had not proved that the Commission misused its powers by adopting the contested Decision.

The first ground of appeal

10. The first ground of appeal, alleging 'misconstruction of the contested decision', is divided into two parts: (a) the Court of First Instance is said to have misconstrued the Decision in finding that it was not based on two distinct grounds, and (b) the Court also misconstrued the Decision by introducing the factor of 'Community interest' which was not mentioned by the Decision.

11. It is true that the wording of the Decision is somewhat ambiguous because it does not use the term 'Community interest', which has well-known legal connotations and is generally used in acts of that type. The Court of First Instance was aware of this when it made the following observations in paragraphs 31 and 32 of the judgment:

'... the only reference to the Community interest — an implicit one, moreover, as it only refers to interest — appears in the penultimate paragraph of the Decision, concerning past infringements. ... However, the

Court considers that the lack of Community interest in continuing the investigation of the complaint underlies the whole Decision. The penultimate paragraph cannot be dissociated from the rest of the document.'

12. If the decision is read without prejudice and impartially, it will be seen that it contains (a) a first reference to the Commission's proposals *de lege ferenda* concerning the postal sector, (b) the main argument concerning the effect of the GD Net decision on the practices complained of, which the Commission considered to have ceased, and (c) a final statement that 'the Commission sees no interest in embarking on such an investigation under Article 86 of the Treaty' in relation to past infringements if the sole purpose or effect of such an investigation is to serve the individual interests of the parties.

13. No doubt it would have been desirable for the Commission to give a decision in more categorical, explicit terms instead of a series of observations which do not clearly relate to its ultimate rejection of the complaint. However, as I see it, this does not mean that the Court of First Instance 'misconstrued' the Decision in concluding, after examining the Decision as a whole, that it was based on the lack of a sufficient Community interest.

14. The Court of First Instance correctly set out the logical sequence of the reasoning of the Decision, in spite of the superimposed observations which it contains. Rightly or wrongly, the Commission considered that the matter had no 'interest' which would justify investigating it because the Commission itself had already taken action in the sector in question and the contested practices had ceased. That interest can be none other than the 'Community interest' which the Commission must serve and which it has power to assess in principle, subject to review by the Court.

15. It happens that the term 'Community interest' is somewhat ambiguous. It has a narrow sense which was discussed by the Court of First Instance in the *Automec* v *Commission* judgment, [2] the characteristic features of which are well-known, but this is not the only sense. The term is also used in speaking of the absence of a (Community) interest in circumstances like those of the present case, where the Commission found that there was no interest in setting in motion its powers of investigation.

16. Furthermore, the appellants themselves recognised in their application to the Court of First Instance that the Commission had, in the Decision, used the absence of Community interest as one of the reasons for rejecting

2 — Case T-24/90 [1992] ECR II-2223.

their complaint. One of the pleas in law on which the application for annulment was based (paragraph 5.6) was precisely that, by rejecting the complaint on the ground that there was no Community interest, the Commission had made a manifest error of assessment. [3] It is somewhat inconsistent to criticise the Court of First Instance for 'finding' in the Decision a legal factor which they themselves consider essential to that Decision (that is to say, the absence of a Community interest).

Second ground of appeal

17. The second ground of appeal contends that there was an 'error in law' on the part of the Court of First Instance in finding that the Commission could support the contested Decision by referring to another decision.

18. In the appellants' opinion, every judicial or administrative decision must be sufficient in itself and its author must adopt it by taking account of the particular circumstances of the case and not by reference to other facts or other cases which have already been judged or decided. In the present case, therefore, the Commission should not have referred to the GD Net decision.

19. The criticism of this point of the judgment seems to me clearly unfounded. There is no mistake in law on the part of the Court of First Instance in concluding that the Commission could refer to the GD Net decision, as it did, and that the reference formed part of the Commission's reasoning in rejecting the complaint.

20. There is nothing to prevent the statement of reasons of an administrative act from referring to other acts, particularly if they are connected or related to each other. Likewise, in such cases, there is nothing to prevent the author of the act from using the existence of a previous act and its content as a logical argument leading to certain conclusions when examining a later act.

21. This is precisely what happened here. The Decision refers to a previous decision relating to the same sector, in which certain conditions were imposed on a concentration of postal undertakings. The existence of the

3 — The application for annulment contains the following passage (paragraph 91): 'the Commission's decision ... to reject the complaint appears to be based on the two following reasons: the Community interest would not justify the opening of an investigation under Article 86'. In paragraph 185 of the same application the applicants state that 'in considering that there was no interest in opening an investigation under Article 86 of the Treaty (paragraph 13 of the Decision), the Commission exercises the option which it has by virtue of case-law to reject a complaint for lack of Community interest'. The applicants expressed themselves in similar terms in paragraph 188 of the application: 'SFEI contends ... that the Commission made manifest errors of assessment regarding the Community interest in continuing the investigation into the matter, in so far as the Commission bases its assessment of the Community interest on the existence of proposals *de lege ferenda*'.

previous decision (GD Net) and the fulfilment of the conditions in it lead the Commission to reach certain conclusions regarding the justification of the complaint by UFEX and the other undertakings. Therefore it cannot be said that, from the viewpoint of statement of reasons, the Commission made an error of law which the Court of First Instance ought to have censured.

22. Whether the GD Net decision and the problems of implementing it are sufficient to justify the rejection of the complaint is another question, which is not a matter of the formal reasoning of the Decision but of its substance, that is to say, a matter of assessing the Community interest underlying the decision.

Third ground of appeal

23. The third ground of appeal relates to 'breach of Article 190 of the Treaty' and consists of two parts: (a) the judgment is said to contain contradictory arguments, and (b) the judgment does not reply to the appellants' submissions on a fundamental point.

24. Article 190 of the Treaty refers only to the requirement that reasons must be stated for certain Community acts adopted jointly by the European Parliament and the Council or by the Council or the Commission, but this does not include decisions of judicial bodies such as the Court of First Instance. [4] Therefore it is insufficient to cite Article 190 as a ground of appeal in order to censure supposed internal defects in a judgment, such as contradictory arguments or the failure to reply to submissions of the appellants.

25. The reference in the appeal to Article 190 of the Treaty may be due to the unfortunate transposition to the appeal proceedings of an argument in the application for annulment before the Court of First Instance, and it overlooks the differences between the procedure on appeal and that at first instance. The appellants could challenge an administrative act before the Court of First Instance on the ground that it was in breach of Article 190, but they cannot rely on the same argument, which is directed specifically at an administrative act, against the judgment of the Court of First Instance dismissing that particular plea.

4 — Obviously, the judgments of the Court of First Instance, like those of any judicial body, must state the reasons on which they are based, as required by Article 81 of the Rules of Procedure of that Court, but not by Article 190 of the Treaty. The function of a court (*iuris dictio*) is not only inseparable from the obligation to state the reasons for a judgment, but finds its legitimation therein. This was not always the case: in absolutist regimes, not only did the courts not state the reasons for their decision, they were actually prohibited from doing so.

26. However, it is clear that any contradiction in the legal reasoning of a judgment, and likewise the absolute insufficiency of such reasoning, [5] are legal defects which may lead to a first instance judgment being set aside or amended, as they are unjustifiable mistakes in law which, if they have a decisive influence on the judgment, vitiate it entirely. Therefore I consider that the Court of Justice may examine the third ground of appeal.

27. So far as the first limb of this ground is concerned, the judgment does not contradict itself when it states on the one hand that the Decision did not 'assess the contested practices from the viewpoint of Article 86 of the Treaty' and, on the other, admits that the Commission considered that the practices in question had come to an end after the GD Net decision.

28. There is no contradiction whatever in the judgment because the Court of First Instance merely finds that the Decision rejects the complaint for the lack of a sufficient interest, and such finding does not entail an assessment of the practices in question by reference to Article 86. The reference to the GD Net decision serves to establish a premiss: even if those practices had existed in the past, the existence of that decision would mean that they ceased when it took effect, with the result that there would be no Community interest in taking action against the breach. However, this does not mean that, in the GD Net decision, the Commission assessed those practices.

29. The second limb of this ground of appeal should not succeed either. The Court of First Instance does indeed reply to the appellants' submissions concerning the differences between the reasons for the first rejection of the complaint (letter of 10 March 1992) and the final rejection (the Decision). These submissions and the letter are referred to in paragraph 22 of the judgment and the submissions are dismissed in paragraph 35, *inter alia*.

The fourth ground of appeal

30. With the fourth ground of appeal, entitled 'Lack of legal basis', the appellants contend that the Court of First Instance did not make the inquiries necessary to ascertain whether the Commission was entitled to find that there was no economic justification for the subsidies to La Poste and its subsidiary.

5 — Absolute insufficiency of the legal reasoning (which would be a defect in the judgment) should not be confused with the absence of a detailed reply to each and every one of the arguments in an appeal, which is possible in the context of an entire judgment. Sometimes a comprehensive reply dismisses simultaneously several arguments of both parties.

31. The appellants' position on this point (paragraph 56 of the appeal) is not exactly a model of clarity or of good grammar. In their opinion, 'the Court of First Instance did not make the essential enquiries to ascertain whether (i) it would be justified in concluding that the defendant was wrong in stating that La Poste could continue to provide cross-subsidies in the absence of requests from third parties to join the network, and (ii) whether therefore it could or could not lawfully apply Article 86 of the Treaty or the Community interest.'

32. In response to the Commission's objection that 'lack of legal basis' is ambiguous because it does not specify the rule of law which is said to have been broken, the appellants observe in their reply [6] that 'legal basis' is a customary term in French procedural law and it refers to 'the observations which must justify the operative part of a judgment, and not to a statutory provision as such'. Consequently, if a judgment lacks a legal basis, the actual body of the judgment does not give a sufficiently detailed account of the facts to enable the appellate court to verify that the law was correctly applied to those facts.

33. Viewed from this angle, the ground of appeal must be dismissed. The judgment specifically states as a fact that the postal authorities had no economic interest in subsidising their joint subsidiary. The absence of such interest was noted by the Commission (paragraph 62 of the judgment).

34. This is a factual finding made by the Court of First Instance after examining the evidence, and therefore the finding cannot be refuted on appeal unless it is shown (which is not the case) that the evidence was completely misinterpreted.

35. However, judging by the terms in which it is formulated, the fourth ground of appeal appears to be based, not on the allegedly insufficient account of certain facts (which, as I have said, are clearly set out by the Court of First Instance), but on the fact that it did not make satisfactory inquiries and did not obtain the evidence necessary for determining those facts scrupulously.

36. Considered in this light, this ground of appeal is directed not so much against the judgment itself as against the previous inquiries by the Court of First Instance which, in the course of the proceedings, is said not to have

6 — Footnote 11 of the reply.

taken sufficient evidence to verify one of the facts at issue (the existence or otherwise of cross-subsidies).

37. The reference to the fact that there would be no economic justification for La Poste to cross-subsidise the joint subsidiary appears in paragraph 72 of the judgment as an additional argument, added to the fourth of the five arguments from which the Court of First Instance concluded that the Commission could legitimately find that the practices alleged in the complaint had ceased as a result of the adoption of the GD Net decision.

38. The presence of these two factors and the comprehensive objection, in the fifth ground of appeal, that this last conclusion of the Court of First Instance is mistaken in law make it expedient to consider this 'part' of the fourth ground of appeal together with the fifth.

The fifth ground of appeal

39. The fifth ground of appeal complains of another 'error of law': the Court of First Instance could not lawfully conclude, having regard to the actual documents in the file, that the Commission was justified in finding that the practices in question had ceased.

40. Clearly, with this ground of appeal the appellants are directly challenging the assessment of the facts by the Court of First Instance.

41. As I did in my opinion in the *John Deere Limited* v *Commission* case, [7] I shall set out briefly the development of the Court's case law concerning objections to the factual assessments in first instance judgments. The Court of Justice has held that an appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The Court has thus taken the view that the appraisal by the Court of First Instance of the evidence submitted to it does not constitute a legal issue which may be reviewed in an appeal, except where such evidence has been distorted or where the material inaccuracy of the findings of the Court of First Instance is apparent from the documents in the file. The Court of Justice has no jurisdiction to examine evidence accepted by the Court of First Instance in determining the facts, provided that it was properly obtained and the general rules and principles of law concerning the burden of proof and the appraisal of evidence were observed. On the other hand, the Court of Justice is entitled to

7 — Case C-7/95 P, [1998] ECR I-3111, point 24.

review the legal characterisation of the facts and the legal conclusions drawn from them by the Court of First Instance. [8]

42. In their criticism, the appellants seek support precisely in one of the 'openings' which permit factual assessments to be challenged: material inaccuracy as shown by the actual documents in the file.

43. This criticism is directed first at paragraph 68 of the judgment, which states that 'with respect to the Commission's certainty that the practices had ceased, it should be observed that since La Poste is bound by the agreements notified and the undertakings given, the Commission was entitled to consider that, once the concentration had been implemented, in other words on 18 March 1992, according to the information provided to the Court [of First Instance], those provisions were being observed, in the absence of evidence to the contrary.'

44. In the appellants' opinion, this is refuted by the wording of the GD Net decision itself, the undertakings of which do not take effect before 18 March 1995. The Commission could not, in 1994, rely on undertakings which were not yet binding in order to conclude that the practices in question had ceased.

45. However, such an allegation goes far beyond a mere claim that there was an ordinary mistake or material inaccuracy arising from a document in the file. In reality, this argument impinges on the area of the judicial interpretation (which is open to dispute) which can be attached to the meaning and the scope of a particular administrative act. In other words, the appellants are trying to reopen the first-instance argument concerning the assessment of evidence and the determining of the facts which it proves.

46. This is clear from the argument which began in the statement of defence and continued in the reply and the rejoinder concerning the scope of the undertakings imposed by the GD Net decision and their effects in time.

47. Secondly, the appellants also criticise the statement in paragraph 71 of the judgment that 'that conclusion [that the Commission made no error in finding that the evidence produced by the complainants was not sufficient to justify an investigation] cannot be affected by the fact, to which the appellants drew attention at the hearing, that in July

8 — See the judgments in Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42, and Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 67, and also the order of 17 September 1996 in Case C-19/95 *San Marco* v *Commission* [1996] ECR I-4435, paragraphs 39 and 40.

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

48. The appellants claim that the new decision of 1996 shows clearly that, even for the period after the GD Net decision, the Commission did not know whether the undertakings which it imposed had been fulfilled or not.

49. Once again the question raised by the appellants is not a matter of 'material inaccuracy' but of the judicial interpretation of a particular document, which disqualifies this ground of appeal because the appellants are merely seeking to have the Court of Justice take the place of the Court of First Instance in assessing the facts.

50. Furthermore, the interpretation suggested by the appellants does not really contradict paragraph 71 of the judgment, because in the last sentence of paragraph 71 the Court of First Instance does not deny that the Commission was 'unaware' whether the undertakings imposed by the GD Net decision had been fulfilled or not. The Court merely observes that the Commission did not have sufficient evidence to warrant an investigation in respect of the period after the adoption of the GD Net decision, as the evidence produced by the complainants was insufficient for that purpose.

The sixth ground of appeal

51. With the sixth ground of appeal the appellants complain of a 'breach of the rules of law on the assessment of the Community interest' by the Court of First Instance.

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

53. The appellants consider that these observations are in breach of Community law in two respects. On the one hand, they are contrary to the rules of law on assessment of the Community interest and, on the other, they infringe the principles of legal certainty and legitimate expectation.

54. In the appellants' opinion, the concept of the Community interest and the legal rules relating to its application (both the concept and the rules being judge-made law) were developed by the Court of First Instance in the *Automec* v *Commission* judgment and were always followed by that Court in subsequent judgments. Therefore the same Court cannot refrain from applying the three criteria for assessing the Community interest which it has itself developed (the significance of the alleged infringement, the probability of establishing its existence, and the scope of the investigation necessary for that purpose), otherwise it will be in breach of the rules and principles of law referred to in the preceding paragraph.

55. In my opinion, this ground of appeal cannot succeed in the terms in which it is formulated, for two reasons.

56. Firstly, as a matter of principle it is questionable whether certain criteria for assessing the Community interest laid down by the Court of First Instance in a particular case must, without more, be deemed to be 'rules of law' which the Court of Justice has an obligation to safeguard. The Court of First Instance itself is not absolutely bound by its previous decisions, from which it can always depart provided that is justified.

57. On the other hand, there is no reason for regarding the list of criteria for assessing the Community interest laid down in the *Automec* v *Commission* judgment as exhaustive. The Court of First Instance rightly observes that the particular circumstances of each case and the grounds on which the Commission justifies every decision to reject a complaint are decisive. In a sector such as the present, where legal situations may vary considerably, new criteria of assessment may arise which were not foreseen in the past and the Court of First Instance will have to decide whether they are appropriate in law.

58. This is what has happened in the present case, in which the Commission's reason for rejecting the complaint was that it considered that the alleged practices had ceased, mainly owing to its own intervention, and that therefore there was no justification for starting an investigation. Consequently this is a new factor which must be taken into account, being different from the three referred to in the *Automec* v *Commission* judgment. It was reasonable for the Court of First Instance to consider whether this new argument of the Commission conformed with the law, instead of merely dismissing it as not being one of the criteria specified in the said judgment.

59. To accept the appellants' argument on this point would amount to 'rigidifying' the case-law in question and preventing not only its further development, but also any addition to it. There is nothing to prevent the Court of First Instance, when ruling on a Commission decision, from finding that there is a further criterion for assessing the Community interest, in addition to those laid down in the *Automec* v *Commission* judgment, which may justify the rejection of complaints concerning certain anti-competitive practices.

The seventh ground of appeal

60. The seventh ground is in fact the most important and, for the reasons which I shall set out, I consider that, unlike the others, it must succeed. I shall therefore propose that it be allowed and that the first-instance judgment be set aside.

61. The seventh ground alleges 'breach of Article 86 of the EC Treaty, read in conjunction with Articles 3(g), 89 and 155 of the EC Treaty'. It criticises the arguments in paragraphs 57 to 59 of the judgment and the conclusions reached by the Court of First Instance which lead it to dismiss the action for annulment.

62. The arguments in question may be described as two of a general nature, and a third which applies the others to this particular case.

63. Before formulating these three arguments, the Court of First Instance laid down, in paragraphs 54 to 56 of the judgment, three premises which are common ground:

(a) the extent of the Commission's obligations in matters of competition law must be considered in the light of Article 89(1) of the Treaty, which constitutes, with regard to those matters, the specific expression of the general supervisory role conferred on the Commission by Article 155 of the Treaty;

(b) Article 3 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, [9] does not confer upon a person who lodges an application under that article the right to obtain from the Commission a decision within the meaning of Article 189 of the Treaty, regarding the existence or otherwise of an infringement of Article 85 or 86 of the Treaty. The Commission is thus entitled to give different degrees of priority to complaints made to it, and it is

9 — OJ, English Special Edition 1959-1962, p. 87.

legitimate for it to refer to the Community interest presented by a case as a criterion of priority;

(c) Article 86 of the Treaty is an application of the general objective of the activities of the Community laid down by Article 3(g) of the Treaty, namely the establishment of a system ensuring that competition in the common market is not distorted.

64. Starting from these premises, the judgment follows a line of reasoning regarding the complaints concerning past infringements and applies that reasoning to the present case in order to justify the Commission's acts.

65. The reasoning is set out in paragraphs 57 and 58 of the judgment as follows:

— In view of that general objective and the functions conferred on the Commission, the Court of First Instance considers that, provided it states the reasons for its decision, the Commission may lawfully decide that it is not appropriate to pursue a complaint regarding practices which have since ceased, all the more so where, as in the present case, they have ceased as a result of action by the Commission. It is not important to know the legal basis for the adoption of a decision putting an end to the practices complained of, since it is only the effect of that decision which must be taken into account.

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

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

67. I think the appellants' criticism of this part of the judgment is well-founded and sufficient to make their appeal successful.

68. Complaints concerning abuses of a dominant position, contrary to Article 86 of the Treaty, are almost inevitably complaints of past acts. [10] When an undertaking has engaged in practices of that kind in a particular sector, abusing its dominant position in the market in question and thereby unlawfully distorting competition, the mere fact that the practices ceased at a given time is not sufficient, in the absence of other factors (which I shall refer to below), to justify the Commission in refraining from taking action on complaints from competitors of that undertaking.

69. In my opinion, the Court of First Instance is mistaken in law in stating that in such cases proof of past infringements would only be of subjective interest to the complainants, but of no interest to the Commission. The same error leads the Court to observe that the 'essential object' of pursuing such a case would be to make it easier for the complainants to prove fault in an action for damages in the national courts.

70. The competition which the Commission must safeguard is not secured when an undertaking has ceased the practices by means of which it proposed to exploit its dominant position only because they have been successful. The practices have ceased, but their effects remain.

71. If the argument in the abovementioned paragraphs of the judgment were to be accepted (particularly in relation to markets recently opened to competition, such as express mail), that would have the paradoxical effect of rewarding an undertaking which, by abusing initially its dominant position, succeeds in permanently distorting the general market situation. In such cases, the cessation of the original practices does not mean that competition is no longer distorted, but that the undertaking in question has found that those practices have achieved their object and are no longer necessary.

10 — On this point the Commission's representative at the hearing put forward the Commission's argument that, unlike proceedings under Article 92 of the Treaty concerning State aids, which are always directed at the past, proceedings under Article 86 are 'directed at the future' because they have the object of putting an end to the breach. This argument is somewhat surprising as it contradicts previous arguments by the Commission itself before the Court of First Instance. For example, in Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, when explaining the differences between the procedure under Article 86 and that of controlling concentrations between undertakings (Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ 1990 L 257, p. 14), the Commission's argument was precisely the opposite: regarding abuse of a dominant position, 'the investigation relates to abuses situated in the past', whereas the examination must concentrate on the future when it is a matter of applying the said regulation. See the judgment of the Court of Justice of 31 March 1998 in that case, ECR I-1375, paragraphs 179 and 180.

72. The Commission should not tolerate such a situation and has an obligation to restore freedom of competition in the sector concerned, provided that the other factors justifying a 'Community interest' in intervention by the Commission are present. For this purpose, the first step is to ascertain whether the undertaking in question has abused its dominant position, which means that the Commission must put in motion the investigation procedures which the complainants seek.

73. Furthermore, where an undertaking or group of undertakings exercise their right under Regulation No 17, which I referred to above, and lodge a complaint, they may legitimately be acting with a view to restoring balanced competition (after it has been distorted) as much as in defence of their own commercial interests.

74. Undertakings which complain of anti-competitive practices perform an activating function or, so to speak, act as catalysts for measures by the Commission involving two orders of interests — the interests of the undertakings themselves in averting commercial damage as a result of the unlawful practices of their competitors, and the general interest that the competition rules should be observed, an interest which is safeguarded by Community law and must be protected by the Commission.

75. Where the latter interest exists (because the sector in question undoubtedly has a Community dimension and Community significance and it is relatively easy to detect the breach complained of in that sector, without the need for exceptional measures of investigation), it cannot be argued that the Commission's measures would only serve to produce evidence with a view to an action for damages in the national courts.

76. The Commission's failure to take action is not justified either by the fact that practices arising from abuse of a dominant position ceased either by reason of a unilateral decision of the undertaking which abused its dominant position or by reason of collateral measures taken by the Commission for a different purpose, but which had the indirect effect of attaining the same result. In any case, the essential point in judging whether the Decision was appropriate in law is that the discontinuance of the practices did not mean the disappearance of their anti-competitive effects.

77. Let me mention once again that, in the context of the proceedings provided for by Article 168a of the Treaty, the Court of Justice is confined to examining points of law and is therefore bound by the facts which the Court of First Instance finds proven. [11] Therefore the Court of Justice must start from the finding that the GD Net decision led to the

11 — Obviously, without prejudice to reviewing those facts within the limits which I indicated in paragraph 41 of this opinion.

cessation of the practices whereby La Poste perhaps abused its dominant position in the postal sector. [12] Although I accept that the evidential basis of this finding is weak, as it is based on a mere unverified presumption that certain undertakings imposed by the GD Net decision were being fulfilled, the limits on the power of review of the Court of Justice on appeal permit of no other course.

78. However, both the Commission, when it adopted the Decision, and the Court of First Instance, when reviewing it, must have been aware that, even if La Poste had ceased the practices of which the appellant undertakings complained, an investigation was still justified to establish whether the effects of those past practices were still distorting competition in the French market for express international mail.

79. In reality, the Commission's attitude in the matter shows a passivity which is difficult to understand, given the importance of the market in question and its obvious Community dimension. The same reasons which existed for the adoption in 1991 of a decision relating to the concentration of postal undertakings in the express mail sector still existed after that decision and they ought to have prompted the Commission to monitor developments in the sector, even on its own initiative.

80. In Decision No 000978 relating to a procedure for the application of Article 86 of the Treaty, which the Commission sent to SFEI on 10 March 1992 to inform it that its complaint had been rejected (a decision which was withdrawn by the Commission itself after the Court of Justice annulled the ruling by the Court of First Instance that the action for annulment of the decision was inadmissible), [13] the Commission observed that 'in such circumstances, although we have no intention of continuing our investigation under Article 86, I can assure you that we shall continue to monitor closely developments in this market.'

81. No-one has given a satisfactory explanation of why, after making these statements in 1992, that is to say, after adopting the GD Net decision, the Commission not only took no further steps to monitor the market, but even refused requests by the complainant undertakings to do so. That was their only purpose in requesting the opening of an investigation on the basis of Article 86 of the EC Treaty.

12 — In reality, the position of the Court of First Instance on this point is not as clear or unequivocal as it may appear: sometimes the judgment appears to accept it as proven that the practices ceased (paragraphs 57, 58 and 59) but at other times it merely observes that the Commission was entitled to consider that the practices had ceased, in the absence of evidence to the contrary (paragraph 68).

13 — See paragraph 9 of the judgment of the Court of First Instance in the present action.

82. The Commission later admitted that it had done nothing to verify that the conditions it had imposed in the GD Net decision to ensure freedom of competition in international express mail had been complied with. In Decision C-3/96 (which the Court of First Instance examined and which is referred to in paragraph 71 of the judgment appealed against), [14] the Commission stated that it had no information concerning the implementation of several of those conditions. In the same decision the Commission admitted that it had no information either concerning the action taken by La Poste on the Commission's recommendation that its accounting system should show that the activities not forming part of the public service (that is to say, competitive operations such as express mail) were not subsidised.

83. To sum up, the situation as it appeared to the Court of First Instance was as follows:

(a) In 1990 the undertakings concerned lodged a complaint with the Commission concerning a sector which had been recently opened to competition and which was manifestly of Community importance and had a Community dimension, in which they had grounds for suspecting anti-competitive practices on the part of La Poste for the benefit of its subsidiary undertakings, by abusing its dominant position in a closed market.

(b) In 1991 the Commission adopted a decision (the GD Net decision) relating to the concentration by means of which La Poste and other postal authorities had created a joint venture. That decision imposed certain conditions on the latter. The Commission took no interest in compliance with those conditions or in the actual situation in the market in question, in spite of the complaint which it had received from competing undertakings, and it refused to open an investigation into the matter four years after receiving the complaint.

84. In view of this situation, to say that the facts which are the subject of the complaint are in the past and that the Commission has already intervened in connection with them is not a sound reason for rejecting a complaint which has never been withdrawn, also bearing in mind the allegations in the course of the said four years which show that the effects of the previous abuse of a dominant position have persisted in a market which has the characteristics of the market in question. By accepting, in substance, this argument of the Commission, which also appears in the contested decision, the Court of First Instance is mistaken with regard to the scope of the Commission's duty under Article 89 of the Treaty when ensuring the application of Article 86.

14 — See paragraph 47 above.

Eighth ground of appeal

85. The eighth ground of appeal, entitled 'Breach of general principles of Community law', claims that the Court of First Instance's judgment infringes the principles of sound administration, equality and non-discrimination, legal certainty and protection of legitimate expectations.

86. With regard to the principle of sound administration, the appellants object to paragraph 100 of the judgment, the effect of which is that the Commission could give a valid ruling on the complaint without taking account of an expert report of 6 December 1990 because it referred to a period before the adoption of the GD Net decision.

87. The Commission contends that this part of the eighth ground of appeal is inadmissible because it merely repeats the submissions of the original application. However, it should be observed that, as the appellants expressly state in paragraph 115 of their reply, they are not now accusing the Commission of having infringed the said principle, but claim that the Court of First Instance misapplied it. Construed in this way, this limb of the ground of appeal cannot be ruled inadmissible but, as I shall show, I think it must be dismissed in any case.

88. The reasoning of the Court of First Instance on this point starts from the premiss that, by rejecting an expert report relating to a period before the adoption of the GD Net decision, the date when the practices in question ceased or ought to have ceased (the question of cessation being a key factor in the contested decision), the Commission's act was consistent with the logic of the Decision as a whole. Consequently, the irrelevance of the report arises from the internal logic of the Decision itself, from which it appears that the opening of an investigation would be of no Community interest after the production of the report.

89. This reasoning of the Court of First Instance does not appear to be refuted by paragraph 146 et seq. of the appeal. The appellants' submissions are not adequate to show a mistake in law in that part of the judgment.

90. With regard to the supposed infringement of the principle of equality and non-discrimination, the appellants contend, firstly,

that the Court of First Instance 'adopts a mistaken and abnormally reductive interpretation of the concept of comparable situations' and, secondly, that it gives 'an interpretation of the rules of law relating to assessment of the Community interest which does not conform with that which it has always upheld.'

91. Both criticisms are unfounded. In paragraph 102 of the judgment the Court of First Instance merely observes, quite correctly, that the appellants have not shown the existence of a situation comparable to that which was the subject of their complaint. No doubt the requirements regarding the degree of analogy of 'comparable situations' may be more or less stringent but, in any case, if the Commission is alleged to have acted unlawfully in rejecting a complaint concerning practices which were accepted on other occasions, it is reasonable to require the comparable situation to be genuinely similar to the situation complained of. In the present case the appellants have not succeeded in identifying a comparable situation on which they can accurately base the charge of discrimination.

92. With regard to the alleged differing interpretation by the Court of First Instance of the rules of law relating to assessment of the Community interest, I will repeat what I said concerning the sixth ground of appeal.

93. In doing so, I take the opportunity to propose that the third part of the eighth ground of appeal be dismissed. This claims that the Court of First Instance infringed the principles of legal certainty and protection of legitimate expectations by departing from its previous case-law (the *Automec* v *Commission* judgment) and by permitting the Commission to assess the Community interest according to criteria differing from those in that judgment.

94. As I noted when discussing the sixth ground of appeal, assessment of the Community interest is necessarily bound up with the facts of each case, and the criteria set out in the *Automec* v *Commission* case are only some of the circumstances or factors which, among others, may and must be taken into account. Consequently, it cannot be said that there is discrimination in applying the law or infringement of the principle of legal certainty (and, much less, of the principle of the protection of legitimate expectations) on the ground that, in a particular case, taking account of the circumstances specific to that case, the Commission did not refer to the criteria laid down by the Court's case-law, but to others which, according to the Commission, were decisive for accepting or rejecting the complaint. In any case, the unlimited jurisdiction of the Court of First Instance in relation to such assessments ensures that they conform with the rules of law.

The ninth ground of appeal

95. The ninth ground of the appeal, which alleges 'errors in law in applying the concept of misuse of powers' on the part of the Court of First Instance, is divided into two parts: (a) the Court is said to have given a ruling on the misuse of powers without examining all the documents referred to by the appellants, and (b) the Court was mistaken in describing the types of acts which could be regarded as evidence of a misuse of powers.

96. The document to which the first part of the ground of appeal refers is a letter of 1 June 1995 from Commissioner Sir Leon Brittan to the President of the Commission, with copies to other members of the Commission. According to the appellants, the letter shows that the Commission had decided deliberately not to pursue the breaches in the postal sector which were the subject of complaints, but to bring about a 'political' solution of the problem. In their reply, the appellants asked the Court of First Instance to order the production of the letter and a number of other documents to which they referred as evidence. [15]

97. In paragraph 117 of the judgment appealed against, the Court of First Instance states that 'the conjecture as to the purpose of the Commission's supposed changes of position, and the applicants' observations based on a letter allegedly sent by Sir Leon Brittan to the President of the Commission, *which has not been produced and whose very existence is unconfirmed,* rest solely on allegations which are unsubstantiated and hence not capable of constituting evidence from which the existence of a misuse of powers could be concluded'. [16]

98. In my opinion, the Court of First Instance is mistaken in law (in this case, by not following the procedural rules concerning the right to a fair hearing, thus damaging the appellants' interests) in refusing, without giving a satisfactory explanation, to treat as evidence a document which in principle appears to be relevant to the outcome of the case and which was requested by the applicants for production to the Court. If the Court was uncertain as to its existence, it could easily have asked the Commission to produce the letter. It is not permissible to question the existence of the document when, at the same time (that is to say, in the same judgment), the Court refuses to grant the appellants' application for an order requiring the production of the document. In other words, the Court of First Instance cannot reject allegations as unproven when the Court itself refuses to order the production of the evidence requested.

15 — It is true that the request for documentary proof in the reply was rather vaguely worded because the Court of First Instance was asked to order the production of documents showing that the Commission had formally refused to pursue the breaches and that it preferred a general political solution to the problem of liberalising the postal sector. However, the request for the production of evidence must also be viewed in the context of the remainder of the reply and the original application, both of which contain repeated express references to Sir Leon Brittan's letter.

16 — Emphasis added.

99. Furthermore, by waiting until the stage of judgment for resolving procedural questions relating to allowing or rejecting measures of inquiry, on which a decision should have been taken earlier, as the application was made during the written stage of the procedure, the Court of First Instance is responsible for a procedural irregularity.

100. Article 66 of the Rules of Procedure of the Court of First Instance provides that the Court must prescribe the measures of inquiry that it considers appropriate by means of an order setting out the facts to be proved. The order is to be served on the parties. The same logic requires that the Court's decision rejecting measures of inquiry requested by the parties during the written phase of the procedure should also be taken by means of an order, which must also be served on the parties. This is all the more necessary in so far as a refusal to take evidence may affect the right to a fair hearing. It enables the parties concerned to make submissions during the oral procedure with greater knowledge of their real possibilities of defence and it also safeguards their right to amplify evidence (Article 66(2) of the Rules of Procedure) when the evidence offered is not admitted.

101. Conversely, if the decision to refuse to take evidence offered during the written stage is adopted in the judgment itself, as in the present case, it is impossible for the parties who requested or offered the evidence to ask the Court of First Instance, during the oral procedure, to reconsider its position, and likewise they cannot produce or offer at that stage new evidence which would counteract the rejection of the evidence previously offered.

102. However, it is not so much this procedural irregularity which leads me to propose that the Court allow the ninth ground of appeal, but the very refusal to take evidence. For reasons which are easy to understand, an accusation that an institution has misused its powers is not normally based on evidence which can be accepted as proof, but on more or less reliable circumstantial evidence which is offered for appraisal by a court. Individuals are usually only in a position to point out such evidence and to request the production of the documents or testimony supporting them if these are in the possession of the institutions concerned. Therefore, provided that the circumstantial evidence shows a degree of probability, to refuse that evidence without justification is all the more to be deprecated in that this would, in most cases, help to deprive the parties concerned of their means of action.

103. In the present case, the Court of First Instance could, theoretically, have refused the production of Sir Leon Brittan's letter on substantive grounds, that is to say, because the Court considered that, according to the information concerning it supplied by the

appellants, it added nothing to the information already available to the Court. This reasoning (which is in fact supported by the Commission) would be debatable, but it would show that a position had been taken on the document's relevance or otherwise.

104. Nevertheless, this was not the explanation given by the Court of First Instance in paragraph 117 of the judgment (reproduced above) for not asking the Commission to produce the document. In reality it did not give a satisfactory explanation at all, as it merely questioned the existence of the document and stated that it had not been produced. It was precisely in order to prove its existence and its content that the appellants had asked the Court of First Instance to order its production.

105. To sum up, I consider that there was no reason for refusing the appellants' request for evidence and, on the contrary, there were good reasons for granting it. I also consider that, as it was a document which they regarded as a key factor and which they could not produce themselves as it was in the possession of a Community institution, the Court of First Instance ought to have ordered its production.

106. This conclusion means that it is unnecessary to examine the second part of this ground of appeal because, in default of one of the items of evidence which might have been decisive in showing a misuse of powers, a judgment on this point would not be safe.

107. Therefore two of the grounds of appeal must succeed, which means that the appeal should be allowed.

Referral back to the Court of First Instance

108. To allow, on substantive grounds, the seventh ground of appeal would not only mean that the first instance judgment would have to be quashed, but would also enable the Court of Justice to exercise its power to give final judgment under Article 54 of the EC Statute of the Court. The outcome would then be simply to annul the contested decision as unlawful.

109. If the Court allows only the ninth ground of appeal, it cannot give final judgment. It seems to me that a final judgment would

require an express ruling on the misuse or otherwise of its powers by the Commission but, once again, this would not be possible without the production of the documents requested as evidence. As the taking of evidence is manifestly outside the limits of appeal proceedings, it would be necessary to refer the case back to the Court of First Instance.

110. Under Article 122 of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself can give final judgment, the respondent must be ordered to pay the costs. It would not be necessary to give a decision on this point if, the appeal being well founded, the Court of Justice does not give final judgment itself.

Conclusion

111. I therefore propose that the Court should:

(1) quash the judgment of the Court of First Instance of 15 January 1997 in Case C-77/95 *Syndicat Français de l'Express International and Others* v *Commission*;

(2) annul the Commission Decision which was the subject of that judgment;

(3) order the Commission to pay the costs.