JUDGMENT OF THE COURT (Fifth Chamber)

4 March 1999 *

In Case C-119/97 P,

Union Française de l'Express (Ufex), formerly Syndicat Français de l'Express International (SFEI), an association of undertakings governed by French law, established in Roissy-en-France, France,

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

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

represented by Éric Morgan de Rivery, of the Paris Bar, and Jacques Derenne, of the Brussels and Paris Bars, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 7 Val Sainte-Croix,

appellants,

* Language of the case: French.

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber) of 15 January 1997 in Case T-77/95 *SFEI and Others* v *Commission* [1997] ECR II-1, seeking to have that judgment set aside,

the other parties to the proceedings being:

Commission of the European Communities, represented by Richard Lyal and Fabiola Mascardi, of its Legal Service, acting as Agents, assisted by Jean-Yves Art, of the Brussels Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant at first instance,

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

applicant at first instance,

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, J. C. Moitinho de Almeida, C. Gulmann, D. A. O. Edward and M. Wathelet (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 2 April 1998,

after hearing the Opinion of the Advocate General at the sitting on 26 May 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 22 March 1997, Union Française de l'Express (Ufex), formerly Syndicat Français de l'Express International (hereinafter 'SFEI'), DHL International and Service CRIE brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of 15 January 1997 in Case T-77/95 *SFEI and Others* v *Commission* [1997] ECR II-1 (hereinafter 'the contested judgment'), in which the Court of First Instance dismissed their application for annulment of the Commission's decision of 30 December 1994 rejecting the complaint brought by them under Article 86 of the EC Treaty (hereinafter 'the contested decision').

2 On 21 December 1990 SFEI, DHL International, Service CRIE and May Courier lodged a complaint with the Commission, seeking a declaration *inter alia* that La Poste, the French Post Office, was in breach of Article 86 of the Treaty.

3 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 operates in the international express mail sector. The abuse by La Poste was alleged to have consisted in allowing SFMI to make use of its infrastructure on unusually favourable terms in order to extend its dominant position on the basic postal service market to the associated market in international express mail.

4 By letter of 10 March 1992 the Commission informed the applicants that their complaint had been rejected.

5 By order of 30 November 1992 in Case T-36/92 *SFEI and Others* v *Commission* [1992] ECR II-2479 the Court of First Instance declared inadmissible the application by SFEI, DHL International, Service CRIE and May Courier for annulment of that act. The order was, however, set aside by this Court by judgment of 16 June 1994 in Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR I-2681, and the case was referred back to the Court of First Instance.

6 By letter of 4 August 1994 the Commission withdrew the decision which had been the subject of the action before the Court of First Instance. By order of 3 October 1994 in Case T-36/92 *SFEI and Others* v *Commission*, not reported in the ECR, that Court consequently ruled that there was no need to give judgment.

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

8 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.

9 After receiving SFEI's observations, the Commission adopted the contested decision, which reads as follows:

'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 possibly to bring a complaint on the basis of Article 3(2) of Regulation No 17. However, statements that "at present the tariffs (excluding possible rebates) applied by SFMI remain substantially lower than those of the members of SFEI" (page 3 of your letter of

28 November) or "Chronopost is advertised on P&T lorries" (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 action before the Court of First Instance

10 By application lodged on 6 March 1995 SFEI, DHL International, Service CRIE and May Courier brought an action for annulment before the Court of First Instance, putting forward pleas in law alleging *inter alia* breach of Article 86 of the Treaty, breach of the rules on the assessment of Community interest, and breach of the principles of good administration, equal treatment and non-discrimination. They also alleged that the Commission had misused its powers.

11 They submitted, first, that Article 86 of the Treaty had been infringed by the Commission, in that it based its decision on a decision taken under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, corrigenda OJ 1990 L 257, p. 13), although the criteria of assessment of the facts before it differ, depending on whether the rule of law being applied is Article 86 or that regulation.

12 Second, the applicants submitted that the Commission failed to observe the rules of law on assessment of the Community interest of the subject-matter of their complaint. In the first place, the Commission had failed to take account of the conditions required by the case-law for the rejection of a complaint for lack of Community interest (Case T-24/90 *Automec* v *Commission* (*'Automec II'*) [1992] ECR II-2223, paragraph 86), namely the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of the infringement, and the scope of the investigation required. In the second place, the Commission had not explained how it could be certain that the anti-competitive practices had ceased.

13 Third, the applicants alleged that the principles of good administration and non-discrimination had been infringed.

14 As regards the principle of good administration, they submitted that the Commission had not taken into account an economic report drawn up by a firm of accountants which was annexed to their complaint.

15 As to the principle of non-discrimination, that had been disregarded in that the Commission had decided to reject the complaint on the ground that, since it concerned only infringements in the past, an investigation would have served only the individual interests of the parties. They claimed that such reasoning ran counter to numerous previous decisions of the Commission.

16 Fourth, the applicants accused the Commission of a misuse of powers. In this respect they submitted that the statements by the members of the Commission successively responsible for competition illustrated the ambiguous attitude of the Commission, which, publicly, appeared concerned with respect for competition in the postal sector, but in reality yielded to pressure from certain States and postal institutions.

17 To substantiate that view, the applicants asked the Court of First Instance to order production of a letter of 1 June 1995 from Member of the Commission Sir Leon Brittan to the President of the Commission, which allegedly showed that the Commission had decided not to prosecute the infringements raised in the complaint, preferring the establishment by the Council of a postal policy.

The contested judgment

18 In the contested judgment, the Court of First Instance held that the plea alleging breach of Article 86 of the Treaty was misconceived, on the ground that the rejection of the complaint had been based on the sole ground that there was no sufficient Community interest in the matter at issue (paragraphs 34 and 36). On this point, it observed that, although the only express reference to the Community interest appeared in the penultimate paragraph of the contested decision (paragraph 31), that paragraph could not be dissociated from the rest of the document, so that

the entire decision rested on the consideration of whether it was appropriate to intervene in a field in which the Commission had already exercised its authority (paragraph 32).

19 The Court of First Instance pointed out that the Commission had noted first that the postal services sector had been analysed as a whole in the context of the Green Paper on postal services, which was the subject of a communication dated 11 June 1992, and the Guidelines for the development of Community postal services, which were the subject of a communication dated 2 June 1993. The Commission had then noted that the infringements complained of with reference to Article 86 of the Treaty in the particular case of international express mail services had been examined and resolved by it in the GD Net decision. The Commission had observed, finally, that the complainants had not produced evidence that the infringements were continuing, and that it was not for the Commission to concern itself with past infringements from the point of view solely of the individual interests of the parties (paragraph 32).

20 The Court of First Instance also observed that the factors noted in the contested decision would make no sense if they were to be regarded as a legal assessment under Article 86 of the Treaty. The decision did not contain any definition of the relevant market in geographical or material terms, any evaluation of La Poste's position on that market, or any assessment of the practices with respect to Article 86 of the Treaty (paragraph 33).

21 On the second plea in law, the Court of First Instance considered, first, that to assess the Community interest the Commission was entitled to take into account relevant factors other than those it had listed in previous judgments. As followed from *Automec II*, that assessment was necessarily founded on an examination of the particular circumstances of each case, subject to review by the Court (paragraph 46).

22 The Court of First Instance considered, second, that the Commission might lawfully decide that it was not appropriate to pursue a complaint regarding practices which had since ceased. Investigating the matter and establishing that infringements had taken place in the past would no longer have helped to ensure undistorted competition in the common market and would thus not have corresponded to the functions conferred on the Commission by the Treaty. The essential object of such a procedure would then have been to make it easier for the complainants to prove fault in an action for damages in the national courts. That was all the more so in the present case, as the contested practices had ceased as a result of action by the Commission (paragraphs 57 and 58).

23 The Court of First Instance examined, third, whether the Commission had been entitled to conclude that in the present case the practices alleged in the complaint had ceased as a result of the adoption of the GD Net decision (paragraph 61).

24 On this point, it observed first that in the GD Net decision the Commission had found that the agreements notified contained a clause under which a service subcontracted by the joint subsidiary to a postal administration was to be provided for payment under normal commercial conditions. Noting, however, that the postal authorities had not set up, by the date of the decision, mechanisms by which the cost of each service provided could be calculated precisely, the Commission had considered that distortions of competition could not be excluded. It then considered that there was no economic justification for the postal authorities to allow the subsidiary to receive cross-subsidies, since their individual shares of the joint subsidiary's profits could not be equal to the possible subsidies each might give. Moreover, the postal authorities taking part in the operation had undertaken to provide the same services to third parties under identical conditions, as long as they could not establish that there were no cross-subsidies (paragraph 62).

25 The Court of First Instance then noted that the GD Net decision involved La Poste among others, and La Poste was thus legally bound by the provisions of the agreements notified, in particular the provisions relating to payment for services subcontracted to it by its subsidiary, and by the undertakings annexed to the decision. The Court also pointed out that, by the operation of the concentration, La Poste had withdrawn from the market in international express mail services, not keeping any activities of its own in that sector which would allow it to evade the undertakings which had been given (paragraph 64).

26 The Court of First Instance concluded that, since La Poste was bound by the agreements notified and the undertakings given, the Commission had been entitled to consider that, once the concentration had been implemented, in other words on 18 March 1992, according to the information provided to the Court, those provisions had been observed, in the absence of evidence to the contrary (paragraph 68).

27 The Court of First Instance noted, fourth, that while they might be capable of establishing that services were indeed subcontracted, the items of evidence produced by the applicants in order to establish that the practices at issue were continuing — namely a bailiff's report recording sight of a 'Chronopost' advertising poster on a La Poste vehicle, and a statement in the body of the applicants' letter that 'at present the tariffs applied by SFMI remain substantially lower than those of the members of SFEI' — did not, however, allow the existence of cross-subsidies to be presumed (paragraph 69).

28 Similarly, according to the Court of First Instance, the Commission's decision of July 1996 to initiate a procedure under Article 93(2) of the EC Treaty regarding aid allegedly granted by France to SFMI-Chronopost (OJ 1996 C 206, p. 3), which the

applicants had relied on at the hearing, did not show that at the time when the contested 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 (paragraph 71).

29 As regards the assertion in the GD Net decision that there would be no economic justification for the postal administrations to cross-subsidise their joint subsidiary, the Court of First Instance found that that assessment had not been referred to the Court and had not been challenged by the applicants in their pleadings (paragraph 72).

30 Accordingly, the Court of First Instance rejected the second plea in law, after stressing that the applicants had been unable to produce the slightest evidence that cross-subsidies were continuing, sufficient to justify opening an investigation (paragraph 73).

31 With regard to the third plea in law, the Court of First Instance pointed out that in the contested decision the Commission had rejected the complaint on the ground of lack of Community interest, essentially because the practices had ceased as a result of the GD Net decision. In those circumstances, the failure to make use of an expert report relating to a period prior to the adoption of the GD Net decision could not constitute an infringement of the principle of good administration (paragraph 100).

32 As regards the principle of non-discrimination, the Court of First Instance found to begin with that the applicants had not shown that in a situation comparable to the instant one, in which the contested practices had ceased as a result of an earlier decision of the Commission, the Commission would nevertheless have launched an investigation into the past events under Article 86 of the Treaty (paragraph 102).

33 The Court of First Instance considered, next, that the applicants could not plead discrimination in the application of Article 86 of the Treaty because the contested decision was founded solely on the lack of Community interest, so that the Commission had not assessed the acts complained of from the point of view of that article (paragraph 103).

34 With regard to the fourth plea in law, alleging a misuse of powers, the Court of First Instance considered that the applicants' observations based on a letter allegedly sent by Sir Leon Brittan to the President of the Commission, which had not been produced and whose very existence was unconfirmed, rested solely on allegations which were unsubstantiated and hence were not capable of constituting evidence from which the existence of a misuse of powers could be concluded (paragraph 117).

35 In view of those factors, the Court of First Instance rejected the fourth plea.

36 The Court of First Instance consequently dismissed the application and ordered the applicants to pay the costs.

The appeal

37 The appellants put forward 12 pleas in law in support of their appeal.

38 They submit, first, that the Court of First Instance misconstrued the contested decision.

39 Second, the Court of First Instance erred in law in considering that the Commission could base the contested decision on a decision relating to another case concerning different parties, with a partially different subject-matter and a separate legal basis.

40 Third, in the alternative, by so acting the Court of First Instance introduced a contradiction in the reasoning of the contested judgment.

41 Fourth, the contested judgment has no legal basis.

42 Fifth, the Court of First Instance could not lawfully infer from the documents before it that the Commission had been entitled to find that the infringements had ceased.

43 Sixth, the Court of First Instance disregarded the rules of law on assessment of Community interest.

44 Seventh, the Court of First Instance infringed Article 86 in conjunction with Articles 3(g), 89 and 155 of the EC Treaty.

45 Eighth, the Court of First Instance disregarded the principles of equal treatment, legal certainty and protection of legitimate expectations.

46 Ninth, the Court of First Instance misinterpreted the concept of 'comparable situations' in its examination of the plea relating to the principle of equal treatment.

47 Tenth, the Court of First Instance misinterpreted the principle of good administration.

48 Eleventh, the Court of First Instance declined to address a fundamental point of the appellants' arguments, concerning the basis of the Commission's rejection of their complaint.

49 Finally, the Court of First Instance committed errors of law in applying the concept of misuse of powers, in that it did not examine all the documents relied on.

The first plea in law

50 In the first part of their first plea the appellants submit that the Court of First Instance misconstrued the contested decision by not accepting that it was based on two distinct grounds, namely the existence of the Green Paper on postal services and the Guidelines for the development of Community postal services on the one hand and the GD Net decision on the other.

51 In the second part of the first plea, the appellants submit that the Court of First Instance also misconstrued the contested decision by introducing a ground based on 'Community interest' which was not mentioned therein.

52 In this regard, it suffices to state that the Court of First Instance was entitled to consider that lack of Community interest underlay the entire contested decision.

53 Throughout the decision the Commission considered whether it was appropriate for it to intervene again in a field in which it had already taken initiatives such as the Green Paper, the Guidelines and the GD Net decision. As those initiatives were mentioned only in that perspective, they may not be regarded as independent grounds for the rejection of the complaint.

54 Consequently, the first plea in law must be rejected.

The second plea in law

55 In their second plea the appellants complain that the Court of First Instance erred in law in holding that the Commission could refer to another decision as a basis for the contested decision.

56 They consider that every judicial or administrative decision must be sufficient in itself, the decision-maker having to decide according to the particular circumstances of the case.

57 It must be pointed out, as the Advocate General has stated in point 20 of his Opinion, that the statement of reasons for an administrative act may refer to other acts and, in particular, take note of the content of an earlier act, especially if it is connected.

58 Consequently, by accepting that in the contested decision the Commission had referred to the GD Net decision in order to conclude that that decision had resulted in the cessation of the practices complained of, in view of the fact that it was legally binding on La Poste, which as a result of the concentration withdrew from the market in international express mail services, the Court of First Instance did not err in law.

59 The second plea in law must therefore be rejected.

The third plea in law

60 In their third plea in law, which is pleaded in the alternative to the second plea, the appellants submit that, should it appear that the Court of First Instance did not err in law in accepting that the Commission gave reasons for the contested decision by referring to the GD Net decision, the contested judgment should be annulled on the ground of contradictory reasoning.

61 According to the appellants, it follows from paragraphs 32 and 67 of the contested judgment that all the facts and infringements which were the subject of the complaint under Article 86 of the Treaty were assessed as to the facts and the law in the GD Net decision. Since the contested decision referred to the reasoning of the GD Net decision, the contested judgment contained a contradiction in its reasoning in stating elsewhere that the contested decision had not assessed the practices complained of from the point of view of Article 86 of the Treaty.

62 In this respect, it suffices to observe that the Court of First Instance merely held that, in the contested decision, the Commission had rejected the complaint for lack of a sufficient Community interest, and had therefore not been obliged to assess the practices at issue from the point of view of Article 86 of the Treaty. Moreover, as follows from paragraph 58 above, the reference to the GD Net decision is limited in scope since, first, it supports the premiss that even if the practices complained of

had in fact taken place in the past, that decision had caused them to cease, and, second, it does not concern the Commission's assessment of those practices from the point of view of Article 86 in the GD Net decision.

63 Since there is thus no contradiction in the contested judgment, the third plea in law must be rejected.

The fourth plea in law

64 In their fourth plea in law, the appellants criticise the Court of First Instance for failing to undertake the inquiries necessary to ascertain whether the Commission was in a position to confirm the alleged absence of cross-subsidies between La Poste and its subsidiary.

65 In particular, they complain that it did not take into account a series of factors which they had drawn to its attention and which gave credence to the argument that subsidies had continued after 1991, for example the lack of analytical accounts of La Poste, the use by SFMI of La Poste's brand image and an economic report submitted by the French Government in Case C-39/94 *SFEI and Others* v *La Poste and Others* [1996] ECR I-3547.

66 On this point, it need only be observed that the appraisal by the Court of First Instance of the evidence put before it does not constitute a point of law which is subject to review by the Court of Justice on appeal, except where the clear sense of

that evidence has been distorted or the substantive inaccuracy of the Court of First Instance's findings is apparent from the documents in the case-file (Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraphs 48 and 49, and Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 67; see also the order of 17 September 1996 in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraph 39), which the appellants do not maintain.

67 The fourth plea in law is therefore inadmissible.

The fifth plea in law

68 In the first part of the fifth plea in law, the appellants submit that in paragraph 68 of the contested judgment the Court of First Instance could not lawfully conclude from the documents in the case-file that the Commission had been entitled to consider that the infringements had ceased following the adoption of the GD Net decision.

69 According to the appellants, that assertion is belied by the very wording of the GD Net decision, which provided that the undertakings entered into by the parties concerned would take effect only from 18 March 1995. The Commission therefore could not in 1994 conclude, on the basis of those undertakings, that the practices complained of had ceased.

70 It must be pointed out that the Court of First Instance held in paragraph 72 of the contested judgment that, regardless of the application of the undertakings,

'the parties to the concentration notified remain bound by the provisions of their contract, including the provision under which any service subcontracted is to be provided for payment under normal commercial conditions. Moreover, it appears from the GD Net decision that there would be no economic justification for the postal administrations to cross-subsidise their joint subsidiary. That assessment, in the GD Net decision which has not been referred to the Court, is not challenged by the applicants in their pleadings. In fact, the undertakings constitute an additional burden on the postal administrations, under which they are obliged to grant identical terms for comparable services to other providers of international express mail services, as long as they cannot demonstrate the absence of cross-subsidies.'

71 Since the Commission and the Court of First Instance considered that, regardless of the undertakings it provided for, the GD Net decision was likely to put an end to the practices complained of, it appears that the first part of the fifth plea addresses, in any event, a point which was not necessary for the reasoning of the contested judgment, and is consequently immaterial. There is therefore no need to consider whether, as the appellants submit, it raises a point of law or whether, by contrast, it concerns the appraisal of the evidence by the Court of First Instance, in which case it would be inadmissible.

72 The first part of the fifth plea in law must therefore be rejected.

73 In the second part of the fifth plea, the appellants criticise the statement in paragraph 71 of the contested judgment that the Commission's decision, in July 1996, to initiate proceedings under Article 93(2) of the Treaty regarding aid allegedly

granted by France to SFMI-Chronopost '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'.

74 In this regard, it suffices to note that since it concerns the examination of the evidence before the Court of First Instance and hence the assessment of the facts, the second part of the fifth plea may not be considered in the context of an appeal.

75 The second part of the fifth plea in law must therefore be rejected.

The sixth and eighth pleas in law

76 In their sixth plea in law the appellants submit that the Court of First Instance erred in law in assessing the Community interest. They submit that it follows from the words 'in particular' in paragraph 86 of the *Automec II* judgment that the Commission is under an obligation to assess the Community interest with regard at least to the factors set out there, which may only be supplemented according to the circumstances by other particulars of the case. Community interest would otherwise become a vague concept defined on a case-by-case basis by the Commission itself.

77 The appellants point out that the wording in paragraph 86 of *Automec II* has been reproduced in all the subsequent judgments of the Court of First Instance concerning the assessment of Community interest (Case T-114/92 *BEMIM* v *Commission* [1995] ECR II-147, paragraph 80, and Case T-5/93 *Tremblay and Others* v *Commission* [1995] ECR II-185, paragraph 62).

78 In their eighth plea in law the appellants submit that the statement by the Court of First Instance in paragraph 46 of the contested judgment that the Commission was not obliged to refer to the factors defined in the case-law when assessing whether or not there was a Community interest in continuing with the examination of a complaint constitutes a breach of the principles of legal certainty, protection of legitimate expectations and equal treatment.

79 In view of the fact that the assessment of the Community interest raised by a complaint depends on the circumstances of each case, the number of criteria of assessment the Commission may refer to should not be limited, nor conversely should it be required to have recourse exclusively to certain criteria.

80 In a field such as competition law, the factual and legal circumstances may differ considerably from case to case, so that it is permissible for the Court of First Instance to apply criteria which have not hitherto been considered.

81 As the Advocate General has observed in points 59 and 93 of his Opinion, to accept the appellants' arguments would rigidify the case-law.

82 The sixth and eighth pleas in law must therefore be rejected.

The seventh plea in law

83 In their seventh plea in law, the appellants submit that the view taken by the Court of First Instance of the Commission's role in reviewing compliance with Article 86 of the Treaty is incorrect. Contrary to what follows from paragraphs 56 to 58 of the contested judgment, the ending of anti-competitive practices is not enough to re-establish an acceptable competitive situation where the structural imbalances caused by those practices have continued. Action by the Commission in such circumstances is indeed part of its task of ensuring that a system of undistorted competition in the common market is established and maintained.

84 The appellants then submit that in the present case the cross-subsidies given by La Poste to its subsidiary SFMI-Chronopost enabled the latter to enter the market in international express mail services and become the market leader in only two years. Even if those cross-subsidies have ceased, they had affected competition and necessarily continued to distort it.

85 A finding that the infringements at issue had occurred would have enabled the Commission to add to the contested decision all appropriate measures for re-establishing a sound competitive situation.

86 It should be observed, to begin with, that according to the settled case-law of this Court, the Commission must consider attentively all the matters of fact and of law which the complainants bring to its attention (Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045, paragraph 19, Case 298/83 *CICCE* v *Commission* [1985] ECR 1105, paragraph 18, and Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 20). Furthermore, complainants are entitled to have the fate of their complaint settled by a decision of the Commission against which an action may be brought (Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503, paragraph 36).

87 However, Article 3 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), does not give a person making an application under that article the right to insist that the Commission take a final decision as to the existence or non-existence of the alleged infringement (Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraphs 17 and 18).

88 The Commission, entrusted by Article 89(1) of the EC Treaty with the task of ensuring application of the principles laid down in Articles 85 and 86, is responsible for defining and implementing the orientation of Community competition policy (Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935, paragraph 44). In order to perform that task effectively, it is entitled to give differing degrees of priority to the complaints brought before it.

89 The discretion which the Commission has for that purpose is not unlimited, however.

90 First, the Commission is under an obligation to state reasons if it declines to continue with the examination of a complaint.

91 Since the reasons stated must be sufficiently precise and detailed to enable the Court of First Instance effectively to review the Commission's use of its discretion to define priorities (Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraph 27), the Commission must set out the facts justifying the decision and the legal considerations on the basis of which it was adopted (*BAT and Reynolds*, paragraph 72, and Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 22).

92 Second, when deciding the order of priority for dealing with the complaints brought before it, the Commission may not regard as excluded in principle from its purview certain situations which come under the task entrusted to it by the Treaty.

93 In this context, the Commission is required to assess in each case how serious the alleged interferences with competition are and how persistent their consequences are. That obligation means in particular that it must take into account the duration and extent of the infringements complained of and their effect on the competition situation in the Community.

94 If anti-competitive effects continue after the practices which caused them have ceased, the Commission thus remains competent under Articles 2, 3(g) and 86 of the Treaty to act with a view to eliminating or neutralising them (see, to that effect, Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraphs 24 and 25).

95 In deciding to discontinue consideration of a complaint against those practices on the ground of lack of Community interest, the Commission therefore cannot rely solely on the fact that practices alleged to be contrary to the Treaty have ceased, without having ascertained that anti-competitive effects no longer continue and, if appropriate, that the seriousness of the alleged interferences with competition or the persistence of their consequences has not been such as to give the complaint a Community interest.

96 In the light of the above considerations, it must be concluded that, by holding, without ascertaining that the anti-competitive effects had been found not to persist and, if appropriate, had been found not to be such as to give the complaint a Community interest, that the investigation of a complaint relating to past infringements did not correspond to the task entrusted to the Commission by the Treaty but

served essentially to make it easier for the complainants to show fault in order to obtain damages in the national courts, the Court of First Instance took an incorrect view of the Commission's task in the field of competition.

97 The seventh plea in law is therefore well founded.

The ninth plea in law

98 In their ninth plea in law, the appellants complain that the Court of First Instance adopted, in paragraph 102 of the contested judgment, an excessively reductionist interpretation of the concept of comparable situations in order to reject their argument that the Commission had breached the principle of equal treatment, in that it had adopted a different approach from that adopted in other cases.

99 On this point, it suffices to note that the appellants have been unable to cite a case in which, notwithstanding a previous decision, the Commission launched an investigation under Article 86 of the Treaty into practices which it considered had ended. In those circumstances, the Court of First Instance cannot be said to have erred in assessing whether situations were comparable by finding that the appellants had not established a breach of the principle of equal treatment.

100 The ninth plea in law must therefore be rejected.

The tenth plea in law

101 In their tenth plea in law, the appellants complain that the Court of First Instance breached the principle of good administration by holding, in paragraph 100 of the contested judgment, that the Commission's failure to make use of an expert report submitted by the complainant, intended to demonstrate that the practices complained of existed in the period prior to the adoption of the GD Net decision, did not constitute an infringement of that principle.

102 Since it concerned only a period prior to the cessation of the practices complained of, the report in question appeared to have no relevance for assessing whether it was appropriate to continue the investigation. In those circumstances, the Court of First Instance was entitled to hold that the Commission was not required to make use of it.

103 The tenth plea in law must therefore be rejected.

The eleventh plea in law

104 In their eleventh plea in law, the appellants criticise the Court of First Instance for failing to address a fundamental point of their arguments, concerning the different basis for the first rejection of the complaint, notified by letter of 10 March 1992, and its final rejection, the subject-matter of the contested decision.

105 In this regard, it must be stated that, as the Advocate General has shown in point 29 of his Opinion, the Court of First Instance referred to this plea in paragraph 22 of the contested judgment and rejected it in paragraph 35.

106 The eleventh plea in law must therefore be rejected.

The twelfth plea in law

107 In their twelfth plea in law, the appellants complain that the Court of First Instance ruled on the plea alleging misuse of powers without examining all the documents they had relied on.

108 Thus in paragraph 117 of the contested judgment the Court of First Instance considered that a letter sent by Sir Leon Brittan to the President of the Commission did not constitute sufficient evidence of a misuse of powers, on the ground that it had not been produced and its very existence was unconfirmed.

109 The appellants argue that since they had expressly asked the Court of First Instance to order the letter to be produced, it committed an error of law in its application of the concept of misuse of powers by holding, without giving itself an opportunity to examine the letter, that it did not constitute sufficient proof.

110 It must be stated that the Court of First Instance could not reject the appellants' request to order production of a document which was apparently material to the

outcome of the case on the ground that the document had not been produced and there was nothing to confirm its existence.

111 As appears from paragraph 113 of the contested judgment, the appellants had stated the author, the addressee and the date of the letter they wished to be produced. Given such details, the Court of First Instance could not simply reject the parties' allegations on the ground of insufficient evidence, when it was up to the Court, by granting the appellants' request to order production of documents, to remove any uncertainty there might be as to the correctness of those allegations, or to explain the reasons for which such a document could not in any event, whatever its content, be material to the outcome of the case.

112 The twelfth plea in law is therefore well founded.

113 In the light of the foregoing, the seventh and twelfth pleas in law must be declared well founded and the contested judgment therefore annulled.

Referral of the case back to the Court of First Instance

114 Under the first paragraph of Article 54 of the EC Statute of the Court of Justice, if the appeal is well founded, the Court of Justice is to quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment. As the state of the proceedings does not so permit, the case must be referred back to the Court of First Instance.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. **Sets aside the judgment of the Court of First Instance of 15 January 1997 in Case T-77/95 *SFEI and Others* v *Commission*;**

2. **Refers the case back to the Court of First Instance;**

3. **Reserves the costs.**

Puissochet Moitinho de Almeida Gulmann

Edward Wathelet

Delivered in open court in Luxembourg on 4 March 1999.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber