

OPINION OF ADVOCATE GENERAL
ALBER

delivered on 1 February 2001¹

I — Introduction

1. The national court requests the Court for a preliminary ruling on the interpretation of Articles 86 and 90 of the EC Treaty (now Articles 82 and 86 EC) with regard to the Italian rules in force in 1997, when the dispute in this case arose, concerning the relationship between the Italian Post Office as a provider of a universal service and a private undertaking that provides postal services. The latter was, for every letter carried by its express courier service, required to pay to the Italian Post Office in essence a charge in the amount of the postage charged by the Italian Post Office for its equivalent ordinary letter service. This was done by franking, either with postage stamps or with a franking machine.

Community law that applied to the case. A legislative framework for the universal postal service and for other postal services was provided for for the first time in Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and for the improvement of quality of service.² As the events in this case occurred in 1997 and the Directive had to be implemented only by February 1999, it is not directly applicable to the case. However, it is appropriate to refer to some of its provisions. It must at least be assumed that they implement general principles of Community law.

3. Article 1 describes the content of Directive 97/67:

II — Relevant law

A — *Community law*

2. At the time of the request for a preliminary ruling, there was no secondary

‘This Directive establishes common rules concerning:

— the provision of a universal postal service within the Community,

1 — Original language: German.

2 — OJ 1998 L 15, p. 14.

- the criteria defining the services which may be reserved for universal service providers and the conditions governing the provision of non-reserved services,
- tariff principles and transparency of accounts for universal service provision,
- the setting of quality standards for universal service provision and the setting-up of a system to ensure compliance with those standards,
- the harmonisation of technical standards,
- the creation of independent national regulatory authorities.'

vices which may be reserved by each Member State for the universal service provider(s) shall be the clearance, sorting, transport and delivery of items of domestic correspondence, whether by accelerated delivery or not, the price of which is less than five times the public tariff for an item of correspondence in the first weight step of the fastest standard category where such category exists, provided that they weigh less than 350 grams...

(2) To the extent necessary to ensure the maintenance of universal service, cross-border mail and direct mail may continue to be reserved within the price and weight limits laid down in paragraph 1.

(3)...'

5. Article 9(4) of Directive 97/67 regulates the conditions under which Member States may provide a fund to compensate for the burdens of a universal postal service:

4. Regarding the demarcation between the monopoly of the undertaking that maintains a universal postal service and the sector open to competition, Article 7 of Directive 97/67 provides:

'In order to ensure that the universal service is safeguarded, where a Member State determines that the universal service obligations, as provided for by this Directive, represent an unfair financial burden for the universal service provider, it may establish a compensation fund administered for this purpose by a body independent of the beneficiary or beneficiaries. In this case, it

'(1) To the extent necessary to ensure the maintenance of universal service, the ser-

may make the granting of authorisation subject to an obligation to make a financial contribution to that fund. The Member State must ensure that the principles of transparency, non-discrimination and proportionality are respected in establishing the compensation fund and when fixing the level of the financial contributions. Only those services set out in Article 3 may be financed in this way.’

6. However, this financing permission must be read in conjunction with the provisions of Article 14 of Directive 97/67, according to which the universal service providers must separate reserved and non-reserved sectors, as well as services which are part of the universal service and services which are not, in their accounting records.

7. Even before then, the Commission had for a long time favoured the separation of a universal postal service protected by a monopoly and a competitive market.³

8. Immediately before Directive 97/67 came into force, the Commission stated in its Notice on the application of the competition rules to the postal sector and on the

assessment of certain State measures relating to postal services that the market for courier services was, because of inherent added value, to be regarded as a market separate from that of general postal services.⁴

9. The Commission also set out the following definition in the Notice:

“express mail service”: a service featuring, in addition to greater speed and reliability in the collection, distribution, and delivery of items, all or some of the following supplementary facilities: guarantee of delivery by a fixed date; collection from point of origin; personal delivery to addressee; possibility of changing the destination and addressee in transit; confirmation to sender of receipt of the item dispatched; monitoring and tracking of items dispatched; personalised service for customers and provision of an à la carte service, as and when required. Customers are in principle prepared to pay a higher price for this service;...’.

10. On 30 May 2000, the Commission published a proposal for a Directive of the European Parliament and of the Council to

3 — As early as in the third and fourth recitals in the preamble to Commission Decision 90/16/EEC of 20 December 1989 concerning the provision in the Netherlands of express delivery services, OJ 1990 L 10, p. 47 (repealed for a procedural defect by the judgment in Joined Cases C-48/90 and C-66/90 *Netherlands v Commission* [1992] ECR I-565) and the second and third recitals in the preamble to Commission Decision 90/456/EEC of 1 August 1990 concerning the provision in Spain of international express courier services, OJ 1990 L 233, p. 19.

4 — OJ 1998 C 39, p. 2, Nos 2.3 and 2.4.

amend Directive 97/67 with a view to liberalising the market for postal services in the Community further.⁵ Amongst other things, the Commission proposed a narrower scope for the area reserved under Article 7 of Directive 97/67 and an express prohibition on cross-subsidising of competitive services.

B — *Italian law*

11. Decreto del Presidente della Repubblica No 156 of 29 March 1973 (the so-called codice postale, hereafter 'Postal Code') contains the basic legislation regulating the postal service. Article 1 of the Postal Code, entitled 'Exclusive right in respect of postal services and telecommunications', provides:

'Within the limits of this decree, the State shall have the sole right to provide the following services:

collection, carriage and delivery of letter post,...

⁵ — COM (2000) 319 final.

12. Article 7 of the Postal Code provides:

'Save for the power reserved to the Minister for Post and Telecommunications in the cases provided for herein, charges for postal services, postal banking services and telecommunication services, shall, as regards domestic services, be laid down by decree of the President of the Republic, on a proposal from the same minister, in consultation with the Treasury Minister, and after hearing the views of the Council of Ministers.'

13. Article 39 of the Postal Code (Contraventions of the postal monopoly) provides for the penalties that protect the exclusivity right and states:

'Any person who either directly or through the intermediary of a third party collects, carries or delivers letter post in breach of Article 1 of this decree is liable to a fine equal to twenty times the amount of the postage rate, subject to a minimum amount of ITL 800...

Any person who habitually entrusts letter post to third parties for carriage or delivery shall be liable to the same penalty...

Correspondence conveyed in breach hereof shall be confiscated and immediately delivered to a post office and a report of the breach shall be drawn up at the same time.’

14. Into this system the Italian legislature introduced, in Article 41 of the Postal Code, an exception to the rule which precisely defines situations and activities to which the penalties provided for in Article 39 of the Postal Code are not applicable.

‘Article 39 shall not apply to

(a) ...

(b) the collection, carriage and delivery of letter post in respect of which postage duty has been paid by means of a franking machine or stamps bearing a postmark or directly by the sender by affixing in indelible ink the date on which the carriage commenced;

(c) — (e)...’.

15. In addition to these provisions, the Commission refers to Circular No 4 DCSP1/1/35466/100/89 of the Italian Minister for Post and Telecommunications of 4 March 1989.⁶ This reads as follows:

‘For the purpose of implementing Articles 86 and 90 of the EC Treaty, which was approved by Law No 1203 of 14 October 1957, the provision of services involving the collection, carriage and delivery of letter post by private international courier services shall, with effect from the day on which this notice is published in the Official Gazette of the Republic of Italy, no longer be subject to the exclusivity rule in Article 1 of Decree No 156 of the President of the Republic of 29 March 1973, but only to the extent that

— the services are provided by persons whose business is conducted internationally;

— these services are provided for letters that are guaranteed an express service.’

16. According to the submissions of the Italian Post Office at the oral hearing, international express courier mail, and

⁶ — GURI No 99 of 29 April 1989.

internal express courier mail that was merely a stage in a cross-border carriage, were by virtue of the circular of 4 March 1989 relieved of liability to postal charges.

features of speed, certainty and personalised delivery to the recipient.

17. Italy implemented Directive 97/67 by Legislative Decree No 261 of 22 July 1999, which was not applicable at the time of the facts of the case, and accordingly repealed Article 41 of the Postal Code.

18. The Italian Post Office was originally a branch of the public administration, before being transformed by a statute of 1994 into a public law corporation — the Ente Poste Italiane — and finally, after the events leading to the current dispute, into a public limited company — Poste Italiane SpA — with effect from 28 February 1998.

20. The plaintiff gives more detailed information on these points. According to it, the plaintiff delivered letters throughout a large part of the country (6 000 districts) within 24 hours, and to areas more difficult to reach (in particular the Italian islands) at the most within 72 hours. Its prices were significantly higher than the tariffs of the Italian Post Office, indeed in some instances significantly over the limit of five times the price of the basic postal service, which Directive 97/67 states to be the limit of the reserved sector. Additionally, the plaintiff offered insurance, payment on delivery, storage of uncollected post and, on request and for an additional charge, collection of post from the sender.

21. Moreover, the plaintiff maintains that the Italian Post Office itself offers an express courier service and thus competes directly with it and with other private express courier services. The only concession the Italian Post Office makes is that it offers, on the basis of Decree No 564 of 28 July 1987,⁷ an internal fast service ('Postacelere interna'), which it claims fulfils but few of the criteria of an express courier service. It is to be noted that a fast city service ('Postacelere urbana') was

III — Facts

19. The plaintiff, TNT Traco SpA, offers postal services in Italy. It provides an express courier service throughout the country. According to the information provided by the national court, this express service distinguished itself at the time of the relevant events from the usual delivery service of the Italian Post Office by the

⁷ — GURI No 24 of 30 January 1988.

introduced by a further decree of the same day.⁸

letters of a charge to be paid directly to the Post Office even though the Post Office operates in free competition on the market.

22. On 27 February 1997, officials of the Italian Post Office conducted an inspection at the plaintiff's branch in Genoa of letters the plaintiff had collected, carried and delivered. They ascertained that a number of the letters had been collected, carried or delivered in breach of the Postal Code. For this they imposed a fine of ITL 46 331 000.

23. The fine led to the main proceedings, in which the plaintiff sought to have the fine set aside as well as, among other things, damages of at least ITL 500 million, and requested a declaration that Articles 1, 39 and 41 of the Postal Code were incompatible with the EC Treaty, primarily with Articles 86 and 90.

25. It also considers it doubtful that this charge, or at least its allocation, is compatible with Community law. Admittedly, a charge on letters in the amount of the postal dues might be a suitable means of guaranteeing the provision of the universal service. However, under reference to the Green Paper on the development of the single market for postal services⁹ and Directive 97/67, the national court states that cross-subsidies between different postal services are only permitted within narrow limits and that even a universal service must in principle be conducted so as to cover its own costs.

IV — Assessment by the national court and the questions referred

24. In the first place, the national court expresses doubts about the imposition on

26. But the national court notes that the Italian State grants to the Italian Post Office, over and above the dues the subject of this case, direct subsidies which are intended to cover the costs of the obligation of providing a universal service. Furthermore, the Post Office is not required to pay the dues at issue in this case. There is no rule guaranteeing that these levies are only used to offset the costs of providing a universal service and are not used to cross-

⁸ — Decree No 563, GURI No 24 of 30 January 1988.

⁹ — COM (91) 476 final.

subsidise services in providing which the Post Office competes with private undertakings.

(b) directly allocates the proceeds of those dues to the undertaking entrusted with the operation of the universal service, without there being any compensatory or regulatory mechanism designed to ensure that there is no allocation of cross-subsidies to non-universal services?'.

27. Though it is true that the corresponding provisions of Directive 97/67 do not apply to the facts of this case, one must be able to deduce corresponding obligations directly from the Treaties.

V — Opinion

28. By judgment of 21 June 1999, the Tribunale civile di Genova (District Court of Genoa) has therefore requested a preliminary ruling on the following question:

A — The admissibility of the question submitted for a preliminary ruling

Arguments of the parties

'Do the provisions of the EC Treaty, and in particular Articles 86 and 90 thereof, preclude a Member State, in organising its postal service, from maintaining in force legislation which, though distinguishing between so-called "universal" services in respect of which exclusive rights are conferred on a private-law undertaking and non-universal services offered and provided on the open market:

29. The Italian Government argues on two separate grounds that the question submitted is inadmissible. In the first place, the judgment referring the question does not include all the facts that are, according to the case-law of the Court, necessary in order to assess the alleged breach of Articles 86 and 90 of the EC Treaty. In the second place, it is impossible to understand why the reference is necessary, given that the national court has already ordered the Italian Post Office to repay the penalties collected.

(a) requires undertakings, other than that on which the monopoly to operate the universal service has been conferred, to pay, even when providing "non-universal" or "value-added" services, the postal dues payable for the basic ordinary postal service, which in such a case is not in fact provided by the monopoly-holder;

30. The Italian Post Office also considers the question to be inadmissible. The legal

issue has already been decided, except for the question of the applicability of Article 41 of the Postal Code, and this question too has been answered in the interim by the implementation of Directive 97/67. According to Article 92(2) of the Rules of Procedure of the Court of Justice (hereinafter, 'the Rules of Procedure'), the Court is entitled, after having heard the parties, to decide that the legal issue has become academic.

implementation by Italy of Directive 97/67, no longer necessary.

Analysis

(1) Disposal of the reference for a preliminary ruling

31. Furthermore, the Italian Post Office argues on the basis of the 'acte clair' doctrine that a reference is not necessary. Following the decision in *Corbeau*,¹⁰ Community law is sufficiently clear to allow the national court not to refer. That case decided that a monopoly over basic postal services was lawful. Moreover, competition in certain postal services may be limited or excluded if this is necessary for the economic equilibrium of the undertaking that guarantees the basic service. As in the judgment in *Corbeau*, the decision as to whether that is necessary in this case must be left to the national court. In any case, any judgment must be limited to a repetition of the findings made in the judgment in *Corbeau*.

33. As the Court has consistently held, it is the task of the national court to determine whether a preliminary ruling is necessary.¹¹ Hence if that court decides that a reference is necessary, it is in general not for the Court to re-examine that issue. The only exception is where the question is patently hypothetical.¹²

34. The relationship of cooperation with national courts that is embodied in the preliminary ruling procedure is founded on a division of tasks that permits the Court to determine the question of disposal only in exceptional cases. This is possible where

32. The plaintiff objects that a decision on the question referred is, following the

10 — Case C-320/91 *Corbeau v Regie des Postes* [1993] ECR I-2533.

11 — See, for example, Case 26/62 *Van Gend en Loos* [1963] ECR 1, at 22, and Case 83/78 *Pigs Marketing Board* [1978] ECR 2347, paragraph 25.

12 — Case C-83/91 *Meilicke v ADV/ORGA* [1992] ECR I-4871, paragraph 25 et seq.

the question of Community law has been answered in the meantime¹³ or when the national court is, despite an obvious, supervening determination, prohibited by national rules of procedure from withdrawing a request for a preliminary ruling.¹⁴

35. According to the information in the judgment referring the question, and also in the view of the national court, the legal dispute appears not to have been resolved. The Italian Post Office has indeed been ordered by an interlocutory judgment to repay the fines imposed, but the final judgment has yet to be delivered. Among other things, the judgment referring the question states that there remain claims for damages made by the plaintiffs in the sum of at least ITL 500 million.

36. Also, although the intervening amendment to the Italian regulations may diminish the general interest in clarification of the questions referred, it does not settle the outcome of the main case.

37. Finally, the ‘acte clair’ doctrine cannot render the reference inadmissible either. This doctrine may assist the national court in determining the need for a reference. It is

not obliged by Community law to refer a question the answer to which is clear from the legislation or from the case-law of the Court.¹⁵ However, if the national court has doubts as to the interpretation of Community law, it is entitled to expect support from the Court in answering his questions. It is not for the Court to direct national courts as to the supposed clarity of Community law.

38. That is confirmed, rather than contradicted, by both the previous and the most recent formulations¹⁶ of Article 104(3) of the Rules of Procedure. The provision does not direct that a preliminary reference is inadmissible where the case-law of the Court or the text of the relevant provision gives unequivocal answers to the questions raised. It merely permits a simplified answer to be given in the judgment. In any case, the following considerations as to the answer to the question referred demonstrate that entirely legitimate doubts do exist as to the interpretation of Community law.

(2) The description of the facts

39. In its judgment in *Telemarsicabruzzo*¹⁷, the Court stated that it is only

13 — Case C-74/99 *Imperial Tobacco* [2000] ECR I-8699, paragraph 5.

14 — Case C-314/96 *Djabali v Caisse d'Allocations Familiales de l'Essonne* [1998] ECR I-1149, paragraph 14 et seq.

15 — Case 283/81 *CILFIT v Ministry of Health* [1982] ECR 3415, paragraph 13 et seq.

16 — Amendment of the Rules of Procedure of the Court of Justice of 16 May 2000, OJ 2000 L 122, p. 43.

17 — Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo* [1993] ECR I-393, paragraph 6.

able to provide an interpretation of Community law that will be of use to the national court if the national court ‘define[s] the factual and legislative context of the questions it is asking or, at the very least, explain[s] the factual circumstances on which those questions are based’. The Court said that those requirements are set particularly high in the field of competition law. Therefore, the possibility that the Court may later be able to glean the relevant information from the file submitted by the national court, the written observations and the submissions of the parties at the oral hearing does not relieve the national court of the obligation to state already in the decision referring the question the facts that the Court must know in order to be able to give a useful answer to the questions referred with sufficient knowledge of the facts of the case.

40. In its decision in *Saddik*,¹⁸ the Court, emphasised moreover, that the content of the decision making the reference should not only provide information for the Court but should also give the Member States the opportunity to submit, pursuant to Article 20 of the Statute of the Court, observations on the legal issues contained in the reference. Specifically, under that provision, the Member States receive only the decision referring the question.

41. It is true that the Court subsequently restricted that approach by stating that it

may also be sufficient if adequate information is contained in the observations submitted to the Court and their presentation in the Report for the Hearing, so that at least during the oral hearing all those concerned may make representations on all the relevant points.¹⁹

42. The judgment of the national court contains only superficial information about the services offered by the plaintiff and the question as to whether the Italian Post Office itself offers express courier services, but the relevant information was contained in the written observations of the plaintiff and was therefore taken up in the Report for the Hearing. The parties had the opportunity to take account of this at the oral hearing — they were indeed expressly invited to give their views on services provided by the Italian Post Office that might be part of the market for express courier services. The final determination of the relevant facts can be left to the national court. The reference for a preliminary ruling is therefore admissible.

B — *The questions referred*

43. The questions referred raise doubts about the compatibility of Italian postal dues for private express courier services with Articles 86 and 90 of the EC Treaty in

18 — Case C-458/93 *Saddik* [1995] ECR I-511, paragraph 13.

19 — Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 24 et seq.

two respects. On the one hand, imposing the charges at all could be incompatible with those provisions. On the other hand, it might be the way in which these charges are imposed and applied — namely, the direct transfer of the charges to the Italian Post Office in the form of income from the sale of postage stamps or the use of franking machines — that contravenes Articles 86 and 90 of the EC Treaty.

tion comprises all the products or services which in view of their characteristics are particularly suited to satisfy constant needs and are only to a limited extent interchangeable with other products or services'.²⁰

1. Whether the postal charge is an abuse of a dominant position

44. The first point to examine is whether a dominant position exists. This requires in the first place a definition of the relevant market.

(a) Definition of the market

45. The Court has said this about defining a market:

46. As the Postal Code grants the Italian Post Office the exclusive right to deliver letters, one could, in considering the exception concerning postal dues, accept that there is a single market for letter post. This is also suggested by the fact that the different letter services represent simply different levels of quality of a fundamentally unified service, namely, transporting letters. Thus, the general postal service could at least in part be substituted for the services offered by the plaintiff. It must also be assumed that the majority of the customers of the plaintiff would resort to services provided by the Italian Post Office if nobody offered services of higher quality.

47. Yet as early as 1989 the Commission proceeded on the assumption that general letter post and the market for courier services were in substance different markets²¹ and continued to hold this view.²² The Court has so far not made any express

'It is settled case-law that, for the purposes of applying Article 86 of the Treaty, the market for the product or service in ques-

20 — Case C-7/97 *Brommer* [1998] ECR I-7791, paragraph 33 and the references therein.

21 — See the third and fourth recitals of Commission Decision 90/16 (cited in footnote 3).

22 — See the Notice on the application of the competition rules to the postal sector (cited in footnote 4); Nos 2.3 and 2.4.

findings on the definition of the substantive market for postal services, but it appears from the judgment in *Corbeau* at least that express courier services are services clearly dissociable from the general postal service, 'which meet special needs of economic operators and which call for certain additional services not offered by the traditional postal service, such as collection from the sender's address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit'.²³

48. Irrespective of the unified regulation of the postal service and express courier services by the Postal Code, it is therefore to be assumed that the general letter service and the express courier service are different enough from one another for there to be as a matter of substance two separate markets. This difference must also apply to the letter service the subject of this dispute, as that service is offered by both the general postal service and express courier services.

(b) The dominant position of the Italian Post Office

49. It is not disputed that in the Italian market for general letter services — and

thus in a significant part of the common market — the Italian Post Office has a dominant position. This position is based at least in part on the postal dues on letters, which guarantee that no other undertaking can compete with the Italian Post Office in providing a basic letter service.

50. In contrast with this, the plaintiff did not operate in the market for general letter services but rather in the market for express courier services. It is only on markets for postal services of a higher quality that customers are prepared to pay higher prices for such services.

51. Neither party submitted that the Italian Post Office had a dominant position in the market for express courier services. Indeed, the parties even disagree as to whether it operates at all in the market for express courier services.²⁴ If necessary, it is for the national court to decide whether the fast service offered by the Italian Post Office forms part of the market for courier services, the general letter service or even a separate third market.

23 — Cited in footnote 10; paragraph 19.

24 — See above, paragraph 21.

(c) Abuse of the dominant position

52. As the Court has consistently held, 'although the mere fact that a Member State has created a dominant position by the grant of exclusive rights is not as such incompatible with Article 86, the EEC Treaty none the less requires the Member States not to adopt or maintain in force any measure which might deprive those provisions of their effectiveness'.²⁵

53. It is therefore necessary to consider whether the obligation on private express courier services when conveying letters to pay dues to the Italian Post Office equal to the carriage charge for the corresponding basic postal service amounts to an abuse of the dominant position of the Italian Post Office on the market for general letter services.

Arguments of the parties

54. The plaintiff takes the view that the Italian Post Office is abusing its dominant position. The fact that customers of express courier services must pay postal dues in addition to costs of such services influences their decision about obtaining such services

and in this way distorts competition. Imposing dues for a service that is not provided is moreover a case of the type mentioned in Article 86(c) of the EC Treaty. The plaintiff points out that the Court in its judgment in *Merci convenzionali porto di Genova* has already held that national laws having the effect of imposing a charge for services that have not been requested are not compatible with Articles 86 and 90 of the EC Treaty.²⁶

55. The EFTA Surveillance Authority, too, considers that imposing a charge for a service that is not rendered would in the normal case be an abuse. None of the exceptions to this generality is applicable here. Therefore, by levying the charge the Italian Post Office must be abusing its dominant position.

56. The Italian Government and the Italian Post Office argue, however, that the charge is concerned only with compensating for the burdens inherent in providing a universal service. The Government finds it inconceivable that the performance of an express courier service should be divided into two performances, of which the basic service would be provided by the universal service against payment of the postal dues and the other would be provided by the private undertaking against payment of a further fee.

²⁵ — *Corbeau* (cited in footnote 10), paragraph 11 and the references therein.

²⁶ — The plaintiff refers to Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraph 19.

57. The Commission considers it possible that the charge imposed on express courier services induces the Italian Post Office to extend its dominant position on the market for postal services of the universal service to the neighbouring market for express courier services. This would, according to the case-law of the Court, represent an abusive exploitation of a dominant position.²⁷

Analysis

58. The Court defines abuse very generally as follows:

‘Article 86 therefore covers not only abuse which may directly prejudice consumers but also abuse which indirectly prejudices them by impairing the effective competitive structure as envisaged by Article 3(f) of the Treaty’.²⁸

59. Thus, there are two different types of abuse. One comprises cases in which a dominant position is used to achieve a result that could not be achieved in condi-

tions of free competition. In particular, the examples in Article 86(2) of the EC Treaty are founded on such cases. Usually, such a case involves a dominant undertaking using its market power to force unreasonable contractual conditions (price, package transactions and so on) on consumers or customers who operate on other markets.

60. The other type comprises cases in which a dominant position is used to restrict competition even further. In such cases, the dominant undertaking uses its dominant position to inflict injury not on those with whom it deals but instead on its competitors on the dominated market or on neighbouring markets. Examples are sales at less than production costs or exclusivity agreements with customers prohibiting them from transacting with competitors. Such abuse thus pre-supposes an attempt to influence a competitive relationship. In this situation, the dominant undertaking fails in its special responsibility for competition.²⁹

61. Abuse of the first type might well be found here in the requirement for express courier services to pay letter postage without receiving corresponding services from the Italian Post Office (i). On the other hand, there might be an abuse of the second type in that express courier services must in

27 — The Commission relies on the judgment in Case C-18/88 *GB-Inmo-BM* [1991] ECR I-5941; on the Opinion of Advocate General Tesauro in *Corbeau* (cited in footnote 10), paragraph 13; and on Commission Decision 95/489/EC of 4 October 1995 concerning the conditions imposed on the second operator of GSM radiotelephony services in Italy, OJ 1995 L 280, p. 49.

28 — Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 125.

29 — Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraph 57.

addition to their own costs pay letter postage, while the services provided by the Italian Post Office are not subject to any corresponding burden (ii).

wanted but for additional services that had not been requested.³⁰ If forcing unwanted services on a customer is in itself an abuse, then demanding payment for services not performed at all must be all the more so.

(i) Abuse in the form of a charge for services not provided

62. The plaintiff and the EFTA Surveillance Authority argue that the postal dues are an abuse because they represent a charge for services that are not provided.

64. However, this case did not concern a package transaction. The result we have here could not be achieved even differently by an undertaking exploiting a dominant position on the market for postal services pertaining to the general letter post. The Italian Post Office could not take any measure that would have made private express courier services pay these dues. The coercion that led to the payment of these dues came instead from the exercise of State sovereignty alone. It is doubtful that this national measure may on its own be considered the equivalent of the abusive exploitation of a dominant position.

63. This view amounts to the allegation that the postal dues produce a result that could not arise in conditions of free competition. It can be supported by reference to Article 86(2)(d) of the EC Treaty. According to it, abuse exists in particular where a dominant undertaking makes the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. Cases of this sort are typically package transactions. An undertaking performs a necessary service that is not otherwise obtainable only in a package with services that are not needed and that are thus not asked for either. Thus, the judgment in *Merci Convenzionali porto di Genova* concerned the allegation that, in exploiting a monopoly for harbour services, the harbour authority charged a fee not for the services that were actually

65. Reading Articles 86 and 90 of the EC Treaty together leads to the conclusion that not all the requirements of Article 86 of the EC Treaty must be satisfied in the person of the dominant undertaking. Specifically, there is also abuse if a national measure — in particular the grant of exclusive rights — results in a competition situation

³⁰ — Cited in footnote 26; paragraph 19.

that is an abuse by reason of its very structure.³¹ Such a structure may be found for example where an undertaking that has a dominant position as an employment agency by virtue of an exclusive right, '[is] manifestly unable to satisfy demand on the employment market for all types of activity'.³²

66. Thus, the relevant national measure may take the place of the fulfilment by the dominant undertaking of the requirements for abuse. A national measure that leads to a situation that could not arise in conditions of free competition is accordingly also to be seen as an abuse. However, it must at the same time be remembered in this regard that by their very nature, mandatory provisions of national law lead to situations that could not arise in conditions of free competition. Thus, for example, the fact that undertakings pay tax on their profits to the State is certainly not something that could be achieved through free competition. But a dominant undertaking could not bring about this situation by its own conduct in exploiting its dominant position, either. Therefore, such situations as could not be attained in conditions of free competition only qualify as abuses if they could also be brought about by the conduct of a dominant undertaking.

31 — Opinions of Advocate General Lenz of 11 July 1991 in Case C-46/90 *Lagauche and Others* [1993] ECR I-5267, paragraph 42 et seq. and, in the same case, of 2 December 1993, paragraph 15 et seq.

32 — Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 35.

67. Because the imposition of the postal dues could not have been effected by a dominant undertaking, it cannot be equated to an abuse in the form of imposing a charge for services that have not been performed.

(ii) Abuse by distorting competition to the advantage of the operations of the Italian Post Office

68. The postal dues on express courier services of other undertakings could be seen as an abuse of the second type in the form of a distortion of competition to the advantage of the Italian Post Office.

69. It is clear that at the material time the Italian Post Office was operating a fast service in parallel with its standard letter service. As all undertakings were required to pay the postal dues to the Italian Post Office when they conveyed letters, their services suffered a disadvantage in so far as they competed with the Italian Post Office. A relationship of competition is suggested in particular by the fast service offered by the Italian Post Office.

70. What is disputed is whether this fast service is to be considered as part of the

market for express courier services. If it is to be considered as part of that market, then it stood in direct competition with the express courier services that had to pay the postal dues. In that case, the postal dues would have directly distorted competition on the market for express postal services. At the same time, they would have facilitated the extension of the Italian Post Office's dominant position on the market for general letter services to the neighbouring market for express courier services. Such an extension of a dominant position would, according to the judgment in *GB-Inmo-BM*, be incompatible with Articles 86 and 90(1) of the EC Treaty.³³

71. On the other hand, if the fast service should be considered as part of the market for general letter services or as a market on its own, there would, *ex hypothesi*, be no question of a direct relationship of competition.

72. In this case, establishing an abuse is made even more difficult by the fact that the two markets that would have been affected are, though very close to each other, in the final analysis distinct. The postal dues applied fundamentally as much to the dominated market for general letter services as to the neighbouring market for express courier services. Here, however, we must consider only the postal dues on express courier services. On this basis, an

abuse could only be seen in the effects of the postal dues on the market for express courier services. The requirements to be satisfied for a finding of an abuse on a market other than the dominated one are in principle very stringent.

73. In its judgment in *Tetra Pak*, moreover, the Court held that 'application of Article 86 presupposes a link between the dominant position and the alleged abusive conduct, which is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market. In the case of distinct, but associated, markets,... application of Article 86 to conduct found on the associated, non-dominated, market and having effects on that associated market can only be justified by special circumstances'.³⁴

74. It is the close connection between the two markets, leading to at least a partial interchangeability of the respective services, that creates such unusual circumstances. That is to say, it would be unrealistic to find there to be no competition between the fast service and the services on the market for express courier services. In practice, at least some of the potential customers of the one service will, because of a price advantage, decide to use the other service, where there is no material difference between the two in terms of quality. The express courier service is not a standard product with fixed attributes: its defining characteristic is the flexible way it combines different services. At least in its

33 — Cited in footnote 27; paragraphs 24 and 25; see also Commission Decision 95/489/EC (cited in footnote 27), in particular the 17th recital. Similarly, the 21st recital of Commission Decision 97/181/EC of 18 December 1996 concerning the conditions imposed on the second operator of GSM radiotelephony services in Spain, OJ 1997 L 76, p. 29.

34 — Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951, paragraph 27.

simpler versions, in particular where additional services such as collection from the sender or re-direction of the item during transport are not required, the service appears to be in large measure comparable to the standard fast service. Thus, the postal dues also facilitate the increase in the market share of the fast service at the cost of express courier services that are burdened with the postal dues even if the fast service of the Italian Post Office is not an express courier service. To this extent too, an extension of the dominant position of the Italian Post Office could be assumed, whether due to an increase in the market for the general letter post or due to an increase in a separate market for the fast service of the Italian Post Office, which would perforce dominate that market. The extension of the dominant position at the cost of the competitive market moreover contradicts the principle of competition, moreover. In addition, the separation between the markets for general letter services and for express courier services seems to be explained principally by the endeavour to protect the competitive sector from an uncontained monopoly. Accordingly, this type of extension of a dominant position must also be considered an abuse.

75. It must be concluded therefore that the postal dues on express courier services are an abuse of a dominant position within the meaning of Articles 86 and 90(1) of the EC Treaty.

(d) Whether trade is affected

Arguments of the parties

76. The Italian Post Office and the Italian Government argue that because of the circular of 4 March 1989,³⁵ there is no possibility that trade between the Member States is affected.

77. The Commission emphasises that its observations regarding abuse are based entirely on the hypothesis that it is possible that trade has been affected, but that this hypothesis must be tested by the national court.

Analysis

78. However, Articles 86 and 90(1) of the EC Treaty are only applicable where a restriction on competition may affect trade between Member States. The concept of trade is not limited to trade in goods, but is to be interpreted broadly.³⁶ In particular, it includes the cross-border provision of ser-

³⁵ — See above, paragraph 15.

³⁶ — Case 172/80 *Züchner v Bayerische Vereinsbank* [1981] ECR 2021, paragraph 18.

vices. On the other hand, trade cannot usually be affected merely by a restriction on the freedom of establishment.

82. In this way, postal dues are capable of affecting trade.

79. If the circular of 4 March 1989 did effectively exclude the application of postal dues to international deliveries and to any connecting services, then on the face of it the postal dues do nothing more than limit the freedom of establishment of postal services.

(e) Justification

80. However, the markets for international carriage of post may be distinguished from most other trading markets because the performance of cross-border postal services on any significant scale requires the creation of a network of branches in the country of posting and in the country of delivery. In this way, restrictions on the freedom of establishment also inhibit trade in services.

83. Although Articles 86 and 90(1) of the EC Treaty prohibit Member States, 'in the case of public undertakings to which Member States grant special or exclusive rights, [from enacting or maintaining] in force any measure contrary to the rules contained in the Treaty with regard to competition', this prohibition must 'be read in conjunction with Article 90(2), which provides that undertakings entrusted with the operation of services of general economic interest are to be subject to the rules on competition [only] in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'.³⁷

81. Due to the price advantage gained from postal dues, the Italian Post Office carries letters that would otherwise be carried by other undertakings. As a result, the fixed costs of these undertakings are divided between a smaller number of deliveries, carriage of which becomes accordingly more expensive. That affects international carriage even if it is not subject to the postal dues. It must also be assumed that this effect is perceptible.

84. On the basis of the judgment in *Corbeau*³⁸ and Directive 97/67, it is not disputed that the basic postal service — the so-called universal service — is a task of general economic interest. This task justifies granting the exclusive right to perform certain services to the undertaking

³⁷ — *Corbeau* (cited in footnote 10), paragraphs 12 and 13 et seq.

³⁸ — Cited in footnote 10; paragraph 12 et seq.

that guarantees the universal service so that it is possible to offset the less profitable sectors against the profitable sectors.³⁹

85. However, whether the interference with competition that results from the postal dues can be justified under Article 90(2) of the EC Treaty is yet to be considered.

Arguments of the parties

86. The plaintiff relies on the judgment in the case of *Corbeau*, according to which Community law is applicable where the service that the private undertaking offers is clearly dissociable from the universal postal service and the application of the competition rules does not compromise the economic equilibrium of the universal service.

87. The plaintiff argues for this reason that the services it offers are dissociable from the universal service. It also submits that, moreover, the application of the competition rules cannot compromise the economic equilibrium of the universal service. On the one hand, it is not necessary to charge postal dues on express courier services in order to cover the deficit of the universal

service because this deficit was already covered by direct subsidies, of ITL 150 000 million in 1997 and ITL 210 000 million in each of the following years up to 2002. On the other hand, the postal dues are not a proportionate means of making up the deficit as the amount of the dues bears no relationship to the amount of the deficit, but is instead determined entirely by the volume of trade of the private express courier services. The principle of proportionality was also the reason for introducing a compensation fund in Article 9(4) of Directive 97/67.

88. According to the Italian Government, the postal dues represent simply compensation for providing a universal service, as is also envisaged in Directive 97/67. The fact that private postal services would concentrate on profitable services cannot be allowed to interfere with the provision of a universal service.

89. The Italian Post Office also takes this view. It submits that for various reasons, which need not be discussed in detail here, the Italian postal market is in European terms a difficult one for the provider of the universal service. In many regions, local customs as well as a sparse population mean that the demand for postal services is very low, whereas it is far more profitable to service other regions. The Italian Post

39 — *Corbeau* (cited in footnote 9), paragraph 17.

Office claims that the scope of the postal monopoly is in practice significantly restricted because of the definition of post and of the exceptions provided for in Article 41 of the Postal Code. It estimates the additional costs of providing a universal service as around ITL 2 500 000 million a year. This burden would completely absorb the subsidies listed by the national court, and it could not be offset by the postal dues imposed on private undertakings for the carriage of letters either.

90. The levy is intended to be not only compensation but also an obstacle to prevent private undertakings from being able to undercut the tariffs of the Italian Post Office. On the other hand, the levy is very low, if it does not actually have an entirely theoretical effect.

91. Thus, the postal dues are an integral part of the means granted to the provider of the universal service and regarded by the legislature as necessary 'in order for that undertaking to be able to perform its public service obligations under conditions of economic equilibrium'.⁴⁰

⁴⁰ — The Italian Post Office cites this passage from the judgment of the Court in Case T-106/95 *FFSA v Commission* [1997] ECR II-229, paragraph 178.

92. The postal dues therefore cannot effect a distortion of competition at the expense of other undertakings and are justified under Article 90(2) of the EC Treaty and Article 16 EC, newly promulgated by the Treaty of Amsterdam.

93. According to the observations of the Commission, it is for the national court to determine whether the postal dues compensate for the losses incurred in the universal service. The Commission does not have sufficient information to reach a conclusion on this point. If the national judge were to find that the postal dues are not necessary to guarantee the universal service, they would be unjustifiable.

Analysis

94. Article 90(2) of the EC Treaty provides that undertakings entrusted with the operation of services of general economic interest are subject to the rules contained in the Treaty only in so far as the performance in law or in fact of the particular tasks assigned to them is not thereby obstructed. The newly promulgated Article 16 EC and Article 36 of the Charter of Fundamental Rights of the European Union underline the importance of this exception as an expression of a fundamental value judgment of Community law.

95. In its judgment in *Corbeau*, moreover, the Court held that restricting competition in a specific service that is dissociable from the universal service is permitted if such competition would compromise the economic equilibrium of the universal service.⁴¹ It is particularly the Italian Post Office that relies on such a risk when it argues that the income resulting from the postal dues is necessary to make up the deficit incurred by the universal service.

96. What must be examined is whether the risk of the loss of such income is enough to compromise the economic equilibrium of the universal service as described in the judgment in *Corbeau*. The judgment does not expressly state how such a risk is to be established. However, if one considers the facts of *Corbeau*, it becomes clear that this risk must arise from the proximity of the relevant service to the universal service. Mr Corbeau carried post in the city of Lüttich and in surrounding areas at tariffs slightly below those of the Belgian Post Office.⁴² In view of the nature of that business, it was apparent that there was a risk that his was not a true express courier service, distinguished by its added value over the universal service, but was instead in competition in a geographically limited area with the universal service, that competition only being made possible by the choice of a particularly profitable trading area. Services of this type are likely to compromise the economic equilibrium of the universal service since according to the judgment in

Corbeau, that equilibrium is founded on the possibility of a financial 'offset [of] less profitable sectors against the profitable sectors'.⁴³

97. In contrast to this, a service that includes real added value and is provided at correspondingly higher prices does not usually compete with the universal service, if the latter is not extensively defined so as to include accelerated forms of carriage that are similar to the simpler forms of express courier service. The burden consisting of the dues for simple letter carriage is clearly not aimed, however, at excluding competition between express courier services and higher quality universal services. Therefore, the question as to whether, prior to the coming into force of Directive 97/67, it would have been lawful to make such services part of the sector reserved to the undertaking that guarantees the universal service need not be answered. The argument of the Italian Post Office that the postal dues are necessary in order to inhibit competition from non-universal services in attractive areas is to be rejected, at least as regards the burden on express courier services.⁴⁴

98. On the other hand, the judgment in *Corbeau* did not consider the question as to whether any part of the costs of a universal service may be transferred to express cour-

41 — Cited in footnote 10; paragraph 19.

42 — Opinion of Advocate General Tesauro in *Corbeau* (cited in footnote 10), point 22 *in fine*.

43 — *Corbeau* (cited in footnote 10), paragraph 17.

44 — One might take a different view as regards a burden imposed on simple letter post that competes directly with the universal service; but it is not necessary to burden express courier services in order to give protection from such competition.

ier services. In principle, a service provided in the public interest ought also to be paid for by the public. However, the *Corbeau* judgment permits only the inference that within a defined reserved sector imposing a burden on customer groups with more efficient cost structures is permissible in order to promote the support of customer groups with inefficient cost structures. In particular, the universal service too ought in principle to fix its prices by reference to its costs.⁴⁵

99. However, the Community legislature also proceeds from the assumption that it is in principle possible to impose levies on neighbouring markets in order to finance the universal service. The model in Article 9(4) of Directive 97/67 of a support fund financed by non-universal postal services is based on such an assumption.

100. Whether the Directive is in this regard compatible with Articles 86 and 90 of the EC Treaty need not be considered here. It may be stated, however, that the regulation of the financing fund rests on a legal principle that may be generalised and that may therefore legitimately — that is, having regard to a financial offset — be applied even to cases from before the Directive came into force, as express courier services and similar, high quality postal

services have a particular responsibility for financing the universal postal service. Until the opposite is proved, it must in short be assumed that (almost) all express courier deliveries would be carried by the universal service *if nobody provided express courier services*.

101. Of course, Article 9(4) of Directive 97/67 quite rightly indicates that the contribution that other services make to financing the universal service must be proportionate. The principle of proportionality is a general principle of Community law, which must be observed in every case in which a right granted by Community law is restricted. Accordingly, each contribution to financing the universal service must be suitable for its purpose, necessary and not excessive.⁴⁶ For this reason, the amount of the contribution is limited in three ways.

102. In the first place, the purpose of guaranteeing the financing of the universal service entails that each contribution is limited by the amount of the deficit of the universal service that needs to be financed. Any contribution exceeding that amount would not be necessary and would therefore be disproportionate. Whether this condition was fulfilled in the present case is a matter for the national court.

45 — See the second indent of Article 12 of Directive 97/67 (cited in footnote 2).

46 — Case 265/87 *Schröder v Hauptzollamt Gronau* [1989] ECR 2237, paragraph 21.

103. In the second place, the obligation on the express courier services to contribute cannot exceed the amount that the provider of the universal service would charge if it were itself to carry in the universal service the letters given to express courier services. The aggregate liability of the express courier services can reach at the most this amount. A greater burden would be excessive. Indeed, in this instance, the Italian Post Office receives only the postage for the normal letter service. Despite that, it is to be assumed that this contribution of the express courier services is higher than the net income that escapes the Italian Post Office. In order not to be excessive, the amount of the contribution must rather be calculated first by subtracting the costs that the universal service saves by not carrying the letter itself.⁴⁷ How these saved costs might be calculated cannot be decided here.⁴⁸ Should it arise, this is also a matter for the national court. It does, however, appear clear that one cannot in any case regard the whole carriage charge as profit that the Italian Post Office would receive if the letter subject to the postal dues had been carried by it instead.

104. Finally, this responsibility also falls in principle on the services provided by the Italian Post Office that do not form part of the universal service. These services must pay the same contribution as the express courier services. At the least, the additional

amount that the express courier services must pay because of the absence of a contribution to financing the universal service from the services provided by the Italian Post Office is not necessary. Whether the fast service of the Italian Post Office was part of the universal service at the time of the events the subject of this case cannot be determined here. This decision also is a matter for the national court.

105. The postal dues could not be justified at all if the Italian Post Office provided its own express courier service that was not subject the postal dues. Admittedly, cross-subsidies of the universal service by an express courier service of the Italian Post Office might be necessary under the applicable financial model to offset losses in the universal service. However, it is not clear why the Italian Post Office should for that reason receive a competitive advantage in the market for express courier services. Such an effect could not be achieved by a lawful tax system; nor could it be justified by any group responsibility that may fall on private express courier services. In practice, such services would be doubly burdened, once by the levy and once by the advantage given to their competitors. Financing regulations, too, must comply with Community competition law. But whether the fast service of the Italian Post Office is to be considered as part of the market for express courier services or as part of the universal service likewise can also only be determined by the national court.

47 — See, *mutatis mutandis*, Joined Cases C-147/97 and C-148/97 *Deutsche Post v Gesellschaft für Zahlungssysteme and Citicorp Kartenservice* [2000] ECR I-825, paragraph 58.

48 — One might take as a starting point for this deduction the rebates the universal service gives to large customers for specific mass deliveries.

106. A contribution that is paid by courier services that provide specific services dissociable from the universal postal service towards financing the universal service and is in the form of a levy on individual deliveries is thus compatible with Articles 86 and 90 of the EC Treaty only if

— the aggregate amount of the levy does not exceed the deficit of the universal service,

— the levy is not higher than the amount that would, after deducting the specific costs of the delivery, accrue to the universal service if the individual delivery were made by the universal service and if

— the postal services of the undertaking that guarantees the universal service that do not form part of the universal service are also subject to the levy.

Whether these conditions are satisfied in the individual case is a matter for the national court.

2. The absence of control mechanisms

107. The national court has asked whether the allocation of the proceeds of the postal dues to the Italian Post Office is a breach of Articles 86 and 90 of the EC Treaty because there is no offsetting or control mechanism to preclude the monies being allocated to non-universal services.

108. It would appear in principle possible now for the national court to decide the case on the basis of the preceding considerations. None the less, some further remarks on this question are called for.

Arguments of the parties

109. The plaintiff emphasises in particular that the current mode of application would not satisfy the requirements envisaged in the compensation provision in Article 9(4) of Directive 97/67.

110. The Italian Post Office and the Italian Government disagree with the finding of the national court that there is no offsetting or control mechanism to preclude cross-

subsidies flowing to non-universal services. In accordance with the duties imposed by national law, the Italian Post Office has on the contrary kept the accounts of its universal service separate from those of its other services since the financial year 1997.

111. The EFTA Surveillance Authority argues in the first place that cross-subsidies by the universal service of non-reserved services provided by the Italian Post Office could only be made if there was a surplus in the universal service. If such cross-subsidies were made — in other words, if the universal service made a profit taking into account the receipts from the postal dues — not all of the postal dues would be necessary, because they are supposed only to secure the existence of the universal service, not to create a surplus. Such cross-subsidies would be incompatible with Articles 86 and 90 of the EC Treaty if the other requirements were satisfied, as may be assumed to be the case here. However, so long as the universal service of the Italian Post Office makes only a deficit, cross-subsidies by the universal service to the competitive sector on the basis of the postal dues would not be possible in practice. Theoretically, however, one might also challenge even that conclusion if deficits were due to inefficiencies.

112. The EFTA Surveillance Authority, considers that the problems lie in the practical application of these points, as

they would require detailed findings to be made as regards the application of receipts and the costs incurred. One might be able to infer the obligation to have a suitable bookkeeping system as a further obligation from Articles 86 and 90 of the EC Treaty, but the EFTA Surveillance Authority rejects this solution. On the one hand it would oblige the Member States to show by a means of their own choosing that a measure was justified under Article 90(2) of the EC Treaty. On the other, the necessary factual questions are to be decided by the national court. In any case, it is for the legislator to introduce such duties regarding documentation.

113. The view of the Commission is that it is for the national court to assess whether the postal dues on private express courier services are necessary in order to cover losses incurred by the Italian Post Office in its universal service. The Commission states that it does not know either the amount of the losses claimed or the amount of the receipts from the postal dues.

Analysis

114. First, it must be remembered that the bookkeeping practice of the Italian Post Office at the time of the events that gave rise to this litigation is a matter of dispute between the parties. It is therefore the task of the national court to make the necessary

findings. The Court can only give guidance on the requirements to which the Italian Post Office is to be subject in accounting for the application of the receipts from postal dues imposed on private express courier services.

115. Furthermore, before Directive 97/67 became applicable, there were no obvious Community law obligations to adopt any specific offsetting or control mechanisms to ensure that contributions to financing the universal service remained proportionate.

116. However, the undertakings concerned must be allowed to oppose, should the need arise, any burden that does not comply with the conditions stated above. The Court has most recently summarised the requirements of Community law, as laid down in a consistent line of case-law, for domestic legal safeguards as follows:

to exercise rights conferred by Community law'.⁴⁹ These principles apply also where reliance is placed on Articles 86 and 90 of the EC Treaty.⁵⁰

117. Therefore, the undertaking that receives the benefit of the levy, or the Member State that fixes the levy, may in principle be required to prove that the full amount of the levy is justified according to the above criteria. On the other hand, the undertaking that opposes the levy may be required to prove the abuse. How such proof is to be provided is, under Community law as it currently stands, to be determined in accordance with national rules of procedure.

118. However, the form in which postal dues are levied may make it at least difficult to calculate the losses of the universal service and the receipts from the postal dues exactly, as these receipts were included in the general receipts of the universal service without any identifying marks.

'The Court has consistently held that, in the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions; nor may they make it impossible or excessively difficult in prac-

49 — Case C-228/98 *Douglas* [2000] ECR I-577, paragraph 58.

50 — Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraph 23 et seq.

VI — Conclusion

119. For these reasons, I suggest that the questions referred for a preliminary ruling should be answered as follows:

(1) A contribution that is paid by postal services that provide specific services dissociable from the universal postal service towards financing the universal service and is in the form of a levy on individual deliveries is compatible with Articles 86 and 90 of the EC Treaty (now Articles 82 and 86 EC) only if

— the aggregate amount of the levy does not exceed the deficit of the universal service,

— the levy is not higher than the amount that would, after deducting the specific costs of the delivery, accrue to the universal service if the individual delivery were made by the universal service and if

— the postal services of the undertaking that guarantees the universal service that do not form part of the universal service are also subject to the levy.

- (2) Whether the levy in this case satisfies these requirements is, in the absence of applicable Community law provisions, to be decided by the national court under the national rules of procedure. However, such rules must not be less favourable than those governing similar domestic actions; nor may they make it impossible or excessively difficult in practice to exercise rights conferred by Community law.