

OPINION OF ADVOCATE GENERAL  
TIZZANO

delivered on 12 December 2002<sup>1</sup>

1. The present cases concern appeals brought by the French Republic, Chronopost SA and La Poste against the judgment delivered on 14 December 2000 by the Court of First Instance in Case T-613/97 *Ufex and Others v Commission* (hereinafter ‘the contested judgment’)<sup>2</sup> annulling Article 1 of Commission Decision 98/365/EC of 1 October 1997 ‘concerning alleged State aid granted by France to SFMI-Chronopost’ (hereinafter ‘the contested decision’).<sup>3</sup>

December 1990. In that connection, it appears in particular from the contested judgment that:

‘1. Syndicat Français de l’Express International (hereinafter “SFEI”), now known as the Union Française de l’Express (“Ufex”), of which the three other applicants are members, is a trade association established under French law, grouping together almost all of the companies offering express courier services competing with Société Française de Messagerie Internationale (hereinafter “SFMI”).

I — Facts and procedure

*The complaint lodged by SFEI and the relations between La Poste and SFMI-Chronopost*

2. The complex history of the present case goes back more than ten years to a complaint lodged with the Commission in

2. On 21 December 1990 SFEI lodged a complaint with the Commission alleging principally that the logistical and commercial assistance afforded by the French Post Office (hereinafter “La Poste”) to SFMI constituted State aid within the meaning of Article 92 of the EC Treaty (now, after amendment, Article 87 EC). In particular, SFEI complained that the remuneration paid by SFMI for the assistance provided by La Poste was not in accordance with normal market conditions. It alleged that the difference between the market

1 — Original language: Italian.

2 — [2000] ECR II-4055.

3 — OJ 1998 L 164, p. 37.

price for the purchase of such services and the price actually paid by SFMI constituted State aid. An economic study carried out by Braxton, a consultancy firm, at SFEI's request, was appended to the complaint in order to demonstrate the value of the amount of aid during the period from 1986 to 1989.

delivery service provided by SFMI under the name of EMS/Chronopost were set out in an order from the Ministry for Posts and Telecommunications of 19 August 1986. According to that order, La Poste was to provide SFMI with logistical and commercial assistance. The contractual relations between La Poste and SFMI are governed by agreements, the first of which dates from 1986.

3. La Poste, which operates as a legal monopoly in the ordinary mail sector, was an integral part of the French State administration until the end of 1990. Since 1 January 1991 it has been a legal entity governed by public law by virtue of Law 90-568 of 2 July 1990. That law authorises it to perform certain activities open to competition, and particularly express delivery services.
4. SFMI is a company incorporated under private law which has been entrusted with the management of La Poste's express delivery service since the end of 1985. SFMI was formed with a share capital of FRF 10 million held as to 66% by Sofipost a holding company wholly owned by La Poste, and as to 34% by TAT Express, a subsidiary of the airline Transport Aérien Transrégional (hereinafter "TAT").
5. The detailed conditions for the operation and marketing of the express delivery service provided by SFMI under the name of EMS/Chronopost were set out in an order from the Ministry for Posts and Telecommunications of 19 August 1986. According to that order, La Poste was to provide SFMI with logistical and commercial assistance. The contractual relations between La Poste and SFMI are governed by agreements, the first of which dates from 1986.
6. In 1992 the structure of the express delivery business carried out by SFMI changed. Sofipost and TAT set up a new company, Chronopost SA, in which their respective holdings were again 66% and 34%. Chronopost, which had exclusive access to La Poste's network until 1 January 1995, concentrated on domestic express deliveries. SFMI was acquired by GD Express Worldwide France, the subsidiary of an international common operator whose participants are the Australian company TNT and the post offices of five countries, a concentration which was authorised by a Commission Decision of 2 December 1991 (TNT/Canada Post, DBP Postdienst, La Poste, PTT Poste and Sweden Post, Case No IV/M.102, OJ 1991 C 322, p. 19). SFMI retained the international business, using Chronopost as an agent and service provider in the handling of its international dispatches in France (hereinafter "SFMI-Chronopost").

*The action before the Tribunal de Commerce de Paris and the reference for a preliminary ruling*

3. It is also apparent from the contested judgment that, in addition to lodging the aforesaid complaint with the Commission, 'on 16 June 1993 SFEI and other undertakings brought an action before the Tribunal de Commerce de Paris (Paris Commercial Court) against SFMI, Chronopost, La Poste and others. A second study by Braxton was attached to the application, updating the information contained in the first study and evaluating the amount of the aid up to the end of 1991. In a judgment of 5 January 1994, the Tribunal de Commerce de Paris referred several questions to the Court of Justice for a preliminary ruling on the interpretation of Articles 92 and 93 of the EC Treaty (now Article 88 EC), one of which sought clarification of the concept of State aid in the circumstances of the present case. The French Government lodged, as an annex to its observations of 10 May 1994, an economic study by Ernst & Young. In Case C-39/94 *SFEI and Others v La Poste and Others* [1996] ECR I-3547 (hereinafter "the SFEI judgment"), the Court ruled that "the provision of logistical and commercial assistance by a public undertaking to its subsidiaries, which are governed by private law and carry on an activity open to free competition, is capable of constituting State aid within the meaning of Article 92 of the EC Treaty if the remuneration received in return is less than that which would have been demanded under normal market conditions" (paragraph 9).

*The Commission's investigations and the contested decision*

4. As regards the investigations into the alleged State aid to SFMI-Chronopost,<sup>4</sup> it is apparent from the contested judgment that, having decided first to take no action and then to reopen the case,<sup>5</sup> the Commission obtained information from the French authorities on several occasions in 1993.<sup>6</sup> Shortly before the abovementioned SFEI judgment in Case C-39/94 was delivered, 'by a letter from the Commission dated 20 March 1996, France was notified of the initiation of the procedure under Article 93(2) of the EC Treaty'.<sup>7</sup>

5. Both the French Government and SFEI submitted observations to the Commission in response to the decision to initiate the procedure, attaching studies they had commissioned from well-known consultancy firms.<sup>8</sup> On that occasion, SFEI also 'extended its complaint of December 1990 to cover a number of additional points,

4 — In the course of this Opinion, as in the Commission decision, "reference will be made to "SFMI-Chronopost", even when only one of the two companies is involved".

5 — Paragraph 7 of the judgment states in particular that 'by letter of 10 March 1992 the Commission notified SFEI of its decision to take no action on the complaint under Article 92 of the Treaty. On 16 May 1992 SFEI together with other undertakings lodged an action with the Court of Justice for annulment of that decision. The Court ruled that it was not necessary to proceed to judgment (order of 18 November 1992 in Case C-222/92 *SFEI and Others v Commission*, not published in the ECR) in the light of the Commission Decision of 9 July 1992 to withdraw the decision of 10 March 1992'.

6 — See paragraph 8 of the judgment in particular.

7 — Paragraph 10 of the judgment; paragraph 11 states that a notice on the initiation of the procedure was published in the *Official Journal of the European Communities* on 17 July 1996 (OJ 1996 C 206, p. 3).

8 — See paragraphs 10, 12 and 13 of the contested judgment.

including the use of La Poste’s brand image, privileged access to the air waves of Radio France, customs and tax privileges and La Poste’s investment in dispatching platforms’.<sup>9</sup>

6. On 1 October 1997, having completed its investigations, the Commission adopted the contested decision in which it concluded that ‘the logistical and commercial assistance provided by the Post Office to its subsidiary SFMI-Chronopost, the other financial transactions between those two companies, the relationship between SFMI-Chronopost and Radio France, the customs arrangements applicable to the Post Office and SFMI-Chronopost, the system of payroll tax applicable to the Post Office and its... investment in the dispatching platforms do not constitute State aid to SFMI-Chronopost’.<sup>10</sup>

7. Confining myself for present purposes to the ‘logistical and commercial assistance’, I note that, according to the Commission itself, that assistance comprised: (i) ‘*logistical assistance*, which consists in making available to SFMI-Chronopost the use of the postal infrastructure for the collection, sorting, transport and delivery of its dispatches’; and (ii) ‘*commercial assistance*, which consists in SFMI-Chronopost’s access to La Poste’s customers and enjoyment of its goodwill’.

8. The contested decision states that, according to the complainant, ‘in deciding whether there is State aid, the Commission should examine whether SFMI-Chronopost paid the “normal market price” for the logistical and commercial services provided by the Post Office’, that is to say ‘the price at which a comparable private company would provide the same services to an unrelated company’. In particular, in calculating that price, ‘the Commission should disregard the group’s strategic interests and the economies of scale arising from the privileged access of SFMI-Chronopost to the Post Office’s network and infrastructure’ because the Post Office has a monopoly. For that very reason, the complainant claimed that ‘SFMI-Chronopost should bear the costs that a private undertaking would incur in creating a network equivalent to that of the Post Office’.

9. The Commission rejected those arguments, observing that ‘nothing in the Court’s case-law suggests that the Commission should disregard the strategic considerations and the synergies stemming from the fact that the Post Office and SFMI-Chronopost belong to the same group’ and that ‘the fact that the transaction takes place between an undertaking operating in a reserved market and its subsidiary operating in a competitive market’ is of no relevance to the case. Accordingly, in the Commission’s view, the relevant question is ‘whether the terms of the transaction between the Post Office and SFMI-Chronopost are comparable to those of an equivalent transaction between a private parent company, which may very

<sup>9</sup> — Paragraph 12 of the contested judgment.

<sup>10</sup> — Article 1 of the decision.

well be a monopoly (for instance because of the ownership of exclusive rights), and its subsidiary'. Therefore, 'the "normal market price" criterion put forward by the complainant does not answer this question since it overlooks the fact that the transaction takes place between two companies within the same group'.

10. That being so, the Commission considered that 'internal prices at which products and services are transacted between companies belonging to the same group do not involve any financial advantage whatsoever if they are full-cost prices (total costs plus a mark-up to remunerate equity capital investment)'. Applying that principle to the present case, it therefore observed:

'In this case payments made by SFMI-Chronopost did not cover total costs over the first two years of operation, but covered total costs before central and local offices' overheads. The Commission considers that this situation is not abnormal since revenues from the operations of a new firm belonging to a group of companies may cover only variable costs in the start-up period. Once the undertaking has stabilised its position on the market, the revenues generated by it must be in excess of variable costs so as to make a contribution to the fixed costs of the group. Over the first two years (1986 to 1987) of operation payment made by SFMI-Chronopost covered not only variable costs, but

also some fixed costs (such as buildings and vehicles). France has shown that as from 1988 the remuneration paid by SFMI-Chronopost for the assistance covers all the costs incurred by the Post Office, plus a contribution by way of interest on its equity capital'.

11. On those grounds, the Commission therefore concluded that 'the logistical and commercial assistance was provided by the Post Office to its subsidiary under normal business conditions and did not constitute State aid'.

12. The Commission subjected that conclusion to a further test by considering 'whether the Post Office behaviour as a shareholder of SFMI-Chronopost was commercially justified under the market economy investor principle'. In that connection, it observed in particular:

'Under that test, to establish whether a transaction between a Member State and an undertaking contains State aid, it is necessary to verify whether the undertaking would have been able to obtain the monies on the private capital markets. To assess

whether the Post Office has behaved like a market economy investor the Commission has to look at the return to the parent company in terms of dividends distributed and capital growth. No State aid arises if the internal rate of return (“IRR”) of the investment exceeds the cost of capital of the company (that is to say, the normal rate of return that a private investor would require under similar circumstances)’.

13. On that basis, the Commission has therefore ‘worked out the IRR and compared it with SFMI-Chronopost’s cost of equity in 1986..., the year when the company was incorporated and started its operations. This has permitted it to verify whether the profitability of the whole capital venture has been adequate’. As the IRR calculated by the Commission was ‘largely in excess of the cost of equity in 1986’, it concluded that ‘no State aid was involved in the financial transactions between the Post Office and its subsidiary over the years 1986 to 1991’ and that this conclusion was all the more valid ‘for the years subsequent to 1991, when the amount of dividends paid out was higher than in the previous period’.

*The action before the Court of First Instance and the contested judgment*

14. By application lodged on 30 December 1997, Ufex, DHL International, Federal Express and CRIE called on the Court of

First Instance to annul the Commission’s decision. The application was naturally opposed by the Commission and the French Government, La Poste and Chronopost subsequently intervened in support of the Commission.

15. According to the contested judgment, ‘the applicants put forward four pleas for annulment in support of their application’, alleging: (i) ‘infringement of the rights of the defence, in particular the right of access to the file’; (ii) ‘an inadequate statement of reasons’; (iii) ‘errors of fact and manifest errors of assessment’; and (iv) ‘failure to apply the concept of State aid’.<sup>11</sup>

16. For present purposes, particular importance attaches to the fourth plea, which ‘is in two parts, alleging that the Commission failed to apply the concept of State aid, first by not taking account of normal market conditions when analysing the remuneration for the assistance provided by La Poste to SFMI-Chronopost, and second by finding that this concept did not cover various measures from which SFMI-Chronopost allegedly benefited’.<sup>12</sup> The first allegation made in that plea was accepted by the Court of First Instance on the basis of a legal assessment which is at the centre of the complaints raised in the appeals with which we are concerned here.

<sup>11</sup> — Paragraph 37.

<sup>12</sup> — Paragraph 39.

17. The Court of First Instance held as follows in that connection:

‘64 The aim of Article 92(1) of the Treaty is to prevent trade between Member States from being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or certain products (Case C-387/92 *Banco Exterior de España v Ayuntamiento de Valencia* [1994] ECR I-877, paragraph 12, Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 26, and *SFEI*, paragraph 58).

65 The concept of aid thus encompasses not only positive benefits, such as subsidies, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict sense of the word, are of the same character and have the same effect....

66 Furthermore, as the Court of Justice held in Case 78/76 *Steinike & Weinlig v Germany* [1977] ECR 595, paragraph 21, regard must primarily be had to the effects of the aid on the favoured undertakings or producers and not the status of the institutions distributing or administering the aid.

67 It follows that the concept of aid is an objective one, the test being whether a State measure confers an advantage on one or more particular undertakings (Case T-67/94 *Ladbroke Racing v Commission* [1998] ECR II-1, paragraph 52, and Case T-46/97 *SIC v Commission* [2000] ECR II-2125, paragraph 83).

68 The interpretation of the concept of State aid in the circumstances of the present case was given by the Court of Justice in the *SFEI* judgment, namely that “the provision of logistical and commercial assistance by a public undertaking to its subsidiaries, which are governed by private law and carry on an activity open to free competition, is capable of constituting State aid within the meaning of Article 92 of the EC Treaty if the remuneration received in return is less than that which would have been demanded under normal market conditions”.

69 It follows from the above considerations that in order to determine whether the measures in question constitute State aid, it is necessary to examine the situation from the point of view of the recipient undertaking, in this case SFMI-Chronopost, and to establish whether it received the logistical and commercial assistance in question at a price which it would not have obtained under normal market conditions (*SFEI* judgment, paragraph 60, *SIC v Commission*, paragraph 78, Case C-342/96 *Spain v Commission* [1999] ECR I-2459, paragraph 41, and Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 22).

70 In the *SFEI* judgment the Court of Justice found that such a determination presupposes an economic analysis taking into account all the factors which an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the services provided (paragraph 61).

71 In the present case, the Commission observes in the contested decision that the fact that the transaction takes place between an undertaking operating in a reserved market and its subsidiary operating in a competitive market is of no relevance to this case. The Court of Justice has never suggested that in determining whether State aid is involved the Commission must apply a different approach if one of the parties to the transaction has a monopoly’.

72 Consequently, the Commission considered that the internal prices at which products and services are provided between companies belonging to the same group “do not involve any financial advantage whatsoever if they are full-cost prices (total costs plus a mark-up to remunerate equity capital investment)”.

73 It is evident from these statements that the Commission did not base its decision on an economic analysis of the kind required by the *SFEI* judgment in order to show that

the transaction in question would be comparable to a transaction between undertakings operating in normal market conditions. On the contrary, in the contested decision the Commission merely verified the costs incurred by La Poste in providing logistical and commercial assistance and the extent to which those costs were reimbursed by SFMI-Chronopost.

74 Even supposing that SFMI-Chronopost paid La Poste’s full costs for the provision of logistical and commercial assistance, that would not be sufficient in itself to show that no aid within the meaning of Article 92 of the EC Treaty was granted. Given that La Poste might, by virtue of its position as the sole public undertaking in a reserved sector, have been able to provide some of the logistical and commercial assistance at lower cost than a private undertaking not enjoying the same rights, an analysis taking account solely of that public undertaking’s costs cannot, in the absence of other evidence, preclude classification of the measures in question as State aid. On the contrary, it is precisely a relationship in which the parent company operates in a reserved market and its subsidiary carries out its activities in a market open to competition that creates a situation in which State aid is likely to exist.

75 The Commission should thus have examined whether those full costs took account of the factors which an undertaking acting under normal market conditions should have taken into consideration when



fixing the remuneration for the services provided. Hence, the Commission should at least have checked that the payment received in return by La Poste was comparable to that demanded by a private holding company or a private group of undertakings not operating in a reserved sector, pursuing a structural policy — whether general or sectorial — and guided by long-term prospects (see to this effect Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paragraph 20).

76 It follows from the foregoing that, in the contested decision, by ruling out the very existence of State aid without checking whether the remuneration received by La Poste for the provision of commercial and logistical assistance to SFMI-Chronopost corresponded to the price that would have been asked under normal market conditions, the Commission based its decision on an incorrect interpretation of Article 92 of the Treaty.

77 This interpretation is not invalidated by the Commission's submission that Article 222 of the EC Treaty (now Article 295 EC) provides that the Treaty in no way prejudices the system of property ownership in Member States. To require that the remuneration which a public undertaking with a monopoly receives in return for the provision of commercial and logistical assistance to its subsidiary should correspond to the payment which would have been demanded under normal market

conditions, does not prohibit such a public undertaking from entering an open market but subjects it to the rules of competition, as the fundamental principles of Community law require. Such a requirement does not adversely affect the system of public ownership and merely ensures that public and private ownership are treated equally.'

18. In the light of those considerations, the Court of First Instance therefore held that the first part of the fourth plea was well founded and that:

'The first article of the contested decision must therefore be annulled in so far as it finds that the logistical and commercial assistance provided by La Poste to its subsidiary SFMI-Chronopost does not constitute State aid to SFMI-Chronopost, and it is not necessary to examine the second part of this plea or the other pleas in so far as they relate to the logistical and commercial assistance provided by La Poste to SFMI-Chronopost. In particular, it is not necessary to examine the second plea, in which the applicants allege that the statement of reasons for the contested decision regarding logistical and commercial assistance is inadequate' (paragraph 79).

19. In the paragraphs that followed, the Court of First Instance therefore considered

only the first plea (alleging infringement of the rights of the defence) and those aspects of the third plea (alleging errors of fact and manifest errors of assessment) that did not relate to the logistical and commercial assistance provided by La Poste to SFMI-Chronopost. In both cases, the applicants' allegations were held to be unfounded. The Court of First Instance therefore annulled Article 1 of the contested decision within the specified limits and dismissed the remainder of the application.

#### *The procedure before the Court*

20. By notices lodged at the Registry of the Court on 19 and 27 February 2001, Chronopost (Case C-83/01 P), the French Republic (Case C-93/01 P) and La Poste (Case C-94/01 P), which had intervened in support of the Commission in the case before the lower court, appealed against the judgment of the Court of First Instance, requesting the Court to set aside the judgment in question and (in the case of Chronopost) hear the case itself and give judgment directly on the action brought before the Court of First Instance. Ufex, DHL International, Federal Express International (France) and CRIE also took part in the appeal proceedings thus initiated, lodging a joint response pursuant to Article 115 of the Rules of Procedure (for present purposes I shall refer to these entities collectively as 'Ufex'); the Commission on the other hand did not respond and is therefore not a party in the present cases. With the permission of the President of the

Court, pursuant to Article 117 of the Rules of Procedure, Chronopost and La Poste submitted a reply and this was followed by a rejoinder from Ufex.

#### Legal analysis

21. In the present cases which, for obvious reasons, I shall examine together, the grounds of appeal put forward by Chronopost, the French Republic and La Poste largely coincide. Essentially, they claim:

- (i) infringement of Article 87(1) EC arising from an incorrect interpretation of the reference to 'normal market conditions' contained in the *SFEI* judgment;
- (ii) infringement of Article 88(2) EC and a consequent breach of procedure;
- (iii) infringement of the broad discretion accorded to the Commission in assessing an economically complex measure;

(iv) infringement of Article 87(1) EC arising from an incorrect interpretation of the constituent elements of the concept of State aid, in particular the granting of an advantage to the recipient undertaking and the transfer of public resources;

(v) infringement of the obligation to provide a statement of reasons.

*The first plea, alleging infringement of Article 87(1) EC arising from an incorrect interpretation of the concept of 'normal market conditions'*

#### Arguments of the parties

22. The first plea submitted by the appellants against the contested judgment turns on the concept of 'normal market conditions' employed in the *SFEI* judgment to determine the circumstances in which the provision of logistical and commercial assistance by a public undertaking to its subsidiaries operating in a sector open to free competition is capable of constituting State aid. In that judgment, the Court held that the provision of such assistance is capable of constituting State aid 'if the remuneration received in return is less than

that which would have been demanded *under normal market conditions*'.<sup>13</sup>

23. As we have seen, for the purpose of applying that principle in the present case, the Commission considered that the relevant question is 'whether the terms of the transaction between the Post Office and SFMI-Chronopost are comparable to those of an equivalent transaction between a private parent company, *which may very well be a monopoly* (for instance because of the ownership of exclusive rights), and its subsidiary'.<sup>14</sup> In that connection, it explained that 'internal prices at which products and services are transacted between companies belonging to the same group do not involve any financial advantage whatsoever [and thus do not constitute State aid] if they are full-cost prices (total costs plus a mark-up to remunerate equity capital investment)'. However that approach was rejected by the Court of First Instance, which held that in accordance with the *SFEI* judgment 'the Commission should thus have examined whether those full costs took account of the factors which an undertaking *acting under normal market conditions* should have taken into consideration when fixing the remuneration for the services provided. Hence, the Commission should at least have checked that the payment received in return by La Poste was comparable to that demanded by a private holding company or a private group of undertakings *not operating in a reserved sector*, pursuing a structural policy — whether general or sectorial — and guided by long-term prospects'.<sup>15</sup>

13 — Paragraph 62; my emphasis.

14 — My emphasis.

15 — Paragraph 75; my emphasis.

24. By this plea, the appellants contest the conclusion reached by the Court of First Instance which, in their submission, essentially infringed Article 87(1) EC in relation to the concept of State aid by distorting the concept of ‘normal market conditions’.

25. They observe in particular that in order to apply that concept in the present case under the well-known market economy investor principle the Court of First Instance should have referred to the return that would have been demanded from its own subsidiary by a private operator comparable to La Poste pursuing ‘a structural policy — whether general or sectorial — and guided by prospects of profitability in the longer term’.<sup>16</sup> It is, they claim, clear from the case-law of the Court that in order to determine whether aid has been granted it is necessary to compare the behaviour of the public undertaking with that of a private investor ‘of a size comparable’ to that of the bodies administering the public sector<sup>17</sup> or ‘which, so far as possible, is in the same position’.<sup>18</sup> Thus, in referring to a private undertaking ‘not operating in a reserved sector’, they claim that the Court of First Instance erred in basing its comparison on an undertaking that was structurally different from La Poste instead of comparing the behaviour of the latter with that of an undertaking in the same position (that is to say, an undertaking which has a reserved sector).

26. Moreover, the appellants consider that it is clear from Advocate General Jacobs’s Opinion in the *SFEI* case, subsequently confirmed in the judgment delivered by the Court, that the traditional private investor criterion should apply in the present case. They add that if the Court had wanted to refer in its judgment to a private operator which does not have a legal monopoly, it would have said so clearly and unambiguously instead of referring simply to ‘normal market conditions’.

27. In the same connection, Chronopost points out that the case-law of the Court does not in fact require the prices of the public undertaking to be compared with those of its competitors. It is consequently incorrect to assert that there is State aid simply because La Poste charges less for its services than the parent companies of SFMI-Chronopost’s competitors. In fact, there would have been aid only if La Poste had behaved in a manner that would have been impossible for a private operator in the same position, that is to say if it had not required normal remuneration for its services.

28. Chronopost adds that, if granting La Poste a reserved sector does not constitute State aid, any advantages La Poste may derive from the concession in terms of productivity (yet to be demonstrated) are no different from the economies of scale that could be achieved by a private undertaking which is in a dominant position or

16 — Judgment in Case C-305/89 *Italy v Commission*, cited above, paragraph 20.

17 — Judgments in Case C-305/89 *Italy v Commission*, cited above, paragraph 19, and Case C-42/93 *Spain v Commission* [1994] ECR I-4175, paragraph 13.

18 — Judgment in Case C-256/97 *DMT* [1999] ECR I-3913, paragraph 25.

has a monopoly. Consequently, even if the price charged to its subsidiary reflects such economies, it does not constitute State aid if it allows La Poste to cover all its costs, since in that case it would prevent more transfers of resources to activities subject to competition than a private undertaking would have made in the same circumstances.

29. On the other hand, the appellants state that the conclusion reached by the Court of First Instance is abstract, suggesting as it does that in order to determine whether aid has been granted it is necessary to take account of the costs a hypothetical private undertaking 'not operating in a reserved sector' would incur in establishing and maintaining a network comparable to that of La Poste, with which to provide a similar service of logistical and commercial assistance. Ultimately, that would entail finding an ideal undertaking operating in an ideal market, with serious implications for legal certainty.

30. But the appellants also claim that the solution indicated by the Court of First Instance is impracticable. According to the French Republic, that solution is absurd since a private operator which did not have a legal monopoly would never acquire a public service network comparable with that of La Poste. That is confirmed by La Poste, which points out that Ufex itself

maintained in the proceedings before the Court of First Instance that 'the guarantee of a commercial opportunity such as that offered by SFMI, which is conceivable only in the world of public service, appears completely unrealistic in a competitive sector.... A network such as that of SFMI (to be precise, La Poste) is clearly not a market network'. Moreover, since SFMI-Chronopost's competitors were not interested in having access to a similar network (witness the fact that La Poste has received no requests in that connection), La Poste argues that there is no price that could serve as a reference. Chronopost then states that the conclusion reached by the Court of First Instance is abstract, since in practice it would entail finding an ideal undertaking operating in an ideal market and would generate considerable legal uncertainty.

31. More generally, the appellants observe that in practice the contested judgment prevents public monopolies from operating even in markets which are open to competition, thus subjecting them to serious discrimination. Also it calls the financing of public services into question, contrary to the principles of Community law on the subject.

32. Ufex naturally takes the opposite view that the Court of First Instance was correct in its interpretation of the concept of

‘normal market conditions’ employed in the *SFEI* judgment.

33. According to *Ufex*, in order to determine whether certain transactions are conducted under ‘normal market conditions’ and thus do not constitute aid, a distinction must be drawn between cases where the State acts as an investor or creditor and those where it is operating in a competitive market by diversifying activities of a public undertaking which has a legal monopoly.

34. In the first case, it contends that in assessing whether ‘normal market conditions’ obtain it is not necessary to determine a market price (the State is not in fact selling goods or providing services) but only to take account of the return on the capital invested and the risks incurred. However, where a public undertaking operating in a reserved sector provides services for its subsidiaries operating in a market that is open to competition, the transactions would in its view be conducted under ‘normal market conditions’ only if the payment for such services corresponded to the market price. In that case, it would essentially be necessary to employ the market price benchmark normally used by the Commission to establish whether a guarantee given by the State or the sale of public assets (such as public undertakings, land or buildings, for example) constitute State aid.

35. According to *Ufex*, that is how the *SFEI* judgment should be interpreted. In order to establish whether the logistical and commercial assistance provided by La Poste constituted aid to SFMI-Chronopost within the meaning of that judgment, it is necessary to compare the price that company paid with the price a competitor would have had to pay to buy the same services on the market. To that end, the purchase of the services in question may also be assessed not in a completely separate market but within a group operating under ‘normal market conditions’, taking into account the fact that within such a group the parent company may adjust its prices in the light of a structural policy involving long-term investments. But in any case, as the Court of First Instance stated, such a comparison must be made with a private holding company or a private group of undertakings ‘not operating in a reserved sector’, inasmuch as an undertaking which has a legal monopoly is certainly not operating under normal market conditions.

36. In such circumstances, it would therefore be a mistake to assess whether there is State aid by reference to the return obtained by a parent company operating in a reserved sector. The fact that the parent company has a legal monopoly may indeed compromise the assessment in that case, as there is reason to fear that in a monopoly position of this kind costs may be less than the market rate with the result that profits may be artificially high. The Court of First Instance therefore quite rightly avoided concentrating in the contested judgment on the costs incurred by the public undertaking with a legal monopoly and thus on its profitability, referring instead to the market prices charged for

providing the services in question by a private undertaking operating under normal market conditions, thus without a legal monopoly.

37. Ufex adds that in order to carry out the checks required by the Court of First Instance it is not necessary to consider the cost a private operator not operating in a reserved sector would incur in establishing from scratch a postal network comparable to the network commanded by La Poste, which was clearly not a 'market network'. It would merely be necessary to ascertain what services La Poste offered to Chronopost and assess the costs a private undertaking would incur in providing similar services under normal market conditions. Since, for example, the service Chronopost offered to its customers included the use of 14 258 post offices belonging to La Poste to send and collect dispatches, the costs which a private operator would have incurred for the use of such premises (or rather of the part of such premises required to provide the service offered by Chronopost) should be assessed, including the prices charged for renting or buying them on the property market.

to be no doubt that in the period in question La Poste was 'entrusted with a service of general economic interest' within the meaning of the judgment in *Corbeau*.<sup>19</sup> That service consisted essentially in 'the obligation to collect, carry and distribute mail on behalf of all users throughout the territory of the Member State concerned, at uniform tariffs and on similar quality conditions, irrespective of the specific situations or the degree of economic profitability of each individual operation'.<sup>20</sup> In other words, La Poste was entrusted with providing what was later defined, in Article 3 of Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service,<sup>21</sup> as a 'universal service'. To that end, it had to acquire substantial infrastructures and resources of various kinds (the 'postal network'), to enable it to provide all users with a basic postal service (at uniform tariffs and on similar quality conditions) even in rural or sparsely populated areas where the tariffs did not cover the cost of providing the service. The very fact that La Poste was entrusted with that task of general economic interest justified granting a legal monopoly on the ordinary mail delivery service since, as the judgment in *Corbeau* explains, 'the obligation on the part of the undertaking entrusted with that task to perform its services in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and

## Assessment

38. In presenting my assessment of this plea, I must first observe that there appears

19 — Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 15.

20 — *Ibidem*.

21 — Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 (OJ 1998 L 15, p. 14).

hence justifies a restriction of competition from individual undertakings where the economically profitable sectors are concerned'.<sup>22</sup>

39. In order to provide a universal service, La Poste therefore had to acquire a particular network — which we may describe, in the phrase later used in Directive 97/67, as a 'public postal network'<sup>23</sup> — which would not be justified in purely 'market' terms. That network, which involved very high fixed costs, was established and maintained thanks to various forms of intervention by the French administration (of which La Poste was an integral part until 1990), including, as we have seen, granting a legal monopoly on the ordinary mail delivery service (the 'reserved sector').

22 — Paragraph 17 of the judgment. To be precise, the Court held that that restriction of competition is justified by the need to prevent private operators from skimming off the cream as it were, since 'to authorise individual undertakings to compete with the holder of the exclusive rights in the sectors of their choice corresponding to those rights would make it possible for them to concentrate on the economically profitable operations and to offer more advantageous tariffs than those adopted by the holders of the exclusive rights since, unlike the latter, they are not bound for economic reasons to offset losses in the unprofitable sectors against profits in the more profitable sectors' (paragraph 18).

23 — I note in this connection that Article 2(2) of Directive 97/67 defines the 'public postal network' as 'the system of organisation and resources of all kinds used by the universal service provider(s) for the purposes in particular of:

- the clearance of postal items covered by a universal service obligation from access points throughout the territory,
- the routing and handling of those items from the postal network access point to the distribution centre,
- distribution to the addresses shown on items'.

40. The same network, which must in any case be maintained in order to provide the universal service, was essentially employed by La Poste to offer its own subsidiary SFMI-Chronopost (operating in the 'express delivery' sector) logistical assistance which consists in making available to it the use of its own postal infrastructure 'for the collection, sorting, transport and delivery of its dispatches'. In particular, 'SFMI-Chronopost's access to the parent company's network' was cited by the Commission as one of the reasons for its success and the fact that it had 'conquered market shares and consolidated its market position and been constantly profit-making'. The Commission observed that 'especially during the early years of operation, SFMI-Chronopost subcontracted most of its activity to the Post Office and therefore incurred limited start-up costs (in particular, fixed costs)' and that, in its view, this explained 'why the company was provided with very limited equity capital'. Availing itself of La Poste's network, SFMI-Chronopost offered its own customers a product that was 'less sophisticated than other products offered by the competitors and in particular than DHL's products', although it charged 'lower prices': in particular, the Commission noted that 'SFMI-Chronopost normally collected the occasional customers' dispatches at the postal offices, while competitors collected dispatches at home'.

41. In short, the logistical assistance in question consisted in making La Poste's public postal network (financed at least in part from the proceeds of the legal monopoly) available to SFMI-Chronopost to



pursue its own activities in the express delivery sector.

42. In view of the particular kind of service La Poste provided for SFMI-Chronopost, I — like the appellants — am inclined to have doubts about the criterion employed by the Court of First Instance to determine whether the remuneration for that service constituted State aid.

43. As we have seen, according to the Court of First Instance, the Commission could not merely verify whether the remuneration paid by SFMI-Chronopost covered the 'full costs' incurred by La Poste in providing its assistance; on the contrary, it 'should... have examined whether those full costs took account of the factors which an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the services provided. Hence, the Commission should at least have checked that the payment received in return by La Poste was comparable to that demanded by a private holding company or a private group of undertakings *not operating in a reserved sector*, pursuing a structural policy — whether general or sectorial — and guided by long-term prospects'.<sup>24</sup>

44. In short, the Court of First Instance held that the Commission should have

found out what charge would have been made for the same services by a private holding company or a leading company in a private group which was not required to provide a universal postal service and so did not have a legal monopoly. In other words, the Commission should have taken as a parameter the remuneration such a private operator would have demanded from one of its subsidiaries (in addition to payment for commercial assistance) for placing a postal network comparable to La Poste's at its disposal.

45. In so ruling, however, the Court of First Instance in my view required the Commission to apply a test that was clearly unrealistic and consequently unsuitable for the purpose of determining in a similar case whether there was State aid within the meaning of Article 87 EC.

46. As we have seen, the establishment and maintenance of a public postal network such as that commanded by La Poste is not justified in purely market terms, since such a network is clearly designed to provide a universal service; moreover Ufex itself has said that 'a network such as that available to SFMI is clearly not a market network'.<sup>25</sup> This means that 'under normal market conditions' it is not rational from an economic point of view to acquire such a network, incurring the considerable fixed

24 — Paragraph 75; my emphasis.

25 — Rejoinder in Case C-94/01, paragraph 28.

costs that implies, merely in order to provide other customers or subsidiaries with logistical assistance of the kind at issue in this case. The provision of such assistance is economically justified only for an undertaking that is in any case obliged to maintain a public postal network similar to that commanded by La Poste in order to assure a universal service (financed by the State), since only an undertaking that already had such a network could offer the logistical assistance in question by keeping the additional costs reasonably low.

47. It follows that ‘under normal market conditions’ a private undertaking that was not obliged to maintain a public postal network comparable to that commanded by La Poste in order to guarantee the provision of a universal postal service (in return for adequate compensation from the State, for example in the form of a legal monopoly) would not have such a postal network and could not therefore provide one of its subsidiaries with logistical assistance of the kind at issue in this case. Consequently, in asking the Commission to find out what charge would have been made for such assistance by a hypothetical private holding company or a leading company in a private group which was not required to provide a universal postal service and so did not enjoy the benefit of a reserved sector, the Court of First Instance erred in its interpretation of Article 87 EC because it took as a benchmark for the purpose of determining whether there was State aid a private operator which would not in fact exist ‘under normal market conditions’.

48. Nor, in my view, can that conclusion be called into question by Ufex’s contention that in order to carry out the checks required by the Court of First Instance it is not necessary to consider the cost a private undertaking not operating in a reserved sector would incur in establishing from scratch a postal network comparable to the network commanded by La Poste but merely to assess the costs a private undertaking would incur in providing similar services under normal market conditions. I do not see how, without somehow acquiring a public postal network comparable to the network commanded by La Poste, a private operator could ever provide one of its own subsidiaries operating in the express delivery sector with logistical assistance which consists in making available to it a postal network of that kind ‘for the collection, sorting, transport and delivery of its dispatches’.

49. That being established, the next question is how to determine within the meaning of the *SFEI* judgment whether in such a case the remuneration received in return for providing logistical and commercial assistance is ‘less than that which would have been demanded under normal market conditions’. The grounds of the judgment do not give any clear guidance in this connection, merely stating that ‘in order to determine whether a State measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions. In examining that question, it is for the national court to determine what is

normal remuneration for the services in question. Such a determination presupposes an economic analysis taking into account all the factors which an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the services provided'.<sup>26</sup>

50. The appellants, as we have seen, consider that the well-known criterion of the private investor in a market economy should be employed for the purpose. It should therefore be determined whether the remuneration paid by SFMI-Chronopost is less than the remuneration a private undertaking in the same position as La Poste, that is to say with a similar public postal network, would have demanded from one of its own subsidiaries in return for providing the assistance in question.

51. As the appellants have pointed out, that criterion appears to have been favoured by Advocate General Jacobs in his Opinion in *SFEI*, in which he expressed the view that 'the provision by a public body of logistical and commercial assistance to an undertaking in which it has a direct or indirect holding on financial terms that are more favourable than those which the undertaking could obtain from a comparable commercial investor constitutes aid for the purposes of Article 92(1)'. For that pur-

pose, it seemed to him that it was necessary 'to consider whether a commercial investor would be satisfied with the level of the consideration received for the assistance, having regard to factors such as the cost of providing the assistance, the size of its investment in the undertaking and its return from it, the importance of the activity of the undertaking to the investing group as a whole, conditions on the market in question and the period for which the assistance is granted'.<sup>27</sup>

52. However, I do not think that in a case such as the present one the use of that criterion can guarantee that the remuneration paid by the subsidiary does not constitute State aid. A private undertaking in the same position as La Poste would have to fix the amount of the remuneration so as to maximise the profits for the group as a whole, allowing naturally for the profits distributed by the subsidiary operating in the express delivery sector.<sup>28</sup> Such an undertaking might therefore be satisfied with a lower return in pursuit of a general strategy designed to strengthen the subsidiary's competitive position in the express delivery market. Thus, it could give the subsidiary the exclusive advantage of all the economies of scale arising from the use of a postal network already established for

<sup>27</sup> — Point 61.

<sup>28</sup> — For the purposes of the present argument, no account is taken of any other constraints, arising for example from specific tax or company provisions, which may affect the prices charged for transactions within the group.

<sup>26</sup> — Paragraphs 60 and 61.

the provision of a universal service,<sup>29</sup> in order to increase its profits and thus the profits of the group as a whole.

53. The company operating in the express delivery sector could thus be given a substantial competitive advantage over its competitors arising not just from the economies of scale that can be made within any private group ‘under normal market conditions’ but from the fact that it is a subsidiary of an undertaking entrusted with the task of providing a universal postal service which consequently has a public postal network financed by the State through the grant of a legal monopoly. In my view, this proves that the application of the private investor criterion in a case such as this will not serve to establish, as the *SFEI* judgment requires, whether the subsidiary receives ‘an economic advantage which it would not have obtained under normal market conditions’.<sup>30</sup>

54. In fact, in order to prove without doubt that SFMI-Chronopost had benefited from such an economic advantage, the price paid to La Poste would have to be compared with the price La Poste could have obtained if it had offered its logistical and commercial assistance to the express delivery companies concerned on the market. In that way it could really be determined, first, whether SFMI-Chronopost had obtained

that assistance at a lower price than its competitors would have paid for the same services and, second, whether the remuneration received in return by La Poste was ‘less than that which would have been demanded under normal market conditions’.

55. However, in the absence of any specific and objective references in the market, I fear that assessment might appear to be excessively hypothetical and abstract and might produce highly controversial, not to say arbitrary, results. In view of the specific nature of the present case, I believe the market does not afford suitable benchmarks for such an assessment, especially as:

- on the one hand, as we have seen, the assistance in question could be offered only by the undertaking entrusted with the task of providing the universal postal service in France (thus by La Poste), with the result that it is impossible to find any data on the prices charged by other operators for providing similar services;<sup>31</sup> and

29 — The remuneration might for example represent only the additional costs specifically incurred in providing the logistical and commercial assistance to the subsidiary and might not cover an appropriate part of the fixed costs of maintaining the public postal network.

30 — Paragraph 60.

31 — In my view, this is an important difference between the present case and the cases of *Sécuripost* (Commission Decision 1999/676/EC of 20 July 1999 concerning presumed aid allegedly granted by France to *Sécuripost*, OJ 1999 L 274, p. 37) and *SNCM* (Commission Decision 2002/149/EC of 30 October 2001 on the State aid awarded by France to the *Société nationale maritime Corse-Méditerranée* (SNCM), OJ 2002 L 50, p. 66) cited by *Ufex*, in which the Commission was able to compare the prices charged or paid for certain services by the public undertakings suspected of having granted State aid with those charged or paid for similar services by other customers.

— on the other, as La Poste has stated without contradiction, none of SFMI-Chronopost's competitors has ever sought access to La Poste's public service network, not even when (after 1995) SFMI-Chronopost no longer had exclusive access to that network.<sup>32</sup> As a result, there are likewise no objective and verifiable data on the price other operators competing with SFMI-Chronopost would have been prepared to pay for the logistical and commercial assistance in question.

verifiable data such as the details of the costs incurred by La Poste in providing the services in question. In the absence of adequate information on the market value of the services offered and with no estimates associated with a general group strategy to go on, an undertaking operating under normal market conditions would be obliged to fix the price of such services on the basis of their costs. Consequently, in those particular circumstances, I think the costs represent the only objective and verifiable factor which, pursuant to the *SFEI* judgment, 'an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the services provided'.

56. In the light of these considerations, I therefore take the view that in the absence of detailed indications as to the market value of the logistical and commercial assistance offered by La Poste, it is necessary to find other criteria by which to determine whether the remuneration for that assistance is fixed so as to favour SFMI-Chronopost, thus giving it 'an economic advantage which it would not have obtained under normal market conditions'.

57. To that end, I think it is legitimate for present purposes to refer to objective and

58. On that basis, I consider in particular that the possibility that SFMI-Chronopost was granted State aid can be precluded if the price charged covered all the additional costs, fixed and variable, specifically incurred by La Poste in order to provide the logistical and commercial assistance (that is to say, direct costs) and an adequate part of the fixed costs associated with maintaining the public postal network (that is to say, common costs incurred in providing the assistance in question and also the universal service).<sup>33</sup> In this way it would be

32 — According to the contested decision, 'Chronopost was... granted until that date exclusive access to the post office's network'. That is not disputed by Ufex, although it claims that access to La Poste's network was available to other customers only from 18 March 1995 and not from 1 January of that year (see paragraphs 172 and 173 of the response, which referred in particular to the Commission decision in Case No IV/M.102, cited above, authorising the creation of the common operator GNEW).

33 — Useful indications in this connection are given in Article 14(2) and (3) of Directive 97/67, which sets out the cost accounting principles which universal service providers must observe.

possible to determine whether the economies of scale resulting from the use of La Poste's public postal network were all credited to SFMI-Chronopost and whether or not it contributed *pro rata* to covering the costs incurred by La Poste in maintaining that network.<sup>34</sup>

59. It therefore follows, in my view, that in the present case it is incorrect to assert, as the Court of First Instance did, that 'the Commission did not base its decision on an economic analysis of the kind required by the *SFEI* judgment in order to show that the transaction in question would be comparable to a transaction between undertakings operating in normal market conditions' inasmuch as it 'merely verified the costs incurred by La Poste in providing logistical and commercial assistance and the extent to which those costs were reimbursed by SFMI-Chronopost'.

60. Finally, in the light of all the foregoing considerations, I consider that the Court of First Instance erred in law in interpreting

<sup>34</sup> — Conversely, it would also be possible to determine whether the remuneration paid by SFMI-Chronopost helped to reduce the costs incurred by La Poste in providing the universal service. In that connection, it should be noted that in its recent judgment in Case C-340/99 *TNT Traco* [2001] ECR I-4109, on the application of Articles 82 and 86(1) and (2) EC in a case in some respects similar to the present one, the Court held that when the undertaking responsible for the universal postal service is 'itself supplying an express mail service not forming part of that service... it must also ensure that neither all nor part of the costs of its express mail service are subsidised by the universal service, lest charges for the universal service and, consequently, the potential losses of that service be improperly increased' (paragraph 58).

Article 87(1) EC as meaning that the Commission could not determine whether there was aid to SFMI-Chronopost by reference to the costs incurred by La Poste but that it should on the contrary have checked whether the payment received from it in return 'was comparable to that demanded by a private holding company or a private group of undertakings not operating in a reserved sector, pursuing a structural policy — whether general or sectorial — and guided by long-term prospects'.

61. In examining the pleas submitted by Ufex, the Court of First Instance should on the contrary have interpreted the provision in question as meaning that in a case such as the present one the Commission could preclude the possibility that SFMI-Chronopost was granted State aid if the price charged covered all the additional costs, fixed and variable, specifically incurred by La Poste in order to provide the logistical and commercial assistance, and an adequate part of the fixed costs associated with maintaining the public postal network.

62. In accordance with the plea in question, without needing to examine the other pleas, the judgment of the Court of First Instance should therefore be set aside in so far as it in turn annulled Article 1 of the contested decision 'in so far as it finds that the logistical and commercial assistance provided by La Poste to its subsidiary SFMI-Chronopost does not constitute State aid to SFMI-Chronopost'.

63. The case relating to the action for annulment brought by Ufex should accordingly be referred back to the Court of First Instance so that it may rule in the light of the indications given by this Court on the pleas submitted at first instance by Ufex against the Commission's assessment of the logistical and commercial assistance provided by La Poste to its subsidiary.

## II — Conclusions

64. In the light of the foregoing arguments, I therefore propose that the Court of Justice:

- declare that the judgment delivered on 14 December 2000 by the Court of First Instance in Case T-613/97 *Ufex and Others v Commission* is set aside in so far as it annulled Article 1 of Commission Decision 98/365/EC of 1 October 1997 concerning alleged State aid granted by France to SFMI-Chronopost 'in so far as it finds that the logistical and commercial assistance provided by La Poste to its subsidiary SFMI-Chronopost does not constitute State aid to SFMI-Chronopost';
- refer the case back to the Court of First Instance;
- reserve the costs.