OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 16 October 1991 *

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* Original language: Dutch.

Mr President,
Members of the Court,

1. The Netherlands Government on the one hand and Koninklijke PTT Nederland NV and PTT-Post BV (hereinafter referred to together as 'PTT' or 'PTT-Post BV') on the other are asking the Court to declare void the Commission decision of 20 December 1989 concerning the provision in the Netherlands of express delivery services[1] (hereinafter referred to as 'the contested decision'). In that decision, which was addressed to the Netherlands, the provisions of Articles 2 and 12 of the Netherlands Law of 26 October 1988 amending the legislation on the operation of the postal service (hereinafter referred to as 'the Postal Law, 1988')[2] together with those of the implementing Decree of 19 December 1988, which reserves for PTT Post BV the express collection, transport and distribution of postal items weighing up to 500 g, at a price not exceeding HFL 11.90 for EEC destinations and HFL 17.50 for non-EEC destinations, and the obligation to register all tariffs beforehand, imposed by the Decree of 12 May 1989,[3] are declared incompatible with Article 90(1) of the EEC Treaty, read in conjunction with Article 86 of that Treaty (see Article 1 of the decision).

By order of 4 June 1991, the Court transferred Case C-66/90 to the Court of First Instance in pursuance of the first paragraph of Article 47 of the Statute on the Court of Justice of the EEC. By order of 21 June 1991 the Court of First Instance, in pursuance of the last sentence of the third paragraph of Article 47 of the Statute, declared itself as having no jurisdiction on the ground that Case C-48/90 and Case C-66/90 both seek an order that the same measure is void. The Court then ordered the joinder of the two cases and I shall therefore deal with them jointly in this Opinion.

A — Background

1. *The provision of express delivery services in the Netherlands*

2. Before the entry into force of the Postal Law, 1988, the then State undertaking, PTT, enjoyed a statutory monopoly under the Postal Law, 1954, for the transport of postal items up to and including 500 g. The PTT services traditionally carried out this transport (collection, sorting and transport, distribution) in a standardized manner. At the end of the 1960s, however, it appeared that there was a demand for transport services of greater added value, more particularly for more rapid and more individualized transport. A growing number of private messenger services set to work to satisfy this demand; the PTT, for their part, did not seem ready to perform these services, or capable of doing so, as is common ground between the parties. The demand which the private messenger services set out to satisfy concerned mainly the transport of important or urgent documents, or both. In so far as the items were less than 500 g in weight, these undertakings were, according to the literal wording of the Postal Law, 1954, acting in breach of the postal monopoly of the State undertaking, the PTT. However, — and this too is common ground — few or no steps were taken against these messenger

1 — OJ 1990 L 10, p. 47.
2 — *Staatsblad*, 1988, No 522.
3 — Regeling Registratie Koeriersdiensten, *Staatscourant*, 1989, No 109.

services by either the Netherlands authorities or PTT themselves, although there were sporadic prosecutions of private urban postal services. The parties give conflicting explanations for these proceedings: the Netherlands Government states that they were part of a policy aimed at permitting, under the former law, only messenger services 'in the true sense of the word', that is, services consisting in transporting an item on an entirely individual basis, directly from the sender to the addressee, not passing through a sorting centre and thus not being transported together with other items.[4] On the other hand the Commission explains the steps taken against the private urban postal services on the ground that they performed a service which was no better, or hardly, better than the basic postal services. However that may be, it is clear that the demand for rapid, individualized transport services for postal items increased considerably, that the private messenger services were able to satisfy that demand and the authorities never imposed restrictive conditions on their activities. They developed to a remarkable extent.

3. The Postal Law, 1988, however, reshuffled the cards. It expressly confirms the transport monopoly for postal items not exceeding 500 g from and to the Netherlands (including the Netherlands Antilles and Aruba): that service may be performed only by the holder of the exclusive franchise granted by the State, namely PTT-Post BV.[5] Any infringement of this franchise is made a punishable offence by Article 17 of the new postal law. However, there is one exception to this basic monopoly:[6] letters not exceeding 500 g may be collected, transported and delivered by persons other than the holder of the franchise if three cumulative conditions are met: (i) they must provide, for letters transported within the Netherlands or from the Netherlands abroad or from abroad to the Netherlands, a service significantly better than that offered by the franchise holder to anyone on national territory by normal express transport (that is, the express mail service), as regards both speed of delivery, a guarantee thereof and the possibility of keeping track of the communication during transport (a condition which I shall subsequently refer to as the 'quality condition'); (ii) they must provide that service at a rate which must not be less than a minimum laid down by the authorities, namely HFL 11.90 for transport within the Netherlands and to other Member States of the Community and HFL 17.50 for international transport to countries outside the Community (hereinafter referred to as the 'minimum price rule'); and (iii) they must have registered in advance and make an annual declaration of their rates and conditions of delivery (hereinafter referred to as the 'registration condition').[7] In the contested decision the Commission assumed (and I shall deal later with the question

4 — For a description of messenger services in the real sense, see *inter alia* PTT's reply in Case C-66/90, point 50.

5 — See Article 2 in conjunction with Article 12(1) of the Postal Law, 1988.

6 — See Article 12(2) of the Postal Law, 1988.

7 — The requirement to declare rates annually was laid down by the Regeling Registratie Koeriersdiensten (regulation on registration of messenger services) of 12 May 1989, *Staatscourant*, 1989, No 109.

whether that assumption was justified) that these three cumulative conditions did not apply to PTT-Post BV in the event of that undertaking also starting to provide messenger services — which it has actually been doing since 1 June 1990.

The Netherlands Government stated during the pre-litigation stage and during the proceedings before the Court, that these three conditions are necessary to guarantee the quality and continuity of the transport service which PTT-Post BV is required to provide, which is more extensive than the exclusive franchise. PTT-Post BV is in fact required to transport letters and small parcels not exceeding 10 kg in weight and of certain dimensions throughout the country (either in the normal way or by express mail service). The Netherlands Government states that, without these three conditions, PTT-Post BV's exclusive franchise could not be effectively protected and in particular that the private messenger services might make the franchise ineffective by also directing their activities towards profitable destinations (for example within big towns), thus leaving loss-making destinations to the PTT (which, by reason of its duty to transport, cannot abandon them).

2. *The contested decision*

4. As I have said, the conditions I have just outlined for the provision of messenger services in the Netherlands were declared, by the contested decision, to be incompatible with Article 90 of the EEC Treaty, read in conjunction with Article 86.[8] The decision is contested in a number of respects and an examination of the pleas in law relied upon by the applicants will allow me to go in greater detail into the relevant parts of those pleas. Here I shall simply give a general survey by way of introduction to my examination.

The contested decision is based on the existence of two separate but associated markets: that of a basic postal service and that of a messenger service.[9] Next the decision states that PTT-Post BV, as a consequence of its exclusive franchise for letters not exceeding 500 g, holds a dominant position on the market for basic postal services.[10] Because the Postal Law, 1988, imposes on private messenger undertakings three conditions for the transport of letters not exceeding 500 g, but does not impose these conditions on PTT-Post BV, it leads in three respects, the Commission states, to an abuse of that dominant position. First, because the minimum price rule has the effect that part of the market for messenger services is reserved for PTT-Post BV, with the risk that competition on that market will be completely eliminated;[11] secondly because the minimum price rule has the effect of imposing unfair prices and conditions on the

8 — It is true that the declaration of incompatibility, as appears from the operative part of the decision, relates only to the minimum price rule and the requirement to register, and not to the quality condition even though, as may be seen from the statement of reasons on which the decision is based (see Recital (14)), that condition also conflicts with Article 90 in conjunction with Article 86. This is apparently something which has been overlooked and which, whilst it has consequences for the obligations resulting for the Netherlands Government from the contested decision, makes no difference to the appraisal of the complaints relating to the statement of reasons and the legality of the decision.

9 — See Recital (3) to the contested decision.

10 — See Recital (10) to the contested decision.

11 — See Recital (11) to the contested decision.

messenger services;[12] thirdly because the minimum price rule and the quality condition have the effect of restricting supply on the market for messenger services.[13] The Commission draws the conclusion that this represents an infringement of Article 90(1) in conjunction with Article 86 of the Treaty, and it further takes the view that that infringement cannot be justified on the basis of Article 90(2) of the Treaty, or in other words that the maintenance of the competitive system existing on the market for messenger services when the new Postal Law came into operation does not obstruct the performance of the particular tasks assigned to PTT-Post BV by the Netherlands.[14]

B — Admissibility of the action in Case C-66/90

5. It is common ground between the parties that the contested decision, although not addressed to PTT-Post BV, is of direct and individual concern to it. However, the Commission calls in question the admissibility of its action because PTT-Post BV states itself that the legislation which is declared in the contested decision to be incompatible with the Treaty[15] is of no advantage to it, so that it has no legal interest in bringing proceedings.

I do not think the Commission is right here. It vigorously denies that PTT-Post BV derives no advantage from the Netherlands legislation; this alleged advantage is to a considerable extent the basis for the statement in the contested decision that the new Netherlands legislation involves the abuse of a dominant position on the part of PTT-Post BV. What is more, and in particular, PTT-Post BV has stated that the contested decision (which declares part of the Postal Law incompatible with directly applicable provisions of the Treaty) places the private messenger services which, unlike PTT-Post BV, are not subject to a duty to transport, in such a competitive position as compared with PTT-Post BV that the latter's financial viability may be jeopardized and that it might no longer be in a position to fulfil its statutory duty to transport. PTT-Post BV's legal interest in bringing proceedings cannot therefore seriously be questioned.

C — Examination of the 'procedural' grounds relied on for declaring the decision void

6. The pleas in law put forward by the applicants are in the main identical, even though not always identically drafted. For the purposes of my examination I have grouped them under two headings. In this part of my Opinion I shall consider the 'procedural' grounds for declaring the decision void, relating to the Commission's power to take the contested decision (section C-1 infra), to the infringement of the rights of the defence (section C-2 infra) and to the statement of the reasons on which the contested decision is based (section C-3 infra). In the following part

12 — See Recital (12) to the contested decision.

13 — See Recitals (13) and (14) to the contested decision.

14 — See Recitals (16), (17) and (18) to the contested decision.

15 — I shall return later (sections 28 to 31) to this point, which is linked to the applicability to PTT-Post BV of the three conditions to which messenger services are subjected with regard to letters not exceeding 500 g (see section 3 above).

(Part D), I shall consider whether the contested decision is justified.

Since in my examination of Part C, sections 1 and 2, I shall come to the conclusion that Article 90(3) of the Treaty does in fact confer on the Commission power to adopt a decision, but that in this case it has not exercised that power with the required observance of the rights of the defence, I shall consider Part C, section 3, and Part D solely in the alternative in case the Court does not share my view of the points dealt with in Part C, sections 1 and 2.

1. *Misuse of powers conferred by Article 90(3)*

7. The applicants claim that the Commission, in adopting the contested decision, is misusing the power conferred on it by Article 90(3) of the Treaty. They take the view in fact that where the Commission wishes to take action with regard to alleged infringements of the Treaty by the Member States, it must follow the procedure laid down in Article 169 of the EEC Treaty except where the Treaty makes an express exception, as, for example, in Articles 93(2), 100A(4) and 225. In other words, by adopting the contested decision, the Commission applied the power to adopt decisions for a purpose other than that expressly conferred upon it by Article 90(3), in order — to quote the Netherlands Government — to effect punitive supervision over a Member State (in this case the Netherlands). The fact that the contested decision concerns legislation in the formal sense made it all the more important, according to the applicants, to use the 'normal' procedure provided for by Article 169. A decision adopted on the basis of Article 90(3) in fact takes immediate effect in law and an action directed against such a decision has no suspensory effect; on the other hand the procedure under Article 169 does not have such drastic effects: the legislation in question continues to have legal effect both during the pre-litigation stage and during proceedings before the Court.

8. I do not find that argument convincing. To begin with the second part of it, which relates to the immediate *legal effect and* the *drastic consequences* of a decision based on Article 90(3), the comparison with a procedure under Article 169 needs to be toned down. In such a case the latter procedure may result in a judgment of the Court which cannot be contested because there is no appeal to a higher court (see Article 171). Action by the Commission under Article 90(3), on the other hand, has quite different legal consequences: it leads to a decision, that is, a binding instrument, but one which may be challenged. When the Member State to which the decision is addressed thinks that it is incompatible with procedural or substantive rules of Community law it may in fact bring an action before the Court of Justice under Article 173 of the EEC Treaty for a declaration that it is void and may, if it wishes, apply for the suspension of the operation of the measure in question under Article 185 of the Treaty.

Furthermore, the fact is that the power to adopt decisions conferred on the Commission by Article 90(3) allows of a more effective procedure than that provided for by Article 169: in contrast to a 'reasoned opinion' within the meaning of the first paragraph of Article 169, a decision under Article 90(3) has the force of law immediately, even when an application is made for a declaration that it is void (but subject to a suspension of its operation by the Court). However, that is the logical and inevitable consequence of the power of supervision applicable to a specific field, conferred on the Commission by Article 90(3) and of the fact that that power may be exercised *inter alia* by means of decisions. In the recent judgment in Case 226/87 *Commission* v *Greece*[16] the Court expressly confirmed that a decision adopted under Article 90(3) falls within the general category of decisions referred to in Article 189 and is therefore binding in its entirety upon the Member State to which it is addressed. The interpretation of the Netherlands Government to the effect that such decisions may contain only 'indications' explaining to the Member States how they should understand their obligations under Article 90(1) is untenable; it would reduce such decisions to 'recommendations' or 'opinions' within the meaning of Article 189, which have no binding force. Moreover that statement is not a new one: in Case 226/87[17] and Case C-202/88[18] also the Court rejected the argument that Article 90(3) would allow the Commission to issue only 'recommendations' or 'opinions'.[19] (I shall come back presently to Case C-202/88, dealing with the Commission's power to adopt *directives* under Article 90(3).)

9. What are we to make of the Netherlands Government's main argument, namely that by using decisions based on Article 90(3) to declare provisions of national law incompatible with the Treaty, that is, to quote the Netherlands Government, by making a 'repressive' use of its power to adopt such decisions, the Commission is misusing its power? I do not think the Netherlands Government is right and I find strong support for my view in Case 226/87, already cited.[20] That case concerned proceedings under Article 169 by the Commission for a declaration that the Greek Government had failed to comply with a Commission decision under Article 90(3) declaring a Greek law incompatible with Articles 52 and 54, the second paragraph of Article 5 and Article (3)(f) of the Treaty. The Greek Government challenged the legality of that decision before the Court, but the Court declined to consider that defence because the Greek Government had not instituted, within the period prescribed in Article 173,

16 — [1988] ECR 3611, in particular at paragraphs 11 and 12. (The judgment was delivered on 30 June 1988.)

17 — Cited in the previous footnote.

18 — France v Commission [1991] ECR I-1223.

19 — See paragraphs 10 to 12 of the judgment in Case 226/87, previously cited, in which the Court rejects the Greek Government's contention that a Commission decision under Article 90(3) is really nothing more than an 'opinion'. See also paragraph 16 of the judgment in Case 202/88, previously cited, setting out the French Government's claim that Article 90(3) enables the Commission only 'to inform the Member States, in cases where it is unclear how compliance with the Treaty is to be achieved, of the means which must be used in order to ensure such compliance'. That argument is rejected by the Court in paragraph 17.

20 — See footnote 16 above and the portion of the text to which it relates.

proceedings for a declaration that that decision was void. It is true that Greece had argued:

'... that in this case, in order to meet a fundamental requirement of the Community legal order, the Court should none the less, by way of exception, exercise its power of judicial review in regard to the decision of 24 April 1985. That decision ... infringes the fundamental principle of the division of powers between the Community and the Member States and therefore lacks any legal basis in the Community legal order' (paragraph 15 of the judgment).

The Court, however, rejected that argument on the ground that the Greek Government's objection:

'... could be upheld only if the measure at issue contained such particularly serious and manifest defects that it could be deemed non-existent (judgment of 26 February 1987 in Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005). However, the arguments put forward by the Hellenic Republic contain no precise factor of such a kind as to permit the Commission's decision to be so described. Indeed, it itself stated, throughout the pre-litigation stage, that it intended to comply with that decision' (paragraph 16 of the judgment).

It seems to me that the grounds on which a measure may be deemed to be non-existent in the words of that quotation also include the Commission's lack of power to adopt a decision under Article 90(3). The Court thus accepted by implication, but without any doubt, that the Commission is empowered under that provision to declare, by decision, that a national law is incompatible with the Treaty.

10. The Netherlands Government nevertheless contends that its statement is confirmed by the judgment in Case C-202/88.[21] In that case the French Government had challenged the Commission's power to declare under Article 90(3) by means of a *directive* that national statutory provisions were incompatible with the Treaty; in the French Government's view such a finding could be made only on the basis of the procedure under Article 169. The Court rejected that argument on the following grounds:

'... Article 90(3) of the Treaty empowers the Commission to specify in general terms the obligations arising under Article 90(1) by adopting directives. The Commission exercises that power where, without taking into consideration the particular situation existing in the various Member States, it defines in concrete terms the obligations imposed on them under the Treaty. In view of its very nature, such a power cannot be used to make a finding that a Member State has failed to fulfil a particular obligation under the Treaty.

However, it appears from the content of the directive at issue in this case that the Commission merely determined in general terms obligations which are binding on the Member States under the Treaty. The directive therefore cannot be interpreted as

21 — Previously cited in footnote 18.

making specific findings that particular Member States failed to fulfil their obligations under the Treaty . . .' (paragraphs 17 and 18 of the judgment).

I would make two observations with regard to that passage. First I would point out that the Court stated the position only with regard to the issue of directives and that the French Government's plea in law was rejected because the directive at issue in that case was of a generally applicable nature, so that there could be no question of a 'repressive' use of the Commission's power. On the other hand that judgment does not deal with the question whether the Commission has the power to find by way of a decision that a provision of national law is incompatible with the Treaty. It is therefore impossible to say that that judgment supports the Netherlands Government's argument. Moreover the above passage from the judgment cannot be interpreted as meaning that under Article 90(3) the Commission could make a finding merely by means of directives that provisions of national law are incompatible with the Treaty in view of the fact that a directive is of a generally applicable nature: a directive, just like a decision, may be addressed to a single Member State.[22] In other words the essential characteristic of a directive is not its general application but the fact that it requires of the Member State or States to which it is addressed a 'result to be achieved', whilst leaving to the national authorities the choice of form and methods.

Secondly I note that in the above passage the Court defines the scope of the powers conferred on the Commission by Article 90(3) by reference to Article 90(1): it is for the Commission to define or determine the obligations which Article 90(1) imposes on the Member States. Article 90(1) is itself a provision which refers to others and which forbids the Member States, as regards public undertakings or undertakings to which they grant special or exclusive rights, to enact measures contrary to the rules of the Treaty. I do not see therefore why the obligations imposed on a given Member State under the Treaty should not be defined by means of a decision, since Article 90(3) expressly authorizes the Commission to exercise its powers of supervision by means of decisions.

11. In any case, the objections to the use of a decision do not in my opinion in any case apply when — as is the case with the decision now before the Court — the Commission finds that a provision of national law is incompatible with a provision of the Treaty having direct effect such as Article 90(1), read in conjunction with Article 86,[23] that is, a provision of the

22 — That is already clear from the text of Article 189, which provides that, unlike a regulation which has general application and is directly applicable in all Member States, a directive is binding upon each Member State to which it is addressed only as to the result to be achieved. The question whether a directive can have general application überhaupt has even been raised in academic writings. See von der Groeben, H., von Boeckh, H., Thiesing, J. and Ehlermann, C.-D.: *Kommentar zum EWG-Vertrag*, Baden-Baden, 1983, p. 562 at paragraph 39. Moreover the Council and the Commission regularly address directives to a single Member State, namely when there is a specific problem which affects only that Member State. See for example Council Directive 79/174/EEC of 6 February 1979 concerning the flood protection programme in the Hérault Valley, OJ 1979 L 38, p. 18 (addressed solely to the French Republic), Council Directive 81/6/EEC of 1 January 1981 authorizing the Hellenic Republic to communicate and to implement its national plans for the accelerated eradication of brucellosis and tuberculosis in cattle, OJ 1981 L 14, p. 22, and Council Directive 81/1060/EEC of 14 December 1981 derogating in favour of the Kingdom of the Netherlands from Directive 73/403/EEC on the synchronization of general population censuses, OJ 1981 L 385, p. 34.

23 — The Court has already confirmed in its judgment in Case 155/73 *Sacchi* [1974] ECR 409, at paragraph 18, that the obligation imposed by Article 90(1), read in conjunction with Article 86, has direct effect.

Treaty which confers on individuals rights on which they may rely directly as against the Member State concerned without the need for any action by a Community institution or national authority. In such a case a Commission decision is purely declaratory and in no way creates rights or duties, that is, it specifies an already existing obligation and does not impose a new one. I do not see how this power, in view of the wording of Article 90(3), can be denied to the Commission. Nor can it be maintained that such a decision is of a 'repressive' nature since the incompatibility of the provisions of national law does not result from the decision but directly from the Treaty provision in question. [24] It makes no difference whether the national rule in question is of a statutory nature since the precedence of provisions of Community law having direct effect applies equally with regard to national rules of a statutory nature.

12. The Netherlands Government sees further support for its restrictive interpretation of the power to adopt decisions, set out in Article 90(3), in the fact that, in contrast to Article 93(2) (which empowers the Commission to bring direct before the Court of Justice a Member State which does not comply with a decision relating to State aid) Article 90(3) does not contain any derogation from Article 169 of the Treaty.

That argument cannot be accepted either. The fact that Article 90(3) contains no reference to Article 169 cannot provide an argument for restricting the *scope* of the Commission's power to adopt decisions under Article 90(3). The absence of such a reference simply means that, for the application of decisions or directives adopted under Article 90(3) — in contrast to its powers with regard to the application of decisions adopted under Article 93(2) — the Commission is not entitled to omit the pre-litigation procedure of Article 169 and bring direct before the Court of Justice an infringement of a measure it has adopted. [25]

13. The applicants' final argument is to the effect that the Commission cannot claim any power to adopt decisions under Article 90(3) because that provision offers no procedural guarantees on behalf of the Member State concerned. The Commission's reply is that the absence of written procedural guarantees cannot in any event be decisive for the question whether an article of the Treaty may form the legal basis for a measure of a Community institution (in other words for that institution's powers).

24 — Although the Court is not called upon to decide this point in the case now before it, it seems to me logical that the Commission should also be able, under Article 90(3), to require a Member State to reconcile a rule of national law with a Treaty provision not having direct effect (such as Articles 3(f) and 5 — which were moreover referred to in the decision to which Case 226/87 related). Then the effect of such a measure is not to deprive such a national rule of its binding effect but simply to require the Member State to amend it. A directive addressed to the Member State concerned seems to be the most appropriate instrument for the purpose.

25 — See also footnote 27 infra.

In principle I agree with the Commission. The absence of written guarantees does not mean that the Commission is not bound in its actions by the general principles of Community law, which include respect for the rights of the defence (and in particular the principle of the right of both sides to be heard) and for the principle of the duty to take care. Moreover the Court has never hesitated to require the Commission to respect these principles, even in the absence of a written provision — as, for example, the protection of confidential correspondence between lawyer and client, a right not conferred by Regulation No 17.[26]

Although the absence of written procedural guarantees is thus not in principle an obstacle to the Commission's powers, I should like to stress nevertheless that owing to the legal effect, which in principle is immediate (though not unchallengeable), of measures which the Commission may adopt when it finds that a provision of the Treaty has been infringed, it must exercise its powers with special attention to respect for the rights of the defence and the principle of the duty of care, in any case where (as is the case here) its decision also has the effect of altering directly and individually the legal situation of (public) undertakings. That is all the more important since the Commission, in support of its claims to be fully entitled to adopt decisions under Article 90(3), refers to the decision-making powers which it already possesses in the context of Articles 85 and 86 on the one hand and Article 92 on the other, and states in this connection that there must not be any loopholes in its powers of supervision as regards State measures affecting public undertakings and undertakings enjoying special or exclusive rights. If one accepts this argument,[27] as in principle I do, then it must be logically admitted also that in the exercise of these powers the Commission is bound by rules of procedure which admit of equivalent respect for the rights of the defence. I shall draw the necessary conclusions from this in my examination of the following submission.

26 — See the judgment in Case 155/79 *AM & S* v *Commission* [1982] ECR 1575.

2. *Infringement of the rights of the defence*

14. Both applicants complain that the Commission infringed the rights of the defence during the procedure which preceded the adoption of the contested decision. It is true that their arguments differ to some extent: the Netherlands Government, to which the decision was addressed, complains that it did not have a sufficient hearing during the pre-litigation stage as regards the objections raised by the Commission with regard to the new rules relating to the messenger services. PTT-Post BV, to which the decision was not addressed but to which it is of direct and individual concern (see section 5 above) claims that it had a right of its own to be heard by the Commission as to those objections.

27 — However, I should like to observe in this respect that the Commission's decision-making power in respect of Articles 85 and 92 is more extensive than the similar power conferred by Article 90(3), under discussion in this case. Here we are dealing, as I have already said (section 10), with a decision finding an incompatibility between national provisions and Treaty provisions having direct effect. In Articles 92(3) and 85(3) (in contrast to Articles 85(1) and 86) it is a question of decisions in which Treaty provisions not having direct effect are applied and such provisions therefore confer direct effect as regards given national measures of State aid or agreements between undertakings.

I shall first consider the arguments of *PTT-Post BV,* which do not seem to me to be justified. Decisions under Article 90 of the Treaty are adopted by the Commission in pursuance of its supervisory powers with regard to the *Member States* and are directed against measures of the *Member States* as regards public undertakings and undertakings to which they have granted special or exclusive rights. Article 90 imposes obligations only on the Member States, so that decisions adopted in pursuance of that article can specify only obligations falling upon Member States and not those imposed on undertakings by other provisions of the Treaty.[28] Such decisions may of course have repercussions on the material interests of such undertakings so that in certain cases such decisions are of direct and individual concern to them (as is the case here with PTT-Post BV). That does not, however, mean that the Commission is formally required to hear such undertakings before adopting its decision. That appears *a contrario* from the wording of Article 93(2) which in fact requires the Commission, before taking a decision on the subject of State aids, to give notice to the 'parties concerned' to submit their comments. I think that the difference in these procedural guarantees may be explained by the different nature of the authorities' relations with public undertakings and undertakings endowed with special or exclusive rights on the one hand and undertakings enjoying State aid on the other. It may be assumed that undertakings in the first category are closely linked to the State, at least for the performance of the particular tasks assigned to them,[29] so that they may be assumed to be aware of any proceedings pending and a special hearing for them is unnecessary; for undertakings receiving State aid that is not necessarily the case.

Even though the Commission has no formal obligation to give such undertakings a hearing it must nevertheless take their interests specially into account in considering the observations of the Member State concerned, particularly when it knows, or ought to know, that the decision may be of direct and individual concern to them. With specific reference to this case, the Commission has stated, without being challenged, (i) that PTT-Post BV knew of the contacts between the Netherlands Government and the Commission's officers; (ii) that an (informal) discussion had taken place on 5 October 1988 between officials of PTT-Post BV and those of the Commission on the subject of the new postal law; and (iii) that on 7 November the Commission had sent PTT a letter expressing doubts as to the compatibility of the draft law with the Treaty and mentioning a separate letter to the Netherlands Government explaining its objections.[30] PTT were then able to choose whether to make their own point of view known to the Commission, independently of the Netherlands Government, which the Commission would then have had to take

28 — That was expressly confirmed in the judgment in Case C-202/88, already cited in footnote 18, at paragraphs 24 and 55, in which it was emphasized that Article 90 confers powers of supervision on the Commission in relation only to State measures and that anti-competitive conduct engaged in by undertakings on their own initiative may be called in question only by individual decisions adopted under Articles 85 and 86.

29 — That is self-evident for public undertakings; it applies also to undertakings with special or exclusive rights which are placed by Article 90 on the same footing as public undertakings, because the same privileged status conferred on them by the authorities (but which in theory may also be withdrawn) makes them specially dependent on the authorities. See the judgment in Joined Cases 188 to 190/80 France, Italy and the United Kingdom v Commission [1982] ECR 2545, in particular at paragraph 12.

30 — This refers to the telex message of 29 November 1988 to which I shall come back presently.

into account. But in the present state of Community law it is not possible to make any criticism of the Commission for not inviting PTT, on its own initiative, to inform it of their standpoint.

15. The Netherlands Government thinks that its procedural rights have been ignored because the Commission has not given it a sufficient hearing. More specifically, it complains that the Commission, after a letter sent by the government on 16 January 1989, adopted the contested decision without any further contact; it contends that there has never been a genuine exchange of views (oral or written) between it and the Commission. The government also thinks it objectionable that after receiving its letter of 16 January 1989 the Commission made further contacts with a number of delivery service organizations without informing it of the results of these talks.

16. To examine this submission it is necessary to consider carefully the course of the procedure prior to the adoption of the contested decision. According to the documents before the Court matters proceeded as follows.

On 5 October 1988 the Commission had an informal discussion with representatives of PTT on the subject of the new postal law; it is common ground that this discussion also dealt with the legal situation of delivery service undertakings in the Netherlands. Following that discussion, the Commission on 7 November 1988 sent PTT a letter in which it took the view, with regard to Article 12(2) of the draft law (and more particularly with regard to the proposed minimum price rule for delivery services) that that provision '(seems) to conflict with the EEC Treaty'.[31] In that letter it also announced that it would 'communicate its objections to these provisions officially to the Netherlands Government in a separate letter'. That separate letter took the form of a telex message dated 29 November 1988.[32] In that message the Netherlands Government is informed that the Commission's officers are of the opinion 'from a first investigation' that Articles 2 and 12 of the new postal law are incompatible with Article 90 of the EEC Treaty, read in conjunction with Articles 30, 59, 85 and 86 of the Treaty, on the ground that the new postal law (will) subject the provision of delivery services

'to restrictive conditions which are greatly to the disadvantage of the (delivery) undertakings as compared with PTT's express delivery service (EMS), and will prevent them from continuing to provide some of their services, in particular those which were provided at a price below the minimum laid down by law.

The condition in Article 12(2)(a) does not provide the least legal certainty for international delivery services.

The condition under Article 12(2)(b)[33] makes price competition impossible in many cases and has the effect of a price

31 — See Annex 6 to the Netherlands Government's application in Case C-48/90.

32 — See Annex 3 to the Netherlands Government's application in Case C-48/90.

33 — In the final version of the postal law the minimum price rule was inserted in the second indent of Article 12(2)(a).

agreement prohibited by the rules of the Treaty'.

In its telex message the Commission also expresses its views on the possible applicability of Article 90(2): on the basis of the facts available to it the Commission stated that the income received from express deliveries has only a secondary importance for PTT and that the application of the rules of competition therefore does not prevent it from performing the tasks assigned to it. The message ends by inviting the Netherlands Government to make its views known and with the statement that if the factors set out in the telex message are confirmed the Commission might think it appropriate to adopt a decision under Article 90(3).

The Netherlands Government replied to that message by a letter of 16 January 1989. After receiving the letter, the Commission had discussions with a number of messenger service organizations with regard to the Netherlands Government's reply and 'the foreseeable effects of the ... provisions of the new postal law on the activities of the (messenger) undertakings directly concerned'.[34] The contested decision was then adopted on 20 December 1989 without any further consultation with the Netherlands Government.

17. I think, having regard to the foregoing and more particularly to the content of the Commission's telex message and to the subsequent contacts between the Commission and the messenger service organizations, that this submission by the Netherlands Government is justified.

I regard the Commission's telex message as being supported on a legally insufficient foundation to be accepted as a document informing the Netherlands Government appropriately of the considerations which finally led the Commission to declare in the contested decision that the postal law was incompatible with Community law. In that respect I would call attention to the fact that that declaration of incompatibility of the postal law *in the contested decision* is exclusively based on the argument that the postal law conflicts with Article 90(1), read in conjunction with Article 86 (and no longer with Articles 30, 59 and 85 which were also mentioned in the telex message). In that respect reference is made in the contested decision to the fact that PTT has a dominant position on the market for basic postal services and that the postal law results in (i) the extension of that dominant position to the market for messenger services, with the risk that all competition will be eliminated from that market; (ii) that unfair prices and conditions are imposed on customers for delivery services; and (iii) that supply on the market for messenger services is restricted. *The telex message of 29 November 1988* bears no trace of this reasoning. It is true that in the telex message it is suggested, but by no means supported by any legal argument, that the draft postal law would contravene Article 90 read in conjunction with Article 86. The only consideration of a legal nature relating to the application of the competition rules of the Treaty (namely that the minimum tariff 'has the effect of a price agreement prohibited by the rules of the Treaty' relates to the validity of Article 85 and not of Article 86.

34 — See the Commission's reply in Case C-48/90, paragraph 32 at p. 19.

The absence of any argumentation on this point seem to me to be the more serious because the contested decision (as the Commission itself readily admits) does not make a routine application of the rules of competition but on the other hand amounts to a new step in the application of the combined provisions of Article 90 and 86, a step based on an application by analogy of the 'Telemarketing' judgment,[35] which is not even mentioned in the telex message. All in all, it must therefore be stated that the legal arguments on which the contested decision is based was worked out *after* the message in question was sent, in other words that the Netherlands Government was not given a fair chance to express its views on those arguments. I therefore regard the reference at the beginning of the decision: 'Having given the Netherlands authorities the opportunity to make known their views on the objections raised by the Commission in respect of Articles 2 and 12 of the new Postal Law' as out of place. Moreover it is symptomatic that in its rejoinder the Commission denies that it described its telex message of 29 November as a notification of objections[36] — but in doing so it has failed to indicate in which document it did in fact provide its notification of objections.

18. The discussions which took place between the Commission and the messenger service organizations after the Netherlands Government had sent its letter of 16 January 1989 also give food for thought. The Commission itself admits that those discussions related *inter alia* to the effects of the new postal law on the provision of delivery services in the Netherlands and that the messenger service organizations were given the opportunity in that connection to make their comments on the Netherlands Government's letter. In those circumstances it cannot be seriously denied that the *audi alteram partem* principle required the Commission either to involve the Netherlands Government in those discussions or at least to acquaint the government with the conclusions which it had drawn from those discussions with regard to the compatibility of the new postal law with the Treaty. Between the date of the Netherlands Government's reaction to the telex message of 29 November 1988 (16 January 1989) and the date of the contested decision (20 December 1989), the Commission had ample time for such consultations. The fact that, according to the Commission's statement, such consultations could relate only to the documents available to the public makes no difference from that point of view.

19. The foregoing considerations lead me to conclude (i) that the rights of the Netherlands Government have been infringed in two respects: by the absence of a notification in which the Commission's objections were set out with a sufficiency of legal reasons and by the failure to observe the *audi alteram partem* principle; and (ii) that that infringement deprived the Netherlands Government of the opportunity to define and defend its point of view with knowledge of the facts. I think therefore that this amounts to an infringement of an essential procedural requirement so that for that reason the Commission decision must be declared void. However, in case the Court should take the view that the Commission has in fact respected the Netherlands Government's rights of defence I must now consider the other submissions set out by the applicants.

35 — Case 311/84 *CBEM* v *CLT and IPB* [1985] ECR 3261.

36 — See the end of point 32 in its rejoinder in Case C-48/90.

3. *The complaints relating to the statement of the reasons on which the contested decision is based*

20. The complaints set out in the context of this submission by the Netherlands Government and PTT-Post BV may be grouped under four heads:

(i) *terminology:* the statement of the reasons on which the contested decision is based is insufficient, not to say incomprehensible, because the Commission confuses essential concepts; the 'corrigenda' of 2 February 1990 did not provide any solution because they involve amendments of substance to the contested decision;

(ii) the decision is *incomprehensible* because it lacks the necessary understanding of the provisions and services at issue;

(iii) the decision *has no factual basis* because it is based on incorrect perceptions of fact;

(iv) the *operative part* is too broad because it is not supported by the recitals to the decision; moreover it is too vague because it does not specify how the Netherlands Government is to comply with its obligations under the Treaty.

These complaints must be considered on the basis of the Court's consistent case-law according to which the purpose of the obligation imposed by Article 190 of the Treaty to state the reasons on which a Community measure is based is on the one hand to enable those concerned to determine whether the measure is defective, making it possible for its legality to be challenged, and on the other hand to enable the Court to exercise its power of review. The reasoning of the institution which has adopted the measure in question must therefore be set out clearly and without ambiguity so that those concerned and the Court may recognize the reasons which have led to the adoption of the measure.[37]

My explanations in this connection will be lengthy because the pleas in law which have been made necessitate a detailed analysis occasionally drawing subtle distinctions. If it were customary to do so I should reproduce large parts of the exposé I am about to make, up to and including section 34, in small (even very small) print.

(a) The terminology used in the decision and the corrigenda

21. According to the Netherlands Government and PTT-Post BV the statement of the reasons on which the contested decision is based is incomprehensible because it uses incorrectly or ambiguously, or both, the essential concepts of 'basic postal service', 'express post' (or 'express mail service') and 'express messenger service'. They think that appears mainly but not exclusively from the fact that the Commission thought it necessary to publish a number of 'corrigenda' to the contested decision some time after it was adopted.[38] These 'corrigenda', which were published only in the Dutch version of the *Official Journal of the European*

37 — See for example the judgments in Case 108/81 *Amylum* v *Council* [1982] ECR 3107 at paragraph 19 and in Case 176/82 *Nebe* v *Commission* [1983] ECR 2475 at paragraph 21.

38 — The corrigenda were published in the Dutch version of the *Official Journal of the European Communities* of 2 February 1990, p. 46.

Communities, were not adopted in the form of a decision (which moreover was not the Commission's intention). Accordingly if these corrigenda involve amendments of substance to the contested decision (as the Netherlands Government and PTT-Post BV contend), they cannot be taken into account in order to decide whether there is a sufficient statement of the reasons on which the decision was based.[39] The Netherlands Government even expressly requested cancellation of these corrigenda because in its opinion they amounted to a new Commission decision which had been adopted without regard to the essential procedural requirements.

22. Let me say straight away that I do not find the applicants' arguments about the impact of the corrigenda on the content of the contested decision altogether convincing. I think that in this case a distinction must be made between three types of corrigenda. A *first* type of corrigendum consists in obvious clarifications or corrections of mistakes of language — as is the case with the two last corrigenda, namely the replacement of the expression 'De artikelen 2 en 12' (Articles 2 and 12)[40] by 'De bepalingen van de artikelen 2 en 12' (The provisions of Articles 2 and 12) and the correction of 'opgelegt' to 'opgelegd' — which naturally do not disclose any defect in the statement of the reasons on which the decision was based.

23. A *second* type of corrigendum is designed to bring a greater uniformity into the terminology used in the decision (in particular the replacement of the expression 'expressepost' (express delivery) by 'koeriersdiensten' or 'koeriersdienst' (messenger service or services) in Recitals (11) and (17] or to correct the terminology used (see Recital (3) in which the expression 'expressepost' is replaced by the expression 'koeriersdienst' (messenger service), or in Recital (9) where the expression 'de verzending van expressebrieven' (express delivery of letters) is replaced by 'de versnelde verzending van brieven door koeriersdiensten' (express delivery of letters by messenger services)).

Nor do these corrigenda either, contrary to the Netherlands Government's view, make any amendments to the substance of the contested decision. The terminological clarifications or corrections which they make only confirm what was already clear from the context of the decision. And here we must not lose sight of the fact that the meaning and the ways in which the definitions of the concepts of 'expressepost' (express delivery) or 'expressevervoer' (transport of express deliveries) or again 'expressedienst' (express service), 'spoedbesteldienst' (express mail service) and 'koeriersdienst' (messenger service) differ from one another are not altogether clear and that that was even more the position when the contested decision was adopted. The reason is that we are dealing with concepts of services some of which have only recently developed and which are often characterized by rapid, continuous evolution, so that it is not always easy to distinguish one from another. So the descriptions used to designate these services

39 — Cf. the judgment in Case 131/86 *United Kingdom* v *Council* [1988] ECR 905 at paragraphs 31 to 39.

40 — It is not contested that that amendment was made at the request of the Netherlands Government, which wished to have it made clear that not all the provisions of Articles 2 and 12 of the Postal Law, 1988, were affected by the declaration of incompatibility.

are far from being definitely settled. That applies in particular to the expressions 'expressepost', 'expressevervoer' and 'expressedienst' on the one hand and 'koeriersdienst' on the other. The first three expressions are in fact ambiguous because they are used as synonyms to refer both to the 'spoedbesteldienst' (that is, the express transport service offered within the framework of the basic postal service) and the 'koeriersdienst' (that is, the many varied services for the express and individualized transport of letters which were first offered only by private undertakings but later by PTT also). It was precisely because of this ambiguity that PTT-Post BV decided not to use the expression 'expressepost' at all in its pleadings. In practice, nevertheless, it does use that expression, in particular to designate its own rapid delivery service, as may be seen from the photocopy of the envelope which the Commission has attached as Annex 2 to its defence in Case C-66/90.[41] Moreover the Commission has stated,[42] without being challenged on this point by PTT, that in December 1989 (that is, just before the decision was adopted), PTT announced that it was about to supply delivery services both under the designation 'EMS Express' and 'EMS Courier'.[43] I think too that the ambiguity resulting from the indiscriminate use of the expressions 'expressepost', 'spoedbesteldienst' and 'koeriersdienst' cannot be blamed on the Commission in this case and that the corrigenda intended to make a clearer distinction between 'expressepost' (in the sense of 'spoedbesteldienst') and 'koeriersdienst' do not make any alteration to the substance of the contested decision.

Moreover — and this is the important point — none of the expressions corrected by the second type of corrigendum is of a kind to make the statement of the reasons on which the decision was based incomprehensible. In fact it is clear each time from the context that 'expressepost' refers to the 'koeriersdiensten' and not the 'spoedbesteldiensten'. In other words, the corrigenda only clarified what could already be deduced from the context of the decision itself.

24. There is still a *third* type of corrigendum, namely the correction to the second line of Recital (4), in which 'speodbestelling' is replaced by 'koeriersdienst'. It is clear that the original text of the decision contained an error of terminology which this time is not excused by the confusion between the expressions 'expressepost' and 'koeriersdienst'. On the other hand it seems to me that it cannot seriously be stated that that terminological error makes the statement of reasons incomprehensible. The mistake occurs in fact in the first sentence of Recital *(4)* to the

41 — In the official terminology of the World Postal Union too the concepts of rapid delivery service and express mail are used without distinction one for another, as PTT-Post BV itself observes in its reply in Case C-66/90.

42 — See the end of paragraph 30 of the defence in Case C-66/90.

43 — It is true that in footnote 24 to the reply in Case C-66/90 PTT contends that the actual establishment of these 'rapid services' took place only on 1 June 1990, that is, after the decision was adopted. It does not deny, however, that the establishment of the service had been advertised as from December 1989.

decision, which develops further (cf. the use of the word 'eveneens' (also] the distinction made immediately before in Recital *(3)* between the basic postal service and the messenger service. Although the Commission's error of terminology is a matter for regret, it does not — in view of the context — represent an obstacle to comprehension of the statement of reasons on this point.

The foregoing considerations lead me to the conclusion that, contrary to the representations of the Netherlands Government and PTT-Post BV, the corrigenda do not indicate that the statement of the reasons on which the contested decision is based are insufficiently clear or even incomprehensible. Instead I have come to the conclusion that the corrigenda in question must be regarded *either* as obvious verbal or stylistic corrections *or* as terminological clarifications which remedy conceptual uncertainties which cannot be attributed to the Commission, *or* as corrections of terminological slips, and that none of these corrigenda hinders comprehensibility of the statement of the reasons on which the contested decision was based. The question whether these corrigenda may be taken into account is therefore not of great importance for an appreciation of the contested decision. As regards the Netherlands Government's separate request for the corrigenda to be cancelled: it seems to me to be justified only in so far as it relates to the third type of corrigendum, in particular the replacement in Recital (4) of the expression 'spoedbestelling' by 'koeriersdienst'. As regards all the other corrigenda, my view is that they do not amount to a material amendment to the content of the decision.

25. The applicants also state that the statement of the reasons on which the decision is based is incomprehensible as a result of a number of misconceptions which the Commission has not corrected.

However, it seems that this relates each time to the use of the expressions 'expressepost' or 'expressedienst' to indicate either messenger services (see Recitals (4), (14) and (15) and Article 1 of the decision) or the 'EMS' service which was being offered by PTT at the time the decision was adopted and which (at the time) might be compared to a certain extent but not entirely to the messenger services offered by private undertakings (see Recitals (5), (6), (14) and (17) to the decision). I shall therefore simply repeat what I said earlier (section 23), that in view of the fact that the expressions 'expressepost' or 'expressedienst' are also used to designate delivery services, their use cannot be regarded as a mistake of terminology. Nor can the use of these terms, it seems to me, make the statement of the reasons on which the contested decision is based incomprehensible. The first part of the third submission must therefore be rejected.

(b) Lack of understanding of the provisions and services concerned?

26. PTT-Post BV in particular criticized the contested decision on this point. Its argument does not however seem very convincing. Thus it complains that in the contested decision the Commission described PTT-Post BV (instead of the

holding company, Koninklijke PTT Nederland NV) as the holder of the exclusive franchise for transporting letters and that the Commission wrongly stated that the maximum rate for PTT's compulsory transport services amounted to HFL 4.50 instead of HFL 14, which is the maximum rate for express delivery of a letter to another Member State of the Community. I do not think that such mistakes of detail make the statement of reasons in the contested decision incorrect or incomprehensible.

27. More fundamentally, PTT complain that the statement of reasons on which the decision is based is incorrect because (i) the Commission misunderstood the ratio legis of the minimum price rule for messenger services and (ii) in its analysis it did not take account of the fact that the messenger service undertakings are developing more and more services in direct competition with the services offered by PTT in the framework of their legal duty to transport.

As regards the application of Article 190 of the Treaty that criticism seems rather irrelevant. Its purpose in fact is not to show that the statement of reasons in the measure at issue is ambiguous, imprecise or incomprehensible. The complaint regarding the misunderstanding of the *ratio legis* of the minimum price rule is in fact closely linked to the substance of the case: it is a question of whether in the contested decision the Commission was right in thinking that the minimum price rule was not necessary for maintaining the basic postal service.[44] I shall consider this question later (sections 48 to 52). The complaint with regard to the extension of the range of services offered by the messenger service undertakings really amounts to stating that the Commission has not taken into consideration an essential fact, so that its assessment is incorrect. Here too it is in reality not so much a question of an irregularity of procedure but an argument with regard to the substance of the decision, relating to alleged shortcomings in the appreciation of the facts (namely the competitive relationship between PTT-Post BV and the private messenger services) and in the legal conclusions based thereon. That complaint must therefore be considered in the context of the submissions put forward by the applicants with regard to the substance of the decision.[45]

(c) Is the decision devoid of any factual basis?

28. This part of the third submission concerns the applicants' contention that the contested decision lacks any factual basis because it wrongly assumes that the conditions laid down by the Postal Law, 1988, for the provision of messenger services from or to Netherlands territory (see section 3 above) are not applicable to PTT-Post BV when it offers services of that kind.

I should like to stress straight away that this is a point of essential importance for settling the cases before the Court. The exemption enjoyed by PTT (and, in other words, the discrimination against the private messenger undertakings) in fact forms the basis of the

44 — See Recitals (17) and (18) to the decision.

45 — Cf. the judgment in Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359 at paragraphs 25 and 26.

Commission's view that there are here three kinds of abuse within the meaning of Article 86 of the Treaty.[46] In other words, if the Court considers that the Commission was wrong in assuming that PTT was exempt, one indispensable basis for the legal appreciation of the decision will disappear at a stroke, so that the application for the decision to be declared void would have to be granted.

29. Let me point out that it is *not* the (objectively) correct interpretation of the Netherlands legislation which is at issue here — a matter which only a national court is in a position to decide. It is rather for the Court of Justice to decide whether the Commission, at the time at which it adopted the contested decision, *could reasonably suppose* that the three conditions laid down by the law did not apply to PTT.[47] Regard being had to the wording of the Postal Law, 1988, and the actual situation at the time the contested decision was adopted, it seems to me that the Commission's attitude was reasonable.

The main indication for this is that the postal law, as its structure and drafting show, is intended to establish *two* separate legal systems, one for the 'franchise holder' (that is, PTT Nederland NV or PTT-Post BV)[48] on the one hand and a system for 'undertakings other than the franchise holder' on the other hand. That difference in legal status is expressed in particular in Article 12(2)(a) of the postal law which forbids 'undertakings other than the franchise holder' to transport letters weighing up to 500 g unless they satisfy all three of the conditions I have already mentioned (quality condition, minimum price rule and registration condition).[49]

That difference is also expressed in Article 12(2)(b) and (d), where further exceptions to the postal monopoly are made for letters 'transported by order of the franchise holder' or 'obviously intended to be transported by the franchise holder or to be delivered after being transported by the said holder' (the expression 'transport' appearing to refer both to normal and express transport).

The applicants' interpretation assumes that the expression 'other than the franchise

46 — See the summary of the contested decision in section 4 above. I shall be considering in greater detail in sections 41 to 46 infra whether the discrimination against the private messenger services in fact involves the abuse of a dominant position on the part of PTT-Post BV.

47 — Cf. the judgment in Joined Cases 15 and 16/76 *France* v *Commission* [1979] ECR 321. It is naturally not out of the question that if the Commission had provided the Netherlands Government, as it should have done, with the opportunity to express its point of view with regard both to the objections relating to the Postal Law, 1988, which the Commission subsequently regarded as justified, and to the observations which the private delivery services had submitted on the Netherlands Government's letter of 16 January 1989 in reply, the Commission would have reached a different conclusion on the question whether PTT-Post BV was subject to the conditions laid down by the Postal Law, 1988. Since I came to the conclusion earlier (section 19) that the infringement of the rights of the defence of the Netherlands Government amounted to an infringement of essential procedural requirements, there is no need for me to consider whether that infringement had specific prejudicial effects for the legal position of the Netherlands Government. In this part of my Opinion which, as I said, is given in the alternative, I shall examine the arguments as to whether PTT-Post BV was actually subject to the conditions laid down by the Postal Law, 1988, on the supposition that the Commission did not infringe essential procedural requirements and thus *was not required* to pursue a further dialogue with the Netherlands Government. In other words the appraisal, mentioned in the text, of the reasonableness of the Commission's position relates to the information actually at its disposal.

48 — The exclusive concession was granted to PTT Nederland NV; for carrying out the public postal service that company set up a special subsidiary company, namely PTT-Post BV.

49 — Infringement of this rule is made punishable under Article 17(1) of the Postal Law.

holder' also refers to PTT-Post BV when that undertaking is running a messenger service. However, such an interpretation is hard to reconcile with the structure and wording of the postal law since at the time the law was enacted (26 October 1988) PTT did not offer messenger services through the intermediary of another separate undertaking clearly to be distinguished from itself (for example a legal person separately incorporated and administered): the express transport services offered by PTT towards the end of 1988 were entirely integrated into PTT themselves and used their infrastructure (post offices, post vans and the like), their facilities (exemption from turnover tax for dealing with consignments within Netherlands territory) and their trade name PTT.

30. In addition the Commission's view receives further support in the drafting of the quality condition set out in indent 1 of Article 12(2)(a) of the postal law, which requires messenger service undertakings to provide a service 'of a quality significantly better than that of the normal express transport offered by the franchise holder to all persons within the country'. Even accepting that, contrary to what I have stated in the foregoing section, that condition is equally applicable to the messenger services offered by PTT-Post BV, such an interpretation would raise practically insoluble problems of application: for any 'rapid' transport service performed by PTT (and at the time the decision was adopted there were at least three such, advertised or even in operation, namely EMS Express, EMS Time-Net and EMS Courier), it would then be necessary to establish whether that service was to be regarded as an express mail service (coming under the exclusive franchise and therefore not subject to the condition) or as a messenger service in the true sense of the word. I shall give one example by way of illustration: it is not denied that until June 1990 PTT was offering an express mail service *with home collection.* In view of that additional facility it is logical to regard such a service as equivalent to a messenger service. But it then appears that that service does not comply with the quality condition or in particular the requirement that it must be possible to 'keep track of the communication during transit', because that express mail service with home collection was not effected by means of a so-called 'tracking and tracing' system. Such a system was brought into operation, as PTT themselves state,[50] only on 1 June 1990, so that PTT's other rapid services at the time the decision was adopted (including the 'old style' EMS) did not comply with the quality condition either.[51] It was therefore logical for the Commission to conclude from that situation in December 1989 that PTT-Post BV's rapid services were simply not subject to the quality condition.

50 — See note 24 and accompanying text of PTT's reply in Case C-66/90.

51 — The interveners NVIK and NOB have moreover produced a number of documents suggesting that at the time the decision was adopted PTT did not, for its rapid services, comply with the minimum price rule (see in particular Annexes 21 and 24 to their observations). PTT emphatically denied that. I do not think it essential to go into the facts in this connection as it is already sufficiently clear, from the fact that the quality condition was not met by PTT's rapid services, that PTT was not subject to the conditions referred to.

31. The only evidence supporting the applicants' statement is a 'nota van toelichting' (explanatory note) to the Besluit Minimumtarieven Koeriersdiensten[52] and a passage from the preparatory documents for the law.[53] But those documents are far from conclusive. Thus the representative of the interveners NOB and NVIK remarked at the hearing that during the procedure in parliament the Minister for Transport, Water Control and Construction had proposed the insertion in Article 13 of the law a system of individual exemptions from the exclusive franchise for private messenger services. Only at the end of the parliamentary procedure was that system changed to a generic exemption inserted in Article 12(2) — in other words the history of the drafting of Article 12(2) certainly does not suggest that these exemptions were drafted also for any express messenger services which PTT themselves might run. Moreover, and above all, the Commission might very well work on the principle that the preparatory documents can in no way justify an interpretation *contra legem.* Moreover it is significant that the Netherlands Government, as it indicates in its reply in Case C-48/90, is to lodge with the Netherlands States General, 'because of questions which have arisen', a draft law amending the postal law 'for the avoidance of further doubt with regard to the obligation of PTT in the matter'.

I therefore come to the conclusion that it was reasonable for the Commission to suppose, in the contested decision, that PTT-Post BV was not subject to the conditions laid down by the Postal Law, 1988, for the provision of messenger services from or to Netherlands territory. That means that in the following observations (section 35 et seq.), I shall have to appraise the justification for the decision on the assumption that there was indeed discrimination against private messenger services as compared with PTT.

(d) The operative part of the decision

32. The Netherlands Government and PTT-Post BV have claimed first that the operative part of the decision is too vague because it contains no indications as to what measures the Netherlands Government should take to bring the alleged infringement of the Treaty to an end.

That complaint does not seem to me to be well founded. Decisions adopted under Article 90(3) of the Treaty give the Commission the power and the duty to make clear the compatibility with the Treaty of State measures concerning public undertakings or undertakings to which Member States grant special or exclusive rights. It is therefore a matter of an appreciation of such measures in the light of provisions of Community law which for the most part[54] have direct effect. On the other hand it is not part of the Commission's duty to define

52 — See Annex 2 to the Netherlands Government's application in Case C-48/90.

53 — Particularly the 'nota naar aanleiding van het eindverslag' (note on the final report), attached as Annex 2 to PTT-Post BV's application in Case C-66/90.

54 — See section 10 above and footnote 24.

what action is needed, desirable or possible in order to put an end to the infringements which have been established.

The applicants' complaint would be appropriate only if they were to show that the Commission's analysis under Community law of the State measures in question is so vague or involved, or both, as to make it impossible for the Member State concerned to discover how to put an end to the infringements established. However, nothing of that kind has been shown by the applicants in these proceedings. The contested decision is in fact directed against the statutory preferential system enjoyed by PTT-Post BV if it offers messenger services, regard being had to the consequences of such discrimination on competition on the market for messenger services (see the detailed explanations in Recitals (11) to (18) inclusive with regard to abuse of a dominant position, to the consequences thereof on trade between Member States and to the fact that the derogation provided for in Article 90(2) is not applicable). It is for the Netherlands Government to take the necessary steps, if the Court rejects this application, to bring this infringement of the Treaty to an end. The most obvious step is naturally to abolish the existing discrimination and to substitute for it other rules which do not involve an infringement of Article 90 in conjunction with Article 86 of the Treaty. Exactly what the new rules must be is, as I say, not a matter for the Commission but for the Netherlands Government. That naturally does not prevent the Netherlands Government, if it wishes, from addressing the Commission in order to discuss with it the acceptability of the measures it plans or even to propose to it appropriate amendments to the decision in view of the difficulties arising in its implementation.[55] Article 5 of the Treaty in fact requires the Member States to collaborate in good faith to solve any problems involved in fulfilling the obligations arising from Community law.[56]

33. The applicants further claim that the operative part of the contested decision is too wide because, in two respects, it is not supported by the statement of reasons. They complain in the first place that the operative part is not directed only against the minimum price (HFL 11.90) for destinations within the Community but also against the minimum price (HFL 17.50) for destinations outside the Community.

That complaint seems to me to be well founded. That part of the recitals to the contested decision relating to the incompatibility of the minimum price rule with the combined provisions of Articles 90 and 86 relates specifically to the minimum rate in force for destinations within the Netherlands or in other Member States of the Community (see in particular Recital (15)). Although it cannot be excluded that these considerations apply also to the minimum rate for messenger services

55 — Such difficulties may possibly relate also to the time-limit imposed by the decision in question for its implementation — as the Netherlands Government complains that the period prescribed by the contested decision is extremely short.

56 — In the field of aid measures the Court has already confirmed this on several occasions. See for example the judgments in Case 94/87 *Commission* v *Germany* [1989] ECR 175 at paragraph 9 and in Case 52/84 *Commission* v *Belgium* [1986] ECR 89 at paragraph 16.

between the Netherlands and countries outside the Community, that does not relieve the Commission of the duty to give the reasons for its decision on this point. That is true in particular when such an application by analogy is not obvious: thus one may wonder for example whether the minimum rate for messenger services between the Netherlands and countries outside the Community is of such a nature as to affect trade *between Member States.* The contested decision, and in particular Recital (15) do not contain the least information in this connection, so that the statement of the reasons on which the contested decision is based cannot be regarded as sufficient on that point.

34. According to the applicants, the operative part of the decision is too broad in yet another respect, namely in so far as, without any appropriate statement of reasons, it declares incompatible with the Treaty the obligation for messenger services to register their rates in advance.

I think that this complaint is also justified. In the preamble to the contested decision the requirement to register is mentioned only in the last paragraph of Recital (1). There the Commission states that the obligation to register:

'is designed to prevent any variation in charges negotiated with important customers. It particularly affects undertakings located outside the Netherlands as they will be obliged to register their rates annually at The Hague, irrespective of the number of letters collected in the Netherlands'.

In other words the decision merely gives a general description of the effect of the requirement to register on the operations of private messenger services. It is true that this effect is represented in the recitals to the contested decision as being unfavourable, but there is no relevant legal interpretation. The part of the preamble which relates to the infringement of the combined provisions of Articles 90 and 86 of the Treaty actually deals exclusively with minimum rates and the quality condition but does not devote a single word to the requirement to register. Contrary to what the Commission contends, that legal analysis cannot simply be applied by analogy to the requirement to register: thus, for example, it is hard to see, without any statement of reasons, why such a requirement should result in a portion of the market for messenger services being reserved for PTT-Post BV,[57] or why it should require customers of messenger services to use the PTT-Post BV express mail services,[58] or again why it should prevent the private messenger undertakings from offering a complete range of messenger services.[59]

Thus, in so far as the contested decision relates to the minimum price rule for destinations outside the Community and to the requirement to register imposed on private messenger undertakings by the Postal Law, 1988, it must be declared void for lack of a

57 — Cf. the first paragraph of Recital (11) to the contested decision.

58 — Cf. Recital (12) to the contested decision.

59 — Cf. the first paragraph of Recital (14) to the contested decision.

sufficient statement of the reasons on which it is based.[60]

D — Examination of the submissions on the substance

1. *Absence of conduct by the undertaking*

35. According to the applicants, the Commission makes an incorrect application in the contested decision of the combined provisions of Articles 90 and 86. In fact they deny that those two provisions can be applied to a restriction of competition not resulting from the conduct of an undertaking but simply from a measure of the authorities.

To understand this submission correctly it is necessary to consider in greater detail the relevant part of the recitals to the decision (namely Recitals (6) to (18]. According to the Commission the aforementioned provisions of the Postal Law, 1988, infringe Article 90 in conjunction with Article 86 because their effect is to create a dominant position by PTT-Post BV on the market for messenger services. The starting point here is that PTT-Post BV has a dominant position on the market for basic postal services as a consequence of its statutory exclusive franchise for the transport of letters not exceeding 500 g.[61] The abuse consists, according to the Commission, in the extension of that dominant position by the postal law to the market for messenger services, involving the possibility of eliminating all competition from that market.[62] The contested decision further states that PTT-Post BV's newly created dominant position on the market for messenger services involves two additional abuses. First, undertakings which wish to continue to use the private messenger services have unfair prices and conditions imposed upon them because they must either pay a minimum rate for doing so or because they can only obtain a rate below the minimum by using PTT-Post BV.[63] Secondly, supply on the market for messenger services is restricted because the high added value services offered by private undertakings can now only be offered at the minimum rate and because the quality condition prevents private undertakings from offering a full range of rapid services.[64] The restrictions on competition identified in the contested decision are not due — as the parties agree — to the conduct of PTT-Post BV; the decision rather regards such restrictions as resulting from the fact that, unlike the private messenger undertakings, it is not subject to the three conditions laid down by the postal law for the provision of delivery services. In other words, the restrictions on competition are the result of direct intervention in the structure of competition by the Netherlands legislature, which applies a more favourable system to the operations of

60 — In other words I do not think that the two defects I have mentioned in the statement of reasons affect the validity of the decision as a whole. The minimum rates for destinations within the Community and those to third countries may be regarded and applied separately one from the other. As far as the requirement to register is concerned, it may be seen from the preamble to the decision (see Recitals (11) to (14] that those effects of the Postal Law, 1988, which restrict competition are the result of the minimum price rule and the quality condition quite independently of the existence of the registration condition. The registration condition is, in the Commission's view, an 'aggravating factor'.

61 — See Recital (10) to the contested decision.

62 — See Recital (12) to the contested decision.

63 — See Recital (12) to the contested decision.

64 — See Recitals (13) and (14) to the contested decision.

one particular undertaking (PTT-Post BV) than to those of its competitors. According to the Commission, that intervention in the structure of competition has the same effect on the Community market as conduct by an undertaking which is prohibited by Article 86, and that is sufficient for the application of Article 90. In the following sections (36 to 46) I shall discuss first that question of principle, namely whether the Commission is also entitled to take action under Article 90 against distortions of competition which result in the first place from the conduct of a Member State.

36. Before discussing the relevant case-law of the Court on this subject I should like first of all to define the question before us. The parties do not deny that the provisions of Article 90 are addressed *to the Member States* (even though they relate to measures adopted by the Member States with regard *to undertakings*). Nor is it denied that the Commission is able to take action under Article 90 against State measures which distort competition on the Community market apart from any conduct by an undertaking. That will be the case when State measures relating to public undertakings or undertakings enjoying special or exclusive rights infringe the rules of the Treaty with regard to the free movement of persons, goods or capital. For example, in the recent judgment in Case C-202/88,[65] the Court ruled that under Article 90(3) the Commission was empowered to require the Member States (in that case by means of a directive) to withdraw special or exclusive rights granted by them to undertakings for the marketing or maintenance of telecommunications terminal equipment in view of the fact that such rights constituted an infringement of Article 30 of the Treaty. In the same way the Commission would have been entitled, in the contested decision, to declare the registration condition laid down by the postal law incompatible with Article 90 in conjunction with Article 59, regard being had to the serious restrictions which that condition imposes on messenger service undertakings from other Member States which desire to offer their services in the Netherlands. However, the Commission chose to test the postal law against, and declare it incompatible with, a provision of the Treaty (Article 86) which, according to its wording and purport, concerns the conduct of undertakings and not the legal or administrative measures adopted by Member States. Did Article 90 empower it so to do? That is the sole extent of the question which now needs to be considered.

37. It has long been accepted in the Court's case-law that Articles 85 and 86 may also be relevant to legal or administrative provisions adopted by the Member States. More particularly it was decided in the judgment in Case 13/77 *INNO* v *ATAB*[66] that, while it is true that the competition rules of Article 85 et seq. are directed at undertakings, none the less it is also true that the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which might render that provision ineffective.[67] That obligation was linked by the Court to the one in the second paragraph of Article 5 of the Treaty which

65 — Previously cited in footnote 18.

66 — [1977] ECR 2115.

67 — See paragraphs 30 and 31 of the judgment.

requires Member States to abstain from any measure which could jeopardize the attainment of the objective set out in Article 3(f) of the Treaty, namely the institution of a system ensuring that competition in the common market is not distorted.[68] For that reason Member States are required not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings.[69] Article 90 of the Treaty constitutes, specifically with regard to public undertakings and undertakings to which Member States grant special or exclusive rights, a special application of that rule.[70] It was on that basis that the Court decided that, contrary to the Netherlands Government's contention, a monopoly granted by a Member State to an undertaking (or an extension of such a monopoly) may be incompatible with Article 90 of the Treaty more particularly where the detailed arrangements for the organization and operation of that monopoly infringe the provisions of the Treaty — including the rules of competition.[71]

38. The Court's case-law has gradually defined with greater clarity the categories of State measures capable of depriving of their effectiveness the rules of competition applicable to undertakings. It seems to me that a distinction may be drawn between four categories of intervention by the authorities.

First of all a Member State may *contribute* to conduct by an undertaking which is prohibited by Article 85 or 86. This refers to State measures *encouraging* or *reinforcing* the effects of specific conduct by undertakings (concerted practices or abuses). The Court dealt with such a case in the judgment in Case 66/86,[72] in which it held that the approval by the authorities of tariff agreements contrary to Article 85(1) between airlines was incompatible with Article 5 and, in that particular case, with Article 90.

Secondly a Member State may delegate to private traders responsibility for taking decisions affecting the economic sphere and abstain from using its own power to make regulations. In so doing it gives undertakings the *power to act with self-regulatory effect* and thus to distort competition.[73] In Case 267/86 *Van Eycke* the plaintiff in the main action had claimed in particular that that was the position with Belgian rules which granted a tax exemption in respect of income from savings deposits on condition that the interest did not exceed the lowest average rate applicable on the market in question, a rate which, according to the plaintiff, had actually been fixed following consultations with the representatives of the financial institutions and in collaboration with them.[74]

Thirdly, a Member State may *impose* on undertakings conduct which is incompatible with Articles 85 and 86. The Court dealt

68 — See for example the judgment in Case 229/83 *Leclerc* v *Au Blé Vert* [1985] ECR 1 at paragraphs 13 and 14.

69 — See for example the judgment in Case 267/86 *Van Eycke* v *ASPA* [1988] ECR 4769 at paragraph 16.

70 — See paragraph 32 of the judgment in *INNO* v *ATAB*.

71 — That principle, which was already laid down in general terms in the judgment in Case 155/73 *Sacchi* [1974] ECR 409, was recently confirmed in the judgments in Case C-202/88 (previously cited in footnote 18) at paragraphs 22 and 34 to 44; and in Case C-260/89 *ERT* v *DEP* [1991] ECR I-2925 at paragraphs 24 and 31.

72 — *Ahmed Saeed Flugreisen* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803.

73 — See the judgment in Case 267/86, previously cited in footnote 69, at paragraph 16.

74 — See paragraphs 5 to 8 and 17 to 19 of the judgment.

with such a case in the judgment in Case 30/87,[75] in which it held that municipal authorities which required undertakings holding a dominant position to apply particularly high prices for their services were acting in contravention of Article 90(1) of the Treaty.[76] Whereas in the second situation the authorities make it possible for an undertaking to adopt regulatory measures *in their stead,* in this third situation they are using the undertaking as an 'instrument without a will of its own', by means of which they *themselves* exert an influence on the Community market's structure of competition.

Fourthly, a State measure may influence the structure of competition in such a way that it *makes inevitable* conduct prohibited by Articles 85 and 86, which means, in other words, that an undertaking is induced to adopt such conduct. Such a measure was at issue in Case C-41/90 *Höfner and Elser*[77] in which the Court was called upon to consider German legislation conferring on a public employment office an exclusive right to engage in employment procurement (including executive recruitment activities). The Court held that such legislation was incompatible with the combined provisions of Article 90 read in conjunction with Article 86 where the public employment office was manifestly incapable of satisfying demand prevailing on the market for such activities and where at the same time the legislation made it impossible for private undertakings to satisfy that demand (for example because contracts concluded by such undertakings were to be regarded as void). In such a case, the Court held, the legislature creates a situation in which the *public employment agency* cannot avoid infringing Article 86 of the Treaty. The even more recent judgment in Case C-41/90[78] relates to this category of measures. In that case the Court held that a Member State infringes the combined provisions of Articles 90 and 86 of the Treaty where, by conferring an exclusive right on an undertaking, it creates a situation in which that undertaking is led to infringe Article 86 of the Treaty.[79]

39. It appears, I think, from that case-law that the Court's view is that the provisions of Article 90, in conjunction with those of Articles 85 and 86, cover State measures (relating to public undertakings and undertakings to which Member States grant special or exclusive rights) which encourage, require or make inevitable conduct by undertakings which, whatever its nature, is prohibited by Articles 85 and 86, and measures which delegate to undertakings a duty of regulating competition such as ought to be performed by the authorities. The consideration that such State measures, in combination with one form or another of conduct by an undertaking, have the *same effects* with regard to the structure of competition on the Community market as conduct by an undertaking which is unconnected with action by the public authorities. It appears further from that case-law that conduct by an undertaking which is necessary as a 'link factor' to make Article 90(1) applicable *in conjunction with Article*

75 — *Bodson* v *Pompes Funèbres des Régions Libérées* [1988] ECR 2507.

76 — See paragraphs 30, 33 and 34 of the judgment.

77 — [1991] ECR 1979.

78 — Already cited in footnote 71.

79 — Paragraph 37 of the judgment.

85 or 86 need not necessarily precede action by the public authorities but may follow it, result therefrom or even be the inevitable consequence thereof. Nor is it necessary for the undertaking itself to have committed an intentional infringement of the rules of competition (in other words, it is enough for it to be placed in a situation in which it cannot act otherwise than by restricting competition). Thus in his Opinion in Case C-41/90 *Höfner and Elser*[80] Mr Advocate General Jacobs indicated that the Bundesanstalt's conduct in itself could not be regarded as abusive: there was nothing to suggest that it had not endeavoured to the best of its ability to satisfy the demand for assistance in the recruitment of executives; by voluntarily relaxing its monopoly it had even sought to open the market to other operators as far as possible. However, as the Advocate General stressed, the combined *effect* of the monopoly set up by the authorities and the Bundesanstalt's failure to satisfy demand was that the consumer could not receive the service which would have been available on a competitive market. In such a case there is, in the view of the Advocate General, an infringement of Article 90 in conjunction with Article 86.[81] In its judgment the Court approved that view — which gives a very wide interpretation of the 'effectiveness' of Article 86.[82]

The judgment in *Höfner and Elser* also shows that the interrelation between action by the authorities and conduct by an undertaking may be so close that they merge, as the judgment accepts that the action of a public institution such as the German Bundesanstalt für Arbeit must be regarded as conduct by an undertaking such as is referred to in Articles 85 and 86 because it is the act of an entity exercising an economic activity, even though such activity is normally entrusted to public institutions and not to undertakings.[83]

40. Having regard to the foregoing considerations, my view is that the applicants' argument must fail in so far as it aims to exclude from the application of Article 90 conduct by undertakings which, like PTT-Post BV's activities, is for the undertaking concerned the inevitable consequence of State measures and which (in combination with those measures) has exactly the same consequences for competition on the Community market as the conduct of an undertaking which is prohibited by Articles 85 and 86 irrespective of any action by the authorities. As a result of that conclusion I must now consider whether the Commission was right in the contested decision to conclude that the Postal Law, 1988, in conjunction with the conduct of PTT-Post BV which is its inevitable consequence — conduct which is not denied since PTT-Post BV did indeed strive, and is still striving, to develop a complete express messenger service within the framework of the postal law — has for competition on the market for messenger services the same consequences as the abuse of a dominant position prohibited by Article 86. As I have previously stated (section 31),

80 — See his Opinion, delivered on 15 January 1991, at paragraph 45.

81 — See paragraphs 46 and 47 of his Opinion.

82 — Paragraph 31 of the judgment.

83 — Paragraphs 20 to 23.

I shall base this examination on the supposition that PTT-Post BV is not subject to the conditions laid down by the Postal Law, 1988, as regards the provision of messenger services.

2. *No abuse of a dominant position*

(a) Extension of a dominant position

41. It cannot be seriously denied that the granting of the exclusive franchise gave PTT and PTT-Post BV a dominant position on the market for basic postal services in the Netherlands.[84] The Commission also seems to me to be right when it regards the market for basic postal services and that for messenger services as two separate (even though associated) markets. Messenger services have a greater added value and satisfy different needs from the basic postal services; those two types of service are therefore not interchangeable.[85]

According to the contested decision the first factor leading to an abuse is the fact that the Postal Law, 1988, involves the extension of that dominant position of PTT-Post BV on the market for basic postal services to the market for messenger services. That extension consists in reserving for PTT-Post BV a 'whole section' of the market for messenger services, namely the market for mail at less than HFL 11.90, whereas previously the post was in competition with private messenger services on that portion of the market. According to the contested decision the fact that competition continues to apply to the remaining portion of the market for messenger services does not change the position, because on the portion of the market for items less than HFL 11.90 the post can define its strategy without pressure from any competitor because, although they may in fact pursue their activities on that part of the market, any competitors cannot offer any discount below the minimum legal rate of HFL 11.90.[86]

42. This reasoning does not convince me, not, let me admit right away, because of the legal basis, which I acknowledge is correct. The legal basis is that the Commission states, by reference to the judgment in Case 311/84 *CBEM* v *CLT and IPB*[87] (which I shall hereinafter refer to as 'the "Telemarketing" judgment'), that abuse of a dominant position is committed 'where an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such an undertaking'. That is, according to the Commission, exactly the effect of the Postal Law.[88]

In principle I agree with that reasoning. It may in fact be seen from the 'Telemarketing' judgment that according to the Court there is an abuse of a dominant position where an undertaking holding a dominant position on the market in a service (namely the market for televised

84 — See Recital (10) to the contested decision.

85 — See Recitals (3) and (4) to the contested decision.

86 — See Recital (11) to the decision.

87 — Previously cited in footnote 35.

88 — First paragraph of Recital (11) to the contested decision.

broadcasting of advertising 'spots') which *is indispensable* for the activities of another undertaking on an associated but separate market (namely the market for telephone marketing by means of television)[89] actually uses that dominant position on the first market to reserve to itself also services on the second market, with the possibility of eliminating all competition from that second market.[90] In other words, the extension of a dominant position has been made *possible* by the fact that the second market could function only through the intermediary of the first market (on which the undertaking had a dominant position). With this position the 'Telemarketing' judgment links up expressly with the judgment in Joined Cases 6 and 7/73 *Commercial Solvents* v *Commission*[91] relating to a similar situation, although on that occasion in connection with the market for products. In that judgment the Court stated that an undertaking, being in a dominant position on a market for raw materials and refusing to supply a customer on a 'downstream' market (a market for derivatives), with the object of reserving such raw materials for manufacturing its own derivatives, is *abusing* its dominant position on the raw materials market if such conduct risks eliminating all competition from a customer on the derived products market. The characteristic of these two judgments is that they regard a 'refusal to deal' by an undertaking with a dominant position as abusive not only when the refusal is intended to derive unfair advantages from that dominant position (for example unreasonably high selling prices), but also when its purpose is to strengthen that dominant position by extending it to an associated but separate market and consequently to acquire a dominant position on that market also. In that sense this case-law is a continuation of the judgment in Case 6/72 *Continental Can* v *Commission*,[92] in which the Court accepted for the first time that an abuse within the meaning of Article 86 may consist not only in conduct on the market but also in conduct changing the structure of the market by making it less competitive. In that case it was a question not of another market for products but of a different geographical market.[93]

The fact that the market to which the dominant position has been extended in this case is an 'associated but separate' market and not (as was the case in the 'Telemarketing' or *Commercial Solvents* cases) a 'derived' market — so that the dominant position of PTT-Post BV on the market for basic postal services does not stand in a causal relationship with the acquisition of a dominant position on the market for messenger services — does not seem to me to be relevant for the application of Article 86. In the *Continental Can* v *Commission* case the Court already decided that it was not necessary that there should be a causal link between the dominant position of an undertaking and the abuse thereof, in view of the fact that strengthening of the dominant position of an undertaking may, regardless of the means and procedure by which it is achieved, in itself be an abuse

89 — See the first sentence of paragraph 26 of the judgment.

90 — See the second and third sentences of paragraph 26 of that judgment.

91 — [1974] ECR 223.

92 — [1973] ECR 215.

93 — In the *Continental Can* case an undertaking having a dominant position on a substantial part of the common market had extended that dominant position by acquiring shares which gave it power to control a competing company operating in another part of the Community market.

(and therefore prohibited under Article 86), namely when such strengthening fetters competition in such a way that only undertakings remain in the market whose behaviour depends on the dominant one.[94] Such is precisely the effect of the Netherlands postal law, which the contested decision declared incompatible with Article 86 in conjunction with Article 90(1).

43. If the recitals to the contested decision on the existence of an abuse do not convince me, it is not because of the legal arguments but of the appreciation of the underlying facts. That appreciation starts out with the idea that the market for messenger services at a rate less than HFL 11.90 for the despatch of letters not exceeding 500 g forms an important part of the market for messenger services. The abuse is alleged to consist of extending the postal monopoly on the market for basic postal services to that important part of the market for messenger services so that the post acquires a dominant position on that market too. I think that that appreciation of the facts is inappropriate. The market for messenger services consists, according to the contested decision, of three subsidiary markets: the market for items above 500 g, the market for items of a maximum of 500 g at HFL 11.90 and the market for items of a maximum of 500 g at less than HFL 11.90. The first subsidiary market is not controlled, the second is controlled but is open for competition and only the third (which differs from the second only as a result of the minimum rate fixed) is closed to competition. The abuse alleged by the Commission concerns only the third market. The contested decision states that the postal law, by reserving the last named (subsidiary) market for PTT-Post BV, has extended the dominant position of PTT-Post BV on the market for basic services to a 'whole section' of the market for messenger services. However, no figures are given in support of that statement. The Netherlands Government rightly indicates that the minimum rate of HFL 11.90 is fixed at a very low level. Although there is serious evidence that it is *possible* to provide messenger services at a price below that minimum rate (for example by quantity discounts), it is hard to deny that such services — at least during the period relevant for the proceedings — constitute only a very small part of the market;[95] and there are no indications that there is likely to be a change in the near future. Nor can it, in view of the modest level of the minimum rate, reasonably be assumed that the subsidiary market reserved for PTT-Post BV will supply it with such income as to enable it to adopt a stance independent of its competitors on the other subsidiary markets.

From the foregoing considerations it appears therefore that (i) the extension of PTT-Post BV's monopoly to the market for messenger services does not cover their main subsidiary markets (for items above 500 g and those below 500 g from HFL

94 — See paragraphs 26 and 27 of the judgment.

95 — Annex 1 to PTT-Post BV's application in Case 66/90 is interesting in this respect; it consists of a table setting out a number of prices charged by private messenger services. The lowest rate for sending a letter between Amsterdam and Rotterdam appears to be HFL 30.

11.90; and (ii) the Commission has not sufficiently shown that the third subsidiary market which is affected by the extension constitutes such a large part of the market for messenger services that PTT-Post BV is offered the opportunity significantly to avoid competition from present or future competitors. In those circumstances my view is that the Commission has not sufficiently proved the actual existence of the first form of abuse.

(b) Imposition of unfair prices and conditions; restriction of supply

44. Three other forms of abuse identified in the contested decision under the above heading may be considered together. According to the Commission the discriminatory imposition on the private messenger undertakings of the minimum rate means that (i) undertakings which previously chose to make use of the private undertakings (thinking that the postal services did not cater as adequately for their needs as regards either price or quality) are compelled, since the Postal Law, 1988, to make use of PTT-Post BV's messenger services for their consignments up to 500 g in the category of prices not exceeding HFL 11.90 on the terms laid down by PTT-Post BV, whether or not they correspond to their needs. [96] That discrimination also means (ii) that the number of suppliers of services in that price category is limited to one and that the quality of the services offered in that category is reduced since at the time of the decision PTT-Post BV was not yet offering in its EMS service any express messenger service in the full sense of the word. If customers wish to enjoy a higher quality they must be ready to pay the minimum rate instead of the lower rate previously charged. [97] The Postal Law, 1988, also (iii) prevents post office competitors which provide messenger services for consignments exceeding 500 g from offering a full range of messenger services (namely, I gather, in the three sections of the market: not exceeding 500 g for less than HFL 11.90, not exceeding 500 g above HFL 11.90 and exceeding 500 g) at real prices. Unlike the post office they cannot charge their costs for dealing with letters exceeding 500 g (that is, the uncontrolled portion of the market) 'against . . . those services not covered by the monopoly' (sic). [98]

45. The effect on competition described here by the contested decision seems at first sight to be analogous to the effect of the German legislation which the Court in its judgment in *Höfner and Elser* (sections 38 and 39 above) regarded as an abuse within the meaning of Article 86. The postal law too lays down a monopoly on part of the market for messenger services and makes infringements of the monopoly punishable, with the result that users of the messenger services are bound *either* to have recourse to an undertaking which, as regards quality,

96 — See Recital (12) to the contested decision.

97 — Recital (13) to the contested decision.

98 — First paragraph of Recital (14).

meets their needs less well *or* (if they wish for better quality) to pay a price higher than that which would result from the normal operation of supply and demand. The difference from the situation in the *Höfner and Elser* judgment is that, as we have already seen, the Netherlands legislation does not confer on PTT a dominant position either on the whole of the market for messenger services or — at least it has not been demonstrated sufficiently — on a significant part of it, but only on the market for basic postal services. In the absence of a dominant position on the market for messenger services there can be no question, either, by analogy with the position in the *Höfner and Elser* judgment, of the abuse of a dominant position on that market within the meaning of Article 86.

(c) Conclusion

46. Finally a fourth form of abuse is mentioned in the contested decision, namely that the quality condition places private messenger undertakings in a position of legal uncertainty: in so far as PTT-Post BV's 'express deliveries' (that is, the 'EMS' services) reach a comparable level of quality in future, private messenger undertakings would be forbidden, according to the letter of the law, to deal with such items except in the case of packages exceeding 500 g.[99]

Here the reasoning seems to be that the Postal Law, 1988, gives PTT-Post BV the opportunity, by improving the quality of its express deliveries *within the framework of the EMS,* to force its competitors into illegality as regards express deliveries of letters not exceeding 500 g. Although in principle the elimination of competitors may be regarded as an abuse, the decision loses sight of the fact that the quality condition requires private messenger undertakings only to provide a better service than the 'normal express transport' provided by PTT-Post BV, that is, than the *express mail service.* Thus the decision identifies a danger to competition which does not in fact exist.

47. Although the contested decision is based on correct premises, it makes an incorrect factual application of Article 86, because it shows insufficiently that the Postal Law, 1988, induces or may induce PTT-Post BV to extend its dominant position on the market for basic postal services to the (whole) market for messenger services. In the absence of such an extension of a dominant position, the mere fact that the Postal Law, 1988, reserves to PTT a portion of the market for messenger services cannot be described as an abuse, nor can the other effects of the minimum price rules and the quality condition to which the Commission takes exception be described as abuses of a dominant position on the market for messenger services. Although I might bring my Opinion to an end with this finding, I shall now — in case the Court needs it in developing the grounds of its judgment — go briefly into the question whether any abuse may be justified under Article 90(2) of the Treaty.

99 — Second paragraph of Recital (14).

3. *Application of Article 90(2)*

48. In the contested decision the Commission adopted the position that it is for the Member State concerned to show that the conditions for the exemption set out in Article 90(2) are in fact met. [100] The Netherlands Government emphatically denies that, but in my view wrongly. Although it is true that the Commission has the duty of *considering* whether Article 90(2) should be applied, [101] it cannot reasonably be expected to investigate of its own motion all the circumstances which might possibly give rise to the application of the derogation in Article 90(2).

49. Recital (17) to the contested decision deals with a fact which, according to the Netherlands Government, would exclude the application of the competition rules. The Netherlands had referred to the fact that competition between private messenger undertakings and PTT in the field of messenger services would result in only the less financially attractive destinations being left for PTT. It would therefore be impossible to guarantee for the post office the necessary income to perform properly the duty of transport entrusted to it.

In the contested decision the Netherlands Government's statement is rejected for three reasons. I shall briefly consider them.

50. First the decision refers to the favourable trend of turnover and profits during the years before the decision. From those figures the Commission deduces that there is no evidence 'that maintaining the competitive situation existing prior to the new law would jeopardize the basic postal service and that the measure in question is critical for the financial viability of the post office'. [102]

The Netherlands Government first raises the objection that 'the mere fact of making a profit does not necessarily mean that it is no longer possible to rely on Article 90(2)'. [103] In doing so it fails to understand the essential feature of the Commission's argument, which attributes the non-applicability of Article 90(2) in this context to the *volume* of profit made by the post office, which in its view shows that a competitive situation such as that which prevailed at the time the new law came into force does not endanger the operation of the basic postal service or the financial viability of the post office.

The Netherlands Government further contends that the Commission wrongly took as its basis figures from the period before the postal law came into force. That

100 — See the end of Recital (16) to the contested decision.

101 — For further detail see my Opinion delivered on 19 September 1991 in Case C-179/90 *Merci Convenzionali Porto di Genova* v *Siderurgica Gabrielli* [1991] ECR I-5889 at sections 26 to 28.

102 — See the second paragraph of Recital (17) to the contested decision.

103 — See the application in Case C-48/90, top of p. 21.

argument too is misconceived: it was obvious that to assess the applicability of Article 90(2) the Commission would take into account figures showing PTT's competitive viability at the time the new law came into force. The fact that before the new law PTT had a theoretical monopoly of messenger services for letters not exceeding 500 g does not mean that on the eve of the application of the new law there was in fact no vigorous competition with regard to those services. So the figures used by the Commission were indeed relevant.

51. In the second place the Commission took the view in the contested decision that Article 90(2) was not applicable because the post office already possessed, in fact or by the operation of law, substantial advantages in carrying out its tasks, so that the extension of its dominant position to the messenger service market could not objectively be a necessity for its performance of that task. The parties entirely disagree as to the actual impact of those advantages, but this discussion does not seem to be very important: it is in fact established that the exemptions and economies of scale available to PTT (in particular exemptions from statutory obligations regarding transport of goods and driving hours; economies of scale through the use of the same workforce and the same infrastructure for a varied range of postal services) already had the effect of strengthening its competitive position as compared with its private competitors and their financial situation. Regard being had to the factor of profitability already referred to, it does not seem that the performance of the task of general interest entrusted to PTT-Post BV necessitated the granting of a further competitive advantage.

52. Thirdly and lastly the fact that the post office is not obliged to provide its services throughout the Netherlands at the same rates, which it in fact does not do, as it offers certain customers large discounts (so-called 'contractual discounts') makes it appear, according to the contested decision, that PTT-Post BV is entirely capable of facing competition from private undertakings. Once more, the parties entirely disagree as to the amount of these discounts but their existence is not denied.[104] My view is that the contested decision correctly mentions that the existence of discounts shows that PTT, like its competitors, is in a position to take account of differences in costs in fixing its rates. This too shows that the performance of the duty of transport imposed on PTT-Post BV does not prevent PTT from reacting appropriately to market trends.

I therefore concur with the Commission's view that Article 90(2) is not applicable and that PTT-Post BV's monopoly over a portion of the basic postal service is sufficient to guarantee that its public service obligations are fulfilled (see Recital (18) to the contested decision).

104 — See for example the Netherlands Government's application in Case C-48/90, bottom of p. 21.

E — Summary and conclusion

53. My examination has led me to the conclusion that it was possible for the contested decision to be based on the power conferred upon the Commission by Article 90(3) of the Treaty to find that a national law is incompatible with a provision of the Treaty having direct effect. In this case however, the Commission did not observe the rights of the defence in the exercise of that power. My main proposal therefore is that Commission Decision No 90/16/EEC concerning the provision in the Netherlands of express delivery services be declared void and that the Commission be ordered to pay the costs.

Alternatively I think that a number of other grounds put forward by the applicants for declaring the decision void are well founded. Thus it appeared earlier that the Commission wrongly found that there was an infringement of the provisions of Article 90 in conjunction with Article 86 of the Treaty because it did not sufficiently show that by the Postal Law, 1988, PTT-Post BV acquired or threatened to acquire a dominant position on the whole of the market in messenger services, so that it is not possible to conclude that there is an extension of a dominant position or an abuse of a dominant position on the market in messenger services. I think, moreover, that the statement of the reasons on which the contested decision was based is insufficient in so far as it declared that (i) the minimum price rule for destinations outside the Community and (ii) the obligation for messenger services to register their rates in advance are incompatible with the provisions of Article 90 in conjunction with Article 86 of the Treaty. There is no need to give a separate decision on the claim that the corrigenda should be declared void since the decision itself must be declared void.