JUDGMENT OF THE COURT (Grand Chamber)

1 July 2008 *

In Joined Cases C-341/06 P and C-342/06 P,

APPEALS under Article 56 of the Statute of the Court of Justice, brought on 4 August 2006,

Chronopost SA, established in Issy-les-Moulineaux (France), represented by D. Berlin, avocat (C-341/06 P),

La Poste, established in Paris (France), represented by H. Lehman, avocat (C-342/06 P),

appellants,

the other parties to the proceedings being:

Union française de l'express (UFEX), established in Roissy-en-France (France),

* Language of the case: French.

DHL Express (France) SAS, formerly DHL International SA, established in Roissy-en-France,

Federal express international (France) SNC, established in Gennevilliers (France),

CRIE SA, in liquidation, established in Asnières (France),

represented by E. Morgan de Rivery and J. Derenne, avocats,

applicants at first instance,

Commission of the European Communities, represented by C. Giolito, acting as Agent, with an address for service in Luxembourg,

defendant at first instance,

French Republic, represented by G. de Bergues and F. Million, acting as Agents, with an address for service in Luxembourg,

intervener at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, G. Arestis and U. Lõhmus, Presidents of Chambers, P. Kūris, E. Juhász, A. Borg Barthet, J. Malenovský (Rapporteur), E. Levits and A. Ó Caoimh, Judges,

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 6 December 2007,

gives the following

Judgment

1 By their appeals, Chronopost SA ('Chronopost') (C-341/06 P) and La Poste (C-342/06 P) ask the Court to set aside the judgment of the Court of First Instance of the European Communities of 7 June 2006 in Case T-613/97 *UFEX and Others* v *Commission* [2006] ECR II-1531 ('the judgment under appeal').

2 In the judgment under appeal, the Court of First Instance partly annulled Commission Decision 98/365/EC of 1 October 1997 concerning alleged State aid granted by France to SFMI-Chronopost (OJ 1998 L 164, p. 37; 'the contested decision').

Background to the dispute

3 The facts of the dispute are set out as follows in paragraphs 2 to 18 of the judgment under appeal:

'2 [La Poste], which operates as a legal monopoly in the ordinary mail sector, was an integral part of the French State administration until the end of 1990. Since 1 January 1991, it has been a legal entity governed by public law by virtue of Law 90-568 of 2 July 1990 on the organisation of the public post and telecommunications service (*JORF* of 8 July 1990, p. 8069; "Law 90-568"). That law authorises it to perform certain activities open to competition, and particularly express delivery services.

3 The Société française de messagerie internationale ("SFMI") is a company incorporated under private law which has been entrusted with the management of La Poste's express delivery service since the end of 1985. SFMI was formed with a share capital of FRF 10 million (approximately EUR 1 524 490) held as to 66% by Sofipost, a holding company wholly owned by La Poste, and as to 34% by TAT Express, a subsidiary of the airline Transport aérien transrégional ("TAT").

4 The detailed conditions for the operation and marketing of the express delivery service provided by SFMI under the name of EMS/Chronopost were set out in an order from the French Ministry of Posts and Telecommunications of 19 August

1986. According to that order, La Poste was to provide SFMI with logistical and commercial assistance. The contractual relations between La Poste and SFMI were governed by agreements, the first of which dates from 1986.

5 In 1992 the structure of the express delivery business carried out by SFMI changed. Sofipost and TAT set up a new company, [Chronopost], in which their respective holdings were still 66% and 34%. Chronopost, which had exclusive access to La Poste's network until 1 January 1995, concentrated on domestic express deliveries. SFMI was acquired by GD Express Worldwide France, the subsidiary of an international common operator whose participants are the Australian company TNT and the post offices of five countries, a concentration which was authorised by a Commission decision of 2 December 1991 (Case IV/M.102 — TNT/Canada Post, DBP Postdienst, La Poste, PTT Poste and Sweden Post) (OJ 1991 C 322, p. 19). SFMI retained the international express delivery business, using Chronopost as an agent and service provider in the handling of its international dispatches in France ("SFMI-Chronopost").

6 Syndicat français de l'express international (SFEI)... is a trade association established under French law, grouping together almost all the companies offering express delivery services competing with SFMI-Chronopost.

7 On 21 December 1990 SFEI lodged a complaint with the Commission [of the European Communities] alleging principally that the logistical and commercial assistance provided by La Poste to [SFMI-Chronopost] constituted State aid within the meaning of Article 92 of the EC Treaty (now, after amendment, Article 87 EC). In particular, SFEI complained that the remuneration paid by SFMI for the assistance provided by La Poste was not in accordance with normal market conditions. It alleged that the difference between the market price for the purchase of such services and the price actually paid by [SFMI-Chronopost] constituted State aid. An economic study carried out by Braxton, a consultancy firm ['Braxton'], at SFEI's request, was appended to the complaint in order to demonstrate the value of the amount of aid during the period from 1986 to 1989.

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

9 At the Commission's request, the French Republic provided information by letter of 21 January, by fax of 3 May and by letter of 18 June 1993.

10 On 16 June 1993 SFEI and other undertakings brought an action before the Tribunal de commerce de Paris (Paris Commercial Court) against SFMI, Chronopost, La Poste and others. A second study by Braxton was attached to the application, updating the information contained in the first study and evaluating the amount of the aid up to the end of 1991. In a judgment of 5 January 1994, the Tribunal de commerce de Paris referred several questions to the Court of Justice for a preliminary ruling on the interpretation of Article 92 of the Treaty and Article 93 of the EC Treaty (now Article 88 EC), one of which sought clarification of the concept of State aid in the circumstances of the present case. The French Government lodged, as an annex to its observations of 10 May 1994, an economic study by Ernst & Young. In Case C-39/94 *SFEI and Others* [1996] ECR I-3547 …, the Court ruled that "the provision of logistical and commercial assistance by a public undertaking to its subsidiaries, which are governed by private law and carry on an activity open to free competition, is capable of constituting State aid within the meaning of Article 92 of the Treaty if the remuneration received in return is less than that which would have been demanded under normal market conditions" (paragraph 62).

11 In the meantime, by a letter from the Commission dated 20 March 1996, the French Republic was notified of the initiation of the procedure under Article 93(2) of the EC Treaty. On 30 May 1996 the French Republic sent the Commission its comments in this regard.

…

13 On 17 August 1996 SFEI submitted its observations to the Commission in response to that notice. It attached to its observations another economic study by Bain & Co. In addition, SFEI extended its complaint of 21 December 1990 to cover a number of additional points, including the use of La Poste's brand image, privileged access to the air waves of Radio France, customs and tax privileges and La Poste's investment in dispatching platforms.

14 The Commission passed SFEI's comments to the French Republic in September 1996. In reply, the French Republic addressed a letter to the Commission, attaching to it an economic study by Deloitte Touche Tohmatsu, a consultancy company (the "Deloitte report").

…

18 On 1 October 1997 the Commission adopted [the contested decision] …'.

The contested decision

4 According to paragraphs 19 to 23 of the judgment under appeal:

'19 In the contested decision, the Commission stated that it was necessary to distinguish between two sets of measures. The first set is the provision by La Poste of (i) logistical assistance, which consists in making available to SFMI-Chronopost the use of the postal infrastructure for the collection, sorting, transport and delivery of its dispatches, and (ii) commercial assistance, which consists in SFMI-Chronopost's access to La Poste's customers and enjoyment of its goodwill. The

second set is made up of individual measures, such as privileged access to Radio France and tax and customs privileges.

20 The Commission considered that the relevant question was "whether the terms of the transaction between [La Poste] and SFMI-Chronopost [were] comparable to those of an equivalent transaction between a private parent company, which may very well be a monopoly (for instance, because of the ownership of exclusive rights), and its subsidiary". According to the Commission, there was no financial advantage if the internal prices at which products and services were provided between companies belonging to the same group were "full-cost prices (total costs plus a mark-up to remunerate equity capital investment)".

21 In this regard, the Commission noted that the payments made by SFMI-Chronopost did not cover total costs over the first two years of operation, but covered all costs other than central and local offices' overheads. It considered, first, that it was not abnormal that payments made by a new undertaking, that is to say, SFMI-Chronopost, covered only variable costs in the start-up period. Secondly, in the Commission's opinion, the French Republic had been able to show that as from 1988 the remuneration paid by SFMI-Chronopost covered all the costs incurred by La Poste, plus a return on the equity capital invested by the latter. Furthermore, the Commission calculated that the internal rate of return ("the IRR") of La Poste's investment as a shareholder was well in excess of the cost of the company's equity in 1986, that is to say, the normal rate of return that a private investor would require under similar circumstances. Consequently, La Poste provided logistical and commercial assistance to its subsidiary under normal business conditions and that assistance therefore did not constitute State aid.

22 With regard to the second category, that is to say, the various individual measures, the Commission considered that SFMI-Chronopost derived no advantage from the customs clearance procedure, stamp duty, payroll tax or the periods allowed for payment. The use of La Poste's vehicles as advertising media should,

in the opinion of the Commission, be regarded as normal commercial assistance between a parent company and its subsidiary, and SFMI-Chronopost enjoyed no preferential treatment for advertising on Radio France. The Commission also maintained that it had been able to establish that the commitments made by La Poste when the common operator was authorised by the Commission decision of 2 December 1991 did not constitute State aid.

23 In Article 1 of the contested decision, the Commission states as follows:

"The logistical and commercial assistance provided by [La Poste] to its subsidiary SFMI-Chronopost, the other financial transactions between those two companies, the relationship between SFMI-Chronopost and Radio France, the customs arrangements applicable to [La Poste] and SFMI-Chronopost, the system of payroll tax and stamp duty applicable to [La Poste] and its … investment in the dispatching platforms do not constitute State aid to SFMI-Chronopost".'

The first proceedings before the Court of First Instance

5 By application lodged at the Registry of the Court of First Instance on 30 December 1997, SFEI, now known as Union française de l'express (UFEX), and its three member companies, DHL International SA, Federal Express International (France) SNC and CRIE SA ('UFEX and Others'), brought an action for annulment of the contested decision. Chronopost, La Poste and the French Republic intervened in support of the Commission.

6 UFEX and Others relied on four pleas for annulment in support of their action, alleging infringement of the rights of the defence, in particular the right of access to the file; an inadequate statement of reasons; errors of fact and manifest errors of assessment; and error in applying the concept of State aid.

7 The fourth plea was in two parts, alleging that the Commission misapplied the concept of State aid: first, in failing to take account of normal market conditions when analysing the remuneration for the assistance provided by La Poste to SFMI-Chronopost, and second, in holding that this concept did not cover various measures from which SFMI-Chronopost was alleged to have benefited.

8 The Court of First Instance ruled on that action in a judgment of 14 December 2000 in Case T-613/97 *Ufex and Others* v *Commission* [2000] ECR II-4055.

The judgment in *Ufex and Others* v *Commission*

9 In *Ufex and Others* v *Commission*, the Court of First Instance considered that the first part of the fourth plea was well founded.

10 In paragraph 79 of that judgment, the Court concluded:

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

11 In the subsequent paragraphs of the judgment in *Ufex and Others* v *Commission*, the Court of First Instance therefore considered only the first plea, alleging infringement of the rights of defence of Ufex and Others, and the arguments expounded in connection with the third plea, relating to errors of fact and manifest errors of assessment, which were not indissociable from those already examined in connection with the fourth plea. In both cases, the allegations made by Ufex and Others were rejected.

12 As a consequence, the Court of First Instance merely annulled Article 1 of the contested decision in so far as it finds that the logistical and commercial assistance provided by La Poste to its subsidiary, SFMI-Chronopost, does not constitute State aid to SFMI-Chronopost.

The appeals against the judgment in *Ufex and Others* v *Commission*

13 By applications lodged at the Court Registry on 19 and 23 February 2001 respectively, Chronopost, La Poste and the French Republic appealed against the judgment in *Ufex and Others* v *Commission* pursuant to Article 56 of the Statute of the Court of Justice of the European Communities. Those appeals were joined.

14 By its judgment of 3 July 2003 in Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost and Others* v *Ufex and Others* [2003] ECR I-6993, the Court declared the first ground of appeal, alleging an infringement of Article 92(1) of the Treaty as a result of an incorrect interpretation by the Court of First Instance of the concept of normal market conditions, to be well founded.

15 According to paragraphs 32 to 41 of the judgment in *Chronopost and Others* v *Ufex and Others*:

'32 … the Court of First Instance stated, in paragraph 75 of the judgment [in *Ufex and Others* v *Commission*], that the Commission should at least have checked that the payment received by La Poste was comparable to that demanded by a private holding company or a private group of undertakings not operating in a reserved sector.

33 That assessment, which fails to take account of the fact that an undertaking such as La Poste is in a situation which is very different from that of a private undertaking acting under normal market conditions, is flawed in law.

34 La Poste is entrusted with a service of general economic interest within the meaning of Article 90(2) of the EC Treaty [now Article 86(2) EC] (see Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 15). Such a service essentially consists in the obligation to collect, carry and deliver mail for the benefit of all users throughout the territory of the Member State concerned, at uniform tariffs and on similar conditions as to quality.

35 To that end, La Poste had to acquire, or was afforded, substantial infrastructures and resources (the "postal network"), enabling it to provide the basic postal service to all users, even in sparsely populated areas where the tariffs did not cover the cost of providing the service in question.

36 Because of the characteristics of the service which the La Poste network must be able to ensure, the creation and maintenance of that network are not in line with a purely commercial approach. As was recalled in paragraph 22 above, Ufex and Others have indeed accepted that a network such as that available to SFMI-Chronopost is clearly not a market network. Therefore that network would never have been created by a private undertaking.

37 Moreover, the provision of logistical and commercial assistance is inseparably linked to the La Poste network, since it consists precisely in making available that network which has no equivalent on the market.

38 Accordingly, in the absence of any possibility of comparing the situation of La Poste with that of a private group of undertakings not operating in a reserved sector, "normal market conditions", which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements which are available.

39 In the present case, the costs borne by La Poste in respect of the provision to its subsidiary of logistical and commercial assistance can constitute such objective and verifiable elements.

40 On that basis, there is no question of State aid to SFMI-Chronopost if, first, it is established that the price charged properly covers all the additional, variable costs incurred in providing the logistical and commercial assistance, an appropriate contribution to the fixed costs arising from use of the postal network and an adequate return on the capital investment in so far as it is used for SFMI-Chronopost's competitive activity and if, second, there is nothing to suggest that those elements have been underestimated or fixed in an arbitrary fashion.

41 In the light of all the foregoing considerations, the Court of First Instance erred in law in interpreting Article 92(1) of the Treaty as meaning that the Commission was not entitled to determine whether there was aid to SFMI-Chronopost by reference to the costs borne by La Poste but that it should have checked whether the payment received by La Poste "was comparable to that demanded by a private holding company or a private group of undertakings not operating in a reserved sector, pursuing a structural policy — whether general or sectorial — and guided by long-term prospects".'

16 Consequently, having found that there was no need to examine the other grounds of appeal and that the state of the proceedings did not permit the Court to give final judgment in the matter, the Court set aside the judgment in *Ufex and Others* v *Commission* and referred the case back to the Court of First Instance.

The second procedure before the Court of First Instance and the judgment under appeal

17 The case was allocated to the Fourth Chamber (Extended Composition) of the Court of First Instance. Upon a change in composition of the Chambers of the Court pursuant to the Court's decision of 13 September 2004 (OJ 2004 C 251, p. 12), the Judge-Rapporteur was transferred to the Third Chamber (Extended Composition), to which the present case was consequently allocated (paragraph 37 of the judgment under appeal).

18 The oral procedure was initially closed on 23 August 2005, then, after having been reopened, on 19 December 2005.

19 In the judgment under appeal, the Court of First Instance ruled on the forms of order sought by the parties that were still before it after the case was referred back.

20 In paragraph 49 of the judgment under appeal, the Court considered, first of all, that UFEX and Others were essentially maintaining the second, third and fourth pleas raised during the proceedings which gave rise to the judgment of the Court of First Instance in *Ufex and Others* v *Commission*, namely the pleas alleging, respectively, breach of the obligation to state reasons, errors of fact and manifest errors of assessment when analysing the remuneration for the assistance provided by La Poste, and an error in applying the concept of State aid.

21 In paragraph 51 of the judgment under appeal, having considered it necessary to examine, first of all, the plea alleging breach of the obligation to state reasons, the Court added that '[t]he pleas alleging errors of fact and manifest errors of assessment, as well as misapplication of the concept of State aid, which are indissociable, will then be examined together'.

22 After recalling, in paragraphs 63 to 71 of the judgment under appeal, the case-law concerning the statement of reasons, the Court upheld the first plea in paragraphs 77 to 95 of that judgment on the ground that no assessment could be made, on the basis of the statement of reasons in the contested decision, of the additional, variable costs incurred in providing the logistical and commercial assistance, or the appropriate contribution to the fixed costs arising from use of the postal network, or the adequate return on the capital investment, or the coverage of costs in general.

23 The Court also referred in paragraphs 96 to 100 of the judgment under appeal to circumstances justifying a more detailed statement of reasons for the contested decision in the present case.

24 It concluded, in paragraph 101 of the judgment under appeal, 'that the contested decision must be annulled for defective reasoning in so far as it concludes that the logistical and commercial assistance provided by La Poste to SFMI-Chronopost does not constitute State aid'.

25 Next, the Court considered the plea alleging an error in applying the concept of State aid.

26 First of all, it took the view in paragraph 102 of the judgment under appeal that, in view of the inadequate reasoning for the contested decision, it was not possible for it to consider the arguments relating to the alleged lack of coverage of SFMI-Chronopost's costs, the underestimation and arbitrary nature of certain elements found by the Commission, errors in the accounting adjustments in Annex 4 to the Deloitte

report, the abnormally high level of the IRR, or the causes of SFMI-Chronopost's profitability.

27 Second, in paragraphs 162 to 171 of the judgment under appeal, the Court rejected all of the other arguments advanced by UFEX and Others, except for the argument that the transfer of the Postadex client base constituted, by itself, a measure separate from the logistical and commercial assistance, and thus also State aid.

28 With regard to that last point, the Court considered that the Commission had erred in law in taking the view that that transfer did not constitute State aid on the ground that it did not entail any cash advantage.

29 In the judgment under appeal, the Court therefore:

— annulled the contested decision in so far as it finds that neither the logistical and commercial assistance provided by La Poste to its subsidiary, SFMI-Chronopost, nor the transfer of Postadex constitute State aid to SFMI-Chronopost;

— ordered the Commission to bear its own costs and 75% of the costs of UFEX and Others, apart from those caused by the interventions, before the Court of First Instance and the Court of Justice;

— ordered UFEX and Others to bear the remainder of their own costs before the Court of First Instance and the Court of Justice; and

— ordered Chronopost, La Poste and the French Republic to bear their own costs before the Court of First Instance and the Court of Justice.

Procedure before the Court in the present appeals

30 In its appeal, Chronopost claims that the Court of Justice should:

— set aside the judgment under appeal in so far as it partly annuls the contested decision;

— endorse the remainder of the judgment under appeal and give final judgment in the matter;

— dismiss the application for annulment of the contested decision; and

— order UFEX and Others to pay the costs.

31 In its appeal, La Poste claims that the Court of Justice should:

— set aside the judgment under appeal in so far as it partly annuls the contested decision; and

— order UFEX and Others to pay the costs incurred by La Poste before the Court of First Instance and the Court of Justice.

32 UFEX and Others contend that the Court of Justice should:

— dismiss the appeals; and

— order Chronopost and La Poste to pay the costs.

33 By an order of the President of the Court of Justice of 18 April 2007, the two cases were joined for the purposes of the oral procedure and the judgment.

The appeals

34 Chronopost and La Poste, the present appellants, essentially raise four grounds of appeal alleging, respectively:

— a procedural defect arising from the unlawful composition of the Chamber which delivered the judgment under appeal;

— a procedural defect in connection with the Court's substantive ruling on an inadmissible plea;

— an error of law by the Court in the assessment of the duty to state reasons in the contested decision with regard to the logistical and commercial assistance provided by La Poste to SFMI-Chronopost; and

— an error of law by the Court in the assessment of the concept of State aid with regard to the transfer of the Postadex client base.

First ground of appeal: procedural defect arising from the unlawful composition of the Chamber which delivered the judgment under appeal

Arguments of the parties

35 Chronopost and La Poste submit that the judgment under appeal was delivered following an unlawful procedure since the Judge-Rapporteur in the formation of the Chamber which delivered that judgment was the President and Judge-Rapporteur in the formation of the Chamber which delivered the judgment in *Ufex and Others* v *Commission*.

36 The fundamental principle of the right to a fair trial enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), which requires a hearing by an independent and impartial tribunal, means that the composition of the Chamber hearing the case on its referral back following the setting aside of the judgment in *Ufex and Others* v *Commission* may not give rise to doubt as to the impartiality of that formation on account of the presence within it of a Judge who had to hear and determine that case as Rapporteur in the formation which delivered the judgment that was set aside. Consequently, there was an infringement of Article 6 EU.

37 UFEX and Others contend, first of all, that that ground of appeal is inadmissible. The composition of the Chamber which delivered the judgment under appeal and the name of the Judge-Rapporteur were already known before the oral procedure before the Court of First Instance; therefore, Chronopost and La Poste could have raised their doubts as to the impartiality of the formation during that oral procedure. Having waived that opportunity, their ground of appeal is therefore new and, accordingly, inadmissible, as the Court of Justice held in Case C-64/98 P *Petrides* v *Commission* [1999] ECR I-5187.

38 Second, UFEX and Others contend that that ground of appeal is unfounded. The composition of the Chamber which delivered the judgment under appeal was in fact consistent with the provisions of Article 118 of the Rules of Procedure of the Court of First Instance, which governs that composition where the Court of First Instance is seised of a case on a referral back by the Court of Justice after a first judgment has been set aside.

39 Those provisions do not prescribe assignment of a case to a different formation, which would in any event be impossible where the first judgment has been delivered in plenary session. There is no constitutional tradition common to the Member States in that respect. The collegiate nature of the Court is deemed to neutralise the risk of bias by a member of the formation.

40 In the light of the approach taken by the European Court of Human Rights ('the Court of Human Rights') towards the question of judicial impartiality, it must be noted that it has not been possible to point to any subjective or objective element of bias in the present case. On the contrary, it constitutes sound administration of justice to entrust a case as complex as the case at issue to the same Judge-Rapporteur who heard and determined it before the referral.

41 In their replies, Chronopost and La Poste deny that their ground of appeal is inadmissible as alleged. UFEX and Others are precluded from relying in any way on the novel nature of a ground of appeal alleging infringement of a principle that is fundamental and, in consequence, a matter of public policy that cannot be waived.

42 Furthermore, such a ground of appeal could not have been raised before the delivery of the judgment of the Court of First Instance. In addition, it is not one of the procedural issues on which the Court of First Instance can rule under Article 111 of its Rules of Procedure. Moreover, those Rules of Procedure do not provide for the possibility of objecting to a Judge. That ground of appeal was invoked in the application before the Court of Justice; therefore it is not a new plea submitted 'in the course of proceedings' within the meaning of Article 42(2) of the Rules of Procedure of the Court of Justice.

43 In their rejoinders, UFEX and Others contend that the argument raised in the reply — that the infringement of a fundamental principle is a matter of public policy — is a new plea in law and therefore inadmissible. Moreover, the proceedings referred to in Article 42(2) of the Rules of Procedure of the Court of Justice are those commencing before the Court of First Instance and continuing before the Court of Justice on appeal.

Findings of the Court

44 The right to a fair trial, which derives inter alia from Article 6(1) of the ECHR, constitutes a fundamental right which the European Union respects as a general principle under Article 6(2) EU (Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 29).

45 That right to a fair trial means that everyone must be entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Such a right is applicable in the context of proceedings brought against a Commission decision (see, to that effect, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 21).

46 The guarantees of access to an independent and impartial tribunal, and in particular those which determine what constitutes a tribunal and how it is composed, represent the cornerstone of the right to a fair trial. That right means that every court is obliged to check whether, in its composition, it constitutes such an independent and impartial tribunal, where this is disputed on a ground that does not immediately appear to be manifestly devoid of merit. That check is necessary for the confidence which the courts must inspire in those subject to their jurisdiction (see, to that effect, Eur. Court HR, *Remli v. France*, judgment of 23 April 1996, *Reports of Judgments and Decisions* 1996-II, p. 574, § 48). In that respect, such a check is an essential procedural requirement, compliance with which is a matter of public policy.

47 It follows from this that, if, in an appeal, a challenge is made in that respect on a ground that is, as in the present case, not manifestly devoid of merit, the Court of Justice is obliged to check the correctness of the composition of the formation of the Court of First Instance which delivered the judgment under appeal.

48 In other words, a ground of appeal alleging an irregularity in the composition of the Court of First Instance, such as that which is now before the Court of Justice, must be regarded as involving a matter of public policy which must be raised by the Court of its own motion (see, on the raising of matters of public policy by the Court of its own motion, in particular, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67).

49 Consideration of such a plea may therefore take place at any stage in the proceedings (see, to that effect, Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 25).

50 In those circumstances, the failure of the Commission, a principal party at first instance, to raise before the Court of First Instance the irregularity invoked by Chronopost and La Poste in support of their ground of appeal before the Court of Justice, and the argument that, as a result, they — interveners at first instance — are no longer entitled to do so in the context of their appeal, cannot properly be relied upon in opposing the Court's consideration of such a plea.

51 In that regard, it is apparent from the documents in the files submitted to the Court, and undisputed, that the duties of the Judge-Rapporteur in the formation of the Chamber which delivered the judgment under appeal were entrusted to the member who had been both President and Judge-Rapporteur in the formation of the Chamber which had delivered the judgment in *Ufex and Others* v *Commission*.

52 Nevertheless, it has not been established that, in thus designating the Judge-Rapporteur, the Court of First Instance failed to comply with the duty of impartiality by which its members are bound, and thus disregarded the fundamental right to a fair trial.

53 It must be observed, first of all, that the fact that the same Judge in the two successive formations was entrusted with the duties of Judge-Rapporteur is, by itself, irrelevant to the assessment of compliance with the requirement of impartiality, since those duties are performed in a collegiate formation of the Court.

54 Second, there are two aspects to the requirement of impartiality: (i) the members of the tribunal themselves must be subjectively impartial, that is, none of its members must show bias or personal prejudice, there being a presumption of personal impartiality in the absence of evidence to the contrary; and (ii) the tribunal must be objectively impartial, that is to say, it must offer guarantees sufficient to exclude any legitimate doubt in this respect (see, to that effect, in particular, Eur. Court HR, *Fey v. Austria*, judgment of 24 February 1993, Series A no. 255-A, p. 12, § 28; *Findlay v. United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 281, § 73; and *Forum Maritime S.A. v. Roumanie*, judgment of 4 October 2007, nos. 63610/00 and 38692/05, not yet published in the *Reports of Judgments and Decisions*).

55 However, it must be noted that Chronopost and La Poste do not allege personal bias on the part of the members of the Court of First Instance in the present case.

56 Furthermore, the fact that the same Judge sits in two Chambers hearing and determining the same case in succession, cannot, by itself, give rise to doubt as to the

impartiality of the Court of First Instance in the absence of any other objective evidence.

57 In that respect, it is not apparent that the referral of the case back to a Chamber with an entirely different composition from that which first heard and determined the case must, or can, under Community law, be regarded as a general obligation.

58 Moreover, the Court of Human Rights considered that it cannot be stated as a general rule resulting from the obligation to be impartial that a court quashing an administrative or judicial decision is bound to send the case back to a different judicial authority or to a differently composed branch of that authority (see, in particular, Eur. Court HR, *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, § 97, and *Diennet v. France*, judgment of 26 September 1995, Series A no. 325-A, § 37).

59 It must also be observed that, under Article 27(3) of the ECHR, when a case is referred to the Grand Chamber of the Court of Human Rights, on a referral following a Chamber's judgment, no Judge from the Chamber which rendered the judgment is to sit in the Grand Chamber, with the exception of the President of the Chamber and the Judge who sat in respect of the State Party concerned. The ECHR thus accepts that Judges who heard and determined the case initially may sit in another formation hearing and determining the same case again, and that that is not in itself incompatible with the requirements of a fair trial.

60 In those circumstances, it has not been established in the present case that the composition of the Chamber which delivered the judgment under appeal was unlawful merely as a result of the presence in that Chamber of a member of the Court of First Instance who had already sat in the Chamber which previously heard and determined the case.

61 The first ground of appeal must therefore be rejected.

Second ground of appeal: procedural defect in connection with the Court's substantive ruling on an inadmissible plea

Arguments of the parties

62 La Poste submits, in the first part of this ground of appeal, that the Court of First Instance failed to rule on the plea of inadmissibility which it had put forward in opposition to a plea advanced by UFEX and Others alleging that the Postadex transfer constituted State aid, a plea which had not been advanced in the proceedings giving rise to the judgment in *Ufex and Others* v *Commission*, and which was therefore new in the proceedings giving rise to the judgment under appeal. In the second part, it submits that, in ruling on that plea, which was new, the Court of First Instance infringed Article 48(2) of its Rules of Procedure.

63 UFEX and Others argue that the first part of that ground of appeal is inadmissible in that it relies on confused and contradictory arguments and does not state which provision of the Rules of Procedure of the Court of First Instance has been infringed.

64 Furthermore, the first part is unfounded, as the Court of First Instance was not obliged to address a plea which in itself was inadmissible because it had been raised only by an intervener. In addition, in stating that the Court of First Instance expressed that ground of appeal in different terms when considering it under the plea put forward in the application alleging a manifest error of assessment, La Poste admits that the plea was appropriately raised and therefore not new. Thus, since the Court of First Instance was entitled to express the arguments submitted in the application in different terms, the second part is equally unfounded.

65 La Poste, in its reply, denies that the first part of its second ground of appeal is inadmissible, as contended. It maintains that it is clear. Furthermore, even if the plea of inadmissibility which it advanced before the Court of First Instance had itself been inadmissible, the Court should have made an express finding to that effect. Further,

the case-law of the Court of Justice concerning the inadmissibility of pleas raised by an intervener is more nuanced than UFEX and Others claim, and does not preclude consideration of those pleas on a case-by-case basis. The plea in the present case is admissible because, according to La Poste, its pleas are directed towards the same objective as those of the Commission, the new plea by UFEX and Others was raised well after the intervention and, having been accused of infringing the rules on State aid, La Poste had an interest in raising pleas omitted by the Commission.

66 In their rejoinder, UFEX and Others reiterate that a plea put forward by an intervener is not admissible, and that the novel nature of a plea is not a matter of public policy.

Findings of the Court

— First part of the second ground of appeal

67 An intervener has no standing to raise a plea of inadmissibility not set out in the form of order sought by the defendant (see Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 21 and 22; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraphs 11 and 12; and Case C-13/00 *Commission* v *Ireland* [2002] ECR I-2943, paragraph 5).

68 It is common ground that, in the proceedings which gave rise to the judgment under appeal, La Poste intervened in support of the form of order sought by the Commission, and that the Commission did not raise the plea of inadmissibility relied upon by La Poste before the Court of First Instance alleging that the plea advanced by UFEX and Others concerning the Postadex transfer was new, in that it had not been submitted in the procedure which gave rise to the judgment in *Ufex and Others* v *Commission*.

69 The plea of inadmissibility thus raised by La Poste, and which, as the Advocate General noted at point 65 of her Opinion, did not concern an issue of public policy, was therefore itself inadmissible. Accordingly, even if the Court of First Instance had been required to address that plea, it would equally but necessarily have had to conclude that it was inadmissible. Therefore, its failure to give a ruling was of no consequence as regards the rights of La Poste, which is therefore not justified in relying on that omission in order to challenge the lawfulness of the judgment under appeal.

70 In those circumstances, even if the first part of the second ground of appeal were admissible, it is in any event unfounded. It must therefore be rejected.

— Second part of the second ground of appeal

71 It must be borne in mind that, according to Article 48(2) of the Rules of Procedure of the Court of First Instance, applicable by virtue of Article 120 of those Rules where, as in the present case, the Court of First Instance is seised of a case by a judgment of the Court of Justice referring it back, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. It follows that, following the referral judgment of the Court of Justice, the parties are not entitled, in principle, to rely on pleas which were not raised in the procedure which gave rise to the judgment of the Court of First Instance set aside by the Court of Justice.

72 It is apparent from examination of the application brought before the Court of First Instance by UFEX and Others in *Ufex and Others* v *Commission* that the application for annulment was based on four pleas in law which the Court analysed as alleging an infringement of the rights of the defence, an inadequate statement of reasons, errors of fact and manifest errors of assessment, and an error in applying the concept of State aid (*Ufex and Others* v *Commission*, paragraph 37).

73 In their observations lodged following the judgment in *Chronopost and Others* v *Ufex and Others*, UFEX and Others maintained the last three of their pleas which the Court of First Instance, in paragraph 49 of the judgment under appeal, analysed as alleging a breach of the obligation to state reasons, errors of fact and manifest errors of assessment, and an error in applying the concept of State aid.

74 It is not apparent from examination of these observations that UFEX and Others intended to raise a new plea. It is common ground, moreover, that the arguments which they then expounded in relation to the Postadex transfer in support of the plea alleging errors of fact and manifest errors of assessment had already been submitted in the application which they lodged in the proceedings giving rise to the judgment in *Ufex and Others* v *Commission*. Such expounding of arguments cannot be described as a new plea.

75 Furthermore, as the Court of First Instance correctly stated in paragraph 51 of the judgment under appeal, the pleas alleging errors of fact and manifest errors of assessment are indissociable, in the present case, from the plea alleging an error in applying the concept of State aid. Accordingly, the Court of First Instance was entitled to express the arguments of UFEX and Others concerning the Postadex transfer in different terms as supporting the plea alleging an error in applying the concept of State aid (see, on the possibility of expressing a plea in different terms, Case C-316/97 P *Parliament* v *Gaspari* [1998] ECR I-7597, paragraph 21).

76 Therefore, by addressing those arguments in the analysis of the plea alleging an error in applying the concept of State aid, the Court of First Instance did not rule on a new plea and did not, therefore, infringe Article 48(2) of its Rules of Procedure.

77 The second part of the second ground of appeal is unfounded and must therefore also be rejected.

78 Consequently, the second ground of appeal must be rejected in its entirety.

Third ground of appeal: error of law by the Court of First Instance in the assessment of the duty to state reasons in the contested decision with regard to the logistical and commercial assistance provided by La Poste to SFMI-Chronopost

79 In order to examine this ground of appeal, it is necessary to recall the Court's reasons for concluding that the statement of reasons for the contested decision was inadequate, before setting out the arguments of the parties.

The Court's reasons for annulment

80 After recalling in paragraphs 63 to 71 of the judgment under appeal the requirements of the EC Treaty, as established in the case-law, with regard to the statement of reasons for acts of the Community institutions, the Court went on to consider the statement of reasons for the contested decision on the basis, in essence, of two sets of considerations which, according to the Court, were decisive.

81 First, the Court took the view that it had to consider whether the Commission had complied with its obligation to state reasons, in the light of the principles outlined in paragraph 40 of the judgment in *Chronopost and Others* v *Ufex and Others*, as recalled in paragraph 15 of the present judgment.

82 The Court of First Instance concluded in paragraph 72 of the judgment under appeal that '… that implies in particular an examination of the adequacy of the statement of reasons in the contested decision as regards (i) the issue whether the price charged to SFMI-Chronopost covers, first, all the additional, variable costs incurred in providing

the logistical and commercial assistance, second, an appropriate contribution to the fixed costs arising from use of the postal network and, third, an adequate return on the capital investment in so far as it is used for SFMI-Chronopost's competitive activity, and (ii) whether or not there is evidence that those elements have been underestimated or fixed arbitrarily'.

83 The Court of First Instance took the view in respect of each of those points that the contested decision did not provide sufficient details.

84 Second, observing that the scope of the obligation to provide a statement of reasons must be assessed by reference to the circumstances of each case, which could, in an appropriate case, justify a more detailed statement of reasons, the Court held that this was so in the instant case.

85 In that regard, the Court held, in paragraph 97 of the judgment under appeal, that '… the circumstances justifying a more detailed statement of reasons lie in the fact that, first, this was one of the first decisions dealing with the complex question, in the context of the application of the provisions on State aid, of the calculation of the costs of a parent company operating in a reserved market and providing logistical and commercial assistance to a subsidiary which does not operate in a reserved market. Second, the withdrawal of the Commission's first rejection decision of 10 March 1992 following the lodging of an action for annulment and the *SFEI* judgment … should have led the Commission to reason its approach even more diligently and precisely in relation to the disputed points. Lastly, the fact that the applicants submitted several economic studies during the administrative procedure should also have led the Commission to prepare a thorough statement of reasons while addressing the essential arguments of the applicants, as substantiated by those economic studies.'

Arguments of the parties

86 Chronopost and La Poste submit that the requirements to be satisfied by detailed reasoning in the contested decision — the basis on which the Court of First Instance found that decision to be deficient — go beyond what is necessary for the restricted review of a decision taken in an area in which the Commission has a broad discretion. Chronopost further submits that, in what was a real misuse of powers, the Court of First Instance purported to review the statement of reasons but carried out a review of the manifest error of assessment, or even of the expediency of the contested decision, by substituting its own assessment for that of the Commission.

87 UFEX and Others contend that this ground of appeal should be rejected, claiming that the contested decision was not sufficiently reasoned and was confined to general considerations which did not address the detailed arguments of the complaint. They submit that the argument relating to misuse of powers is irrelevant to a decision of the Court of First Instance.

Findings of the Court

88 It is settled case-law that the statement of reasons required by Article 190 of the EC Treaty (now Article 253 EC) must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Community court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular, the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, in particular, *Commission* v *Sytraval and Brink's France*,

paragraph 63 and the case-law cited, and Case C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 73).

89 As regards, more particularly, a Commission decision finding that no State aid as alleged by a complainant exists, it must be noted that the Commission must at least provide the complainant with an adequate explanation of the reasons for which the facts and points of law put forward in the complaint have failed to demonstrate the existence of State aid. The Commission is not required, however, to define its position on matters which are manifestly irrelevant or insignificant or plainly of secondary importance (*Commission* v *Sytraval and Brink's France*, paragraph 64).

90 It must also be observed that the lawfulness of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted (Case C-197/99 P *Belgium* v *Commission* [2003] ECR I-8461, paragraph 86 and the case-law cited).

91 It is in the light of these considerations that it is necessary to assess the validity of the two sets of requirements which the Court of First Instance found in the present case must be satisfied by the statement of reasons, as noted in paragraphs 80 to 85 of this judgment.

92 Assuming, first of all, that, in its response to the complaint of UFEX and Others, the Commission had applied assessment criteria of 'normal market conditions' which might be incorrect in the light of those which the Court of Justice applied in its subsequent judgment in *Chronopost and Others* v *Ufex and Others*, that could be relevant to the substance of the reasoning for the contested decision, but not to its adequacy in procedural terms.

93 Next, as regards the requirement of a more detailed statement of reasons in the contested decision in view of the context in which it was adopted, the analysis of the Court of First Instance is not well founded.

94 As the Advocate General noted at point 94 of her Opinion, the fact that the contested decision is one of the first dealing with the complex issue, in connection with State aid, of calculating the costs of the assistance provided by a parent company operating in a reserved market to its subsidiary which is not operating in such a market does not by itself justify a statement of reasons necessarily going into the detail of the calculation of those costs if, as in the present case, the Commission took the view that the complainants' grounds in that regard were misconceived in terms of the principles on which they were based. Assuming that that approach by the Commission was itself incorrect, that fact could be relevant to the substance of the contested decision but not to its validity in procedural terms.

95 Moreover, while it is true that the contested decision was adopted after the Commission's withdrawal of an earlier decision of 10 March 1992 to take no action on the complaint of UFEX and Others, a decision which was the subject of an action for annulment, that withdrawal did not imply any change in the scope of the Commission's obligation to state reasons. The concept of State aid must be applied to an objective situation, which must be appraised on the date on which the Commission takes its decision (Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 137). The reasons why the Commission made a different assessment of the situation in question in a previous decision cannot therefore have any effect on the assessment of the legality of the contested decision.

96 Finally, the necessary correlation between the grounds relied on by the complainant and the statement of reasons for the Commission's decision cannot mean that the Commission is obliged to reject each of the arguments put forward in support of those grounds. It is sufficient if it sets out the facts and the legal considerations of fundamental importance in the context of the decision (judgment of 11 January 2007 in Case C-404/04 P *Technische Glaswerke Ilmenau* v *Commission*, paragraph 30). In the present case, and provided that the explanations given support the reasons for finding those grounds irrelevant, neither the number nor the significance of the economic studies produced by the complainant in support of those grounds can, by themselves, alter the scope of the Commission's obligation to state reasons.

97 It must also be observed that the analysis as to whether the logistical and commercial assistance provided by La Poste to SFMI-Chronopost constitutes State aid, as UFEX and Others claim, was made in a context characterised, as at the date of the contested decision, by two sets of factors.

98 First, in paragraph 62 of its judgment in *SFEI and Others*, the Court of Justice, as observed in paragraph 3 of the present judgment, considered that the provision of logistical and commercial assistance by a public undertaking to subsidiaries governed by private law and carrying on an activity open to free competition is capable of constituting State aid within the meaning of Article 92 of the Treaty if the remuneration received in return is less than that which would have been demanded under normal market conditions.

99 Second, it is common ground that the complaint which UFEX and Others made to the Commission sought, in essence, to argue that the remuneration for the logistical and commercial assistance was insufficient on the basis of those considerations (Title I, E, of the contested decision).

100 In particular, UFEX and Others maintained that the remuneration for the logistical assistance should have been calculated on the basis of the price which an undertaking acting under normal market conditions should have charged for the services in question without taking into account the economies of scale enjoyed by La Poste by virtue of its monopoly, which were, according to the complainants, precisely the root cause of the distortion in competition.

101 In considering that the response given to the complaints raised by UFEX and Others was inadequate, the Court of First Instance took the view, in paragraphs 75 to 95 of the judgment under appeal, that the data provided by the Commission were too general and imprecise.

102 As the Advocate General noted at point 97 of her Opinion, the Court of First Instance was particularly critical of the lack of precision with regard to the economic and accounting concepts used, the nature of the costs examined and the components

of the financial calculations undertaken. The Court found that it was unable to check for factual errors or errors of assessment and, in respect of variable costs, considered that the contested decision should at least have contained a general summary of the analytical accounting calculations in relation to the services provided.

103 However, it must be noted, first, as the Court of First Instance also observed in paragraph 73 of the judgment under appeal, that 'the reasons for which the Commission rejected the method for calculating the costs [of those services proposed by UFEX and Others] are clear from the grounds set out in recitals 49 to 56 to the contested decision'.

104 In particular, the Commission explains why, in its view, the detailed economic studies provided by UFEX and Others were based on a concept of normal market price which was fundamentally flawed. In fact, the studies defined that price as being the price at which a comparable private company would provide the same services to an unrelated company, whereas it is necessary to take into account the fact that the transaction takes place between two companies within the same group and that, in those circumstances, the strategic considerations and synergies arising from the fact that Chronopost and La Poste belonged to the same group cannot be disregarded.

105 Accordingly, as the Advocate General noted at point 106 of her Opinion, a detailed response to the assumptions and calculations behind the overall amounts of State aid alleged in those studies would be irrelevant. The Commission cannot therefore be criticised for having failed to produce a response of that kind.

106 Second, it must be noted that the Court of First Instance does not specify which elements of the complaint made by UFEX and Others it considered had been inadequately dealt with in the contested decision.

107 Third, it must also be noted that the Court of First Instance does not establish in what respect the contested decision fails to explain why the facts and points of law put forward by UFEX and Others did not enable the Commission to find the existence of State aid. The reasoning given, as set out in paragraph 4 of the present judgment, does in fact disclose in a clear and unequivocal fashion the reasoning followed by the Commission, and enables it to be judicially reviewed.

108 As regards the economic and accounting concepts used by the Commission, the nature of costs examined and the components of the financial calculations undertaken, these undeniably concern complex technical appraisals. Since the contested decision clearly disclosed the Commission's reasoning, enabling the substance of that decision to be challenged subsequently before the competent court, it would be excessive to require a specific statement of reasons for each of the technical choices or each of the figures on which that reasoning is based (see, by analogy, in respect of measures of general application, in particular, Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 134).

109 It must also be observed that, to ensure the respect for business secrets which the Commission must observe under Article 214 of the EC Treaty (now Article 287 EC), certain information relating, in particular, to the cost price of services could not be communicated in a measure such as that at issue in the present case. The non-exhaustive nature of the figures included in such a measure cannot for that reason justify describing its reasoning as inadequate, or prevent a subsequent judicial review.

110 Finally, while various arguments calling in question the information on which the Commission relied were raised by UFEX and Others before the Court of First Instance in order to challenge the justification for the choices thus made and, in particular, their appropriateness to the criteria laid down by the Court of Justice in *Chronopost and Others* v *Ufex and Others* for determining normal market conditions in the present case, it was for the Commission to establish its case before the Court of First Instance in the course of the Court's investigation.

111 However, the fact that all that information did not appear in the body of the contested decision itself does not support the conclusion that that decision was insufficiently reasoned, *a fortiori* if those arguments were raised or developed in the judicial proceedings following the judgment in *Chronopost and Others* v *Ufex and Others*.

112 That is why the Court of First Instance could not, without erring in law, conclude — as it did in paragraph 95 of the judgment under appeal — that it was unable to review whether the method used and the stages of the analysis followed by the Commission were free from error and compatible with the principles laid down by the Court of Justice for determining the existence or absence of State aid.

113 In view of the foregoing considerations, it follows that none of the Court of First Instance's reasons can justify the annulment of the contested decision for defective reasoning. Consequently, the plea put forward by Chronopost and La Poste, alleging an error of law by the Court of First Instance in the assessment of the Commission's duty to state reasons, is well founded.

114 Therefore, the judgment under appeal must be set aside in so far as it held that the contested decision should be annulled for breach of that duty inasmuch as that decision concludes that the logistical and commercial assistance provided by La Poste to SFMI-Chronopost does not constitute State aid.

Fourth ground of appeal: error of law by the Court of First Instance in the assessment of the concept of State aid with regard to the transfer of the Postadex client base

Arguments of the parties

115 Chronopost and La Poste submit that the Court of First Instance incorrectly took the view that the transfer by a Member State of an activity in the competitive sector to a subsidiary constitutes State aid on the ground that the client base, which represents an intangible asset financed from State resources, has thus been transferred for no consideration.

116 In so doing, the Court of First Instance erred in law by failing, contrary to what was laid down by the Court of Justice in *Chronopost and Others* v *Ufex and Others*, to take account of the particular situation of La Poste, which is not comparable to that of private undertakings, on account of the fact that it operates in the reserved sector. The Postadex transfer cannot be artificially distinguished from the establishment by a State body of a subsidiary to perform an activity, a transaction which cannot be assessed in the same way as the contribution of a private company to its existing subsidiary. In addition, as the Commission found, the State's capital contribution to Chronopost was paid for; therefore the State did not in any way assist the subsidiary created.

117 Furthermore, the establishment of the subsidiary in question — which was sought by the Commission in the context of the liberalisation of sectors in which there was previously a monopoly — cannot be compared with relations between companies and existing subsidiaries. At the time of the establishment of and transfer to the subsidiary — which is akin to a hiving-off — there cannot have been any State aid as there was not yet a beneficiary and, in any event, there was not necessarily an advantage. In fact, the Commission took the assumed value of the intangible assets transferred into account.

118 Finally, the Court has already held that a capital transaction in favour of a public sector subsidiary generally does not involve any State aid where a private investor

also participates in the transaction, which is the case here, since TAT, which had a 34% shareholding in SFMI, contributed its own assets to it.

119 As far as UFEX and Others are concerned, there was a free transfer of Postadex to SFMI-Chronopost — there having been no consideration, since the return on the equity capital invested cannot be regarded as consideration, the Commission's figures being irrelevant in that regard. The capital contributions which, under company law, must always give rise to a valuation did indeed benefit Chronopost by procuring for it, as a new entrant, a competitive advantage obtained outside normal market conditions. It was a free transfer of a — moreover captive — client base from a monopoly undertaking to its subsidiary.

120 It is of little significance for the application of Article 92(1) of the Treaty whether or not there was a hiving-off, since the concept of State aid is defined not by the reasons for or methods used in the transaction but by its effects on the market and on trade within the Community.

Findings of the Court

121 At the outset, it must be recalled that, according to settled case-law, classification as 'State aid' for the purposes of Article 92(1) of the Treaty requires that all the conditions set out in that provision are fulfilled (see Case C-142/87 *Belgium* v *Commission* ('Tubemeuse') [1990] ECR I-959, paragraph 25; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 20; Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 68; and Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 74).

122 First, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to

distort competition (see, in particular, Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 56).

123 Furthermore, the Court has consistently held that the agreed benefits may include not only positive benefits such as subsidies, loans or direct investment in the capital of undertakings, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict sense of the word, are of the same character and have the same effect. The supply of goods or services on preferential terms is one of the indirect advantages which have the same effects as subsidies (see to that effect, in particular, Case C-126/01 *GEMO* [2003] ECR I-13769, paragraphs 28 and 29).

124 In finding, in paragraphs 165 and 167 of the judgment under appeal, that the transfer of Postadex by La Poste (then a State service) to SFMI-Chronopost constituted State aid, the Court of First Instance took the view that that transaction had led to the transfer of the client base — that is to say, an intangible asset which had an economic value — and that there had been no consideration in favour of La Poste for the ensuing benefit for SFMI-Chronopost.

125 Such a line of reasoning suggests that La Poste split from Postadex for no consideration, as though the activity transferred had been privatised without any remuneration.

126 However, that analysis is based on a false premiss. It is common ground that La Poste proceeded with this transfer by means of establishing a subsidiary and that, by virtue of its 100% holding, it acquired a 66% shareholding in its subsidiary, Chronopost. It cannot be ruled out that that shareholding at least partly takes into account the value of the tangible and intangible assets transferred, and particularly the value of the Postadex client base.

127 As the Advocate General noted at point 117 of her Opinion, La Poste retained the economic value of the activities transferred to Chronopost corresponding to its 66% shareholding in Chronopost.

128 In those circumstances, it must be held that the Court of First Instance could not, without erring in law, justify an analysis in which it disregards entirely the legal and economic conditions of a client base transfer upon the establishment of a subsidiary, where those conditions are, by themselves, capable of giving rise to a consideration in return for the benefit conferred by that transfer.

129 In addition, such classification as 'State aid' could be accepted only if the transfer of the Postadex client base, as such, fulfilled all the conditions referred to in Article 92(1) of the Treaty, as recalled in paragraph 122 of this judgment, those conditions being cumulative conditions (see, to that effect, Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 50).

130 However, it is not claimed that all those conditions are fulfilled. In any event, as regards the issue whether — under the fourth of those conditions — such a transfer distorts or threatens to distort competition, that could only be the case if, in particular, the transfer altered the structure of the market concerned and affected the situation of the competing undertakings already present on that market.

131 In that regard, as the Advocate General noted at point 120 of her Opinion, since the express delivery business was already being operated directly by La Poste under the name 'Postadex' until the date on which SFMI-Chronopost was created, the transfer of the Postadex client base to SFMI-Chronopost does not appear to have had the effect, by itself, of changing the conditions of competition on the express delivery market.

132 In those circumstances, the fourth ground of appeal put forward by Chronopost and La Poste must be upheld and the judgment under appeal set aside in so far as it determined that the contested decision should be annulled inasmuch as that decision finds that the transfer of Postadex does not constitute State aid.

133 In view of all the foregoing considerations, the judgment under appeal must be set aside in so far as it (i) annuls the contested decision inasmuch as that decision finds that neither the logistical and commercial assistance provided by La Poste to its subsidiary, namely SFMI-Chronopost, nor the transfer of Postadex constitute State aid to SFMI-Chronopost, and (ii) allocates the burden of costs accordingly.

The consequences of setting aside the judgment under appeal

134 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, if the Court of Justice quashes the decision of the Court of First Instance, it may itself give final judgment in the matter, where the state of the proceedings so permits. Since that is the case here, it is appropriate for the Court of Justice — within the limits of the matter before it — to rule on the merits of the application for annulment of the contested decision, taking into account the fact that the parties have been able to put forward all the factors for assessing the legality of that decision throughout a procedure which has passed through a number of stages.

Scope of the action

135 It must be observed, first of all, that the judgment under appeal annulled the contested decision only in so far as it finds that neither the logistical and commercial assistance provided by La Poste to SFMI-Chronopost, nor the transfer of Postadex constitute State aid to SFMI-Chronopost, whereas, as has been noted in paragraph 4 of the present judgment, Article 1 of the contested decision refers to other matters which the Commission regarded as not constituting State aid.

136 The Court of First Instance rejected the arguments of UFEX and Others in relation to those other matters, either in the judgment in *Ufex and Others* v *Commission*, as recalled in paragraph 180 of the judgment under appeal, or in paragraphs 189 to 191 of the latter judgment.

137 Furthermore, in its consideration of the plea alleging an error in applying the concept of State aid, the Court of First Instance, in the judgment under appeal, rejected the arguments put forward by UFEX and Others in support of that plea relating to the use of the so-called 'backward projection' method and to the use of La Poste's brand image.

138 In those circumstances, and since UFEX and Others, the respondents in the present appeals, have not made pertinent submissions, the partial setting aside by the Court of Justice of the judgment under appeal does not affect that judgment inasmuch as the Court of First Instance rejected those arguments.

139 Consequently, the subject-matter of the dispute remaining before the Court of Justice following the setting aside of the judgment under appeal (paragraph 132 above) is now limited to the challenge to the contested decision in so far as it finds that the logistical and commercial assistance provided by La Poste to SFMI-Chronopost does not constitute State aid.

140 Within the limits of that subject-matter, it therefore remains for the Court to rule on the arguments put forward in support of the plea alleging an error in the application of the concept of State aid, as maintained by UFEX and Others before the Court of First Instance following the judgment in *Chronopost and Others* v *Ufex and Others*, namely the lack of coverage of costs borne by La Poste, the underestimation and arbitrary nature of certain elements found by the Commission, errors in the adjustments

in Annex 4 to the Deloitte report and the abnormally high level of the internal rate of return of La Poste's investment.

The merits of the application for annulment of the contested decision

141 At the outset, it must be borne in mind that State aid, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Community judicature must in principle, having regard both to the specific features of the case before it and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 92(1) of the Treaty (Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25).

142 It follows that it is for the Court to check whether the facts relied upon by the Commission are substantively accurate and whether they establish that all the conditions referred to in paragraph 122 of this judgment justifying the classification of 'aid' within the meaning of Article 92(1) of the Treaty are fulfilled.

143 Since a complex economic appraisal is involved here, it should also be noted that, according to settled case-law, in reviewing an act of the Commission which has necessitated such an appraisal, the Court must confine itself to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (see, to that effect, Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 11, and Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 39).

144 In addition, since, as has been stated in paragraph 95 of the present judgment, the concept of State aid must be applied to an objective situation appraised on the date on which the Commission takes its decision, it is the appraisals carried out on that date which must be taken into account in the conduct of the review referred to above.

145 The arguments put forward by UFEX and Others must be examined in the light of those considerations, those arguments being designed to establish errors in the appraisals which led the Commission to find that the remuneration for the logistical and commercial assistance given by La Poste to SFMI-Chronopost in respect of the period from 1986 to 1995 was sufficient and did not therefore disclose State aid in favour of SFMI-Chronopost.

146 In particular, UFEX and Others contend that the Commission merely confirms that the total costs borne by La Poste were covered, without specifying the figures involved or the calculations made, and also that the Deloitte report upon which it relies recognises the Commission's inability to justify its findings on the variable costs in the absence of analytical accounts for La Poste before 1992.

147 In that regard, and as the Court of First Instance has already noted in paragraphs 134 to 136 of the judgment under appeal, as to the use of the backward projection method, it is common ground that it is only from 1992 that La Poste, until then an integral part of the French State administration, kept analytical accounts, and that without them it was impossible to calculate precisely the costs of the services provided by La Poste before then in respect of SFMI-Chronopost.

148 Furthermore, as the Court has already observed in paragraph 38 of the judgment in *Chronopost and Others* v *Ufex and Others*, in the absence of any possibility of comparing the situation of La Poste with that of a private group of undertakings not operating in a reserved sector, 'normal market conditions', which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements available.

149 In those circumstances, the Commission should not, at first sight, be criticised for having based the contested decision on the only data available at the time, deriving in particular from the Deloitte report and supplied by the French Government, from which it was possible to reconstruct the costs incurred by La Poste. The use of those data could be open to criticism only if it was established that they were based on manifestly incorrect considerations.

150 However, examination of the documents in the files submitted to the Court does not allow such a finding.

151 First, there was no reason for the Commission to query the veracity of the data supplied from the analytical accounts drawn up by La Poste from 1992 and which — as is common ground — were certified by the auditors and by a State auditor. The fact that the French Court of Auditors pointed out the weaknesses of certain aspects of those accounts in a 2003 report does not prove that the Commission's findings at the date of the contested decision were manifestly incorrect.

152 It must moreover also be noted in that regard that UFEX and Others appended to the complaint which they submitted to the Commission an economic study by Braxton and another study by that same firm in support of the action which they brought before the Tribunal de commerce de Paris in 1993. It is apparent from undisputed statements in the contested decision that UFEX and Others attached to the observations they submitted to the Commission in August 1996 another economic study by the consultancy Bain & Co. ('the Bain study') with figures which, according to UFEX and Others, were more accurate than those of the two previous studies by Braxton.

153 Not only does that series of studies reflect the difficulty of assessing the real costs of the assistance provided by La Poste to SFMI-Chronopost, but it is evident, according to undisputed statements in the contested decision, that the Deloitte report analyses the findings of the Bain study and addresses them. In those circumstances, the data which the Commission used after that report was lodged, and on the basis of all of the

considerations included in it, must be regarded as having been established according to the information available at the time, rather than arbitrarily.

154 Second, UFEX and Others contest the methodology used in the Deloitte report and then by the Commission in order to determine the costs incurred by La Poste in respect of the SFMI-Chronopost express delivery business, on the ground that it effectively disregards the fact that certain fixed costs are directly attributable to the express delivery business alone. However, such criticism is relevant only on the assumption that La Poste incurred costs specifically attributable to the express delivery business; this has in no way been demonstrated by UFEX and Others, who, without identifying any of those costs precisely, merely referred to documents containing otherwise unsubstantiated general information.

155 In any event, the use of that method — which falls within the Commission's broad discretion in the technical findings it has to make — is not evidently the product of a manifest error of assessment, in circumstances where, as here, it is not necessarily inconsistent to attribute the proportion of fixed costs to one or other activity depending on the volume of the various activities.

156 Third, it is common ground that, as has been stated in paragraph 147 of the present judgment, it was impossible, in the absence of analytical accounts for La Poste for the period from 1986 to 1992, to calculate exactly the costs of services provided for SFMI-Chronopost.

157 It is precisely in order to overcome that deficiency that the consultants, Deloitte Touche Tohmatsu, were entrusted with reprocessing the available accounting data in order to be able to produce the best possible estimate of the total costs involved in the logistical and commercial assistance thus provided to SFMI-Chronopost.

158 In that context, it is not manifestly inappropriate for that reprocessing to have entailed various adjustments, the reasons for and extent of which were explained in the Commission's response of 27 May 2005 to the written questions put to the parties by the Court of First Instance. The existence of such adjustments does not, by itself, justify a finding of inconsistency in the data used by the Commission on the basis of that study.

159 Fourth, as regards the question whether La Poste's behaviour as a shareholder of SFMI-Chronopost was commercially justified under the market economy investor principle, and therefore did not conceal subsidies liable to constitute State aid, the Commission, as the contested decision shows, verified that the IRR of La Poste's investment as a shareholder was in excess of the total cost of the equity in SFMI-Chronopost, that is to say, the normal rate of return that a private investor would require under similar circumstances.

160 There is no dispute about the fact that the calculations made, as explained in the contested decision and as shown in table 1 in the Commission's statement in reply of 27 May 2005, — that is to say, without taking into account the aid consisting in the access to La Poste's network and goodwill (first scenario) — resulted in the finding that the IRR largely exceeded the cost of the equity. As to the IRR calculated with account being taken of the aid consisting in the access to the network and that goodwill (second scenario), UFEX and Others submit that table 2 of that statement is vitiated by a calculation error.

161 However, it must be held that UFEX and Others' claim, which does not challenge the finding resulting from the first scenario, cannot have any effect. It follows from the contested decision that the Commission resorted to the second scenario only on the basis of the data provided by UFEX and Others, the content of which was disputed by the Commission, and only in order to reinforce the results of its first scenario.

162 Moreover, that data includes the figure which, according to UFEX and Others, corresponds to the aid stemming from the advantageous conditions of access to La Poste's counters, even though neither UFEX and Others nor the Bain study (as

indicated in the contested decision) explain how that figure was calculated. In those circumstances, the claim in question does not establish the manifestly erroneous nature of the Commission's assessment of the adequate return on the capital investment relating to the competitive activity.

163 Finally, it must be observed that the determination of the IRR had no other purpose in the present case than to verify whether La Poste's behaviour as a shareholder of SFMI-Chronopost was commercially justified under the market economy investor principle. In view of that objective, what was important for the Commission was whether the IRR exceeded the normal rate of return that a private investor would require under similar circumstances. Therefore, whether that excess is large or small has no bearing on whether the financial transactions which took place between La Poste and its subsidiary included an element of aid. The argument of UFEX and Others, alleging an abnormally high IRR, is, therefore, of no consequence in the present case.

164 In view of all the foregoing considerations, the plea alleging an error in applying the concept of State aid is unfounded, and the application of UFEX and Others for annulment of the contested decision must therefore be dismissed.

Costs

165 The first paragraph of Article 122 of the Rules of Procedure provides that, where the appeal is unfounded, or where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The first subparagraph of Article 69(3) of the rules provides, however, that the Court may order that the parties bear their own costs where the circumstances are exceptional. The first subparagraph of Article 69(4) provides that Member States which intervene in the proceedings are to bear their own costs.

166 In view of the background to the case, each of the parties and the French Republic must be ordered to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Sets aside the judgment of the Court of First Instance of the European Communities of 7 June 2006 in Case T-613/97 *Ufex and Others* v *Commission* in so far as it (i) annuls Commission Decision 98/365/EC of 1 October 1997 concerning alleged State aid granted by France to SFMI-Chronopost inasmuch as that decision finds that neither the logistical and commercial assistance provided by La Poste to its subsidiary, SFMI-Chronopost, nor the transfer of Postadex constitute State aid to SFMI-Chronopost and (ii) allocates the burden of costs accordingly;

2. Dismisses the action brought before the Court of First Instance of the European Communities in Case T-613/97;

3. Orders each of the parties and the French Republic to bear their own costs.

[Signatures]