JUDGMENT OF THE COURT

17 May 2001 *

In Case C-450/98 P,

International Express Carriers Conference (IECC), established in Geneva (Switzerland), represented by E. Morgan de Rivery, J. Derenne and M. Cunningham, avocats, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber, Extended Composition) of 16 September 1998 in Joined Cases T-133/95 and T-204/95 *IECC* v *Commission* [1998] ECR II-3645, seeking to have that judgment set aside in so far as it relates to Case T-204/95 and paragraphs 78 to 83 of Case T-133/95,

the other parties to the proceedings being:

Commission of the European Communities, represented by K. Wiedner, acting as Agent, and N. Forwood QC, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: English.

Deutsche Post AG, represented by D. Schroeder, Rechtsanwalt, with an address for service in Luxembourg,

United Kingdom of Great Britain and Northern Ireland,

The Post Office

and

La Poste,

interveners at first instance,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, A. La Pergola and M. Wathelet (Presidents of Chambers), J.-P. Puissochet, P. Jann, L. Sevón, N. Colneric, S. von Bahr and C.W.A. Timmermans (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the International Express Carriers Conference (IECC), represented by E. Morgan de Rivery, J. Derenne and M. Cunningham, from the Commission, represented by K. Wiedner and C. Quigley, Barrister, and from Deutsche Post AG, represented by D. Schroeder, at the hearing on 14 November 2000,

after hearing the Opinion of the Advocate General at the sitting on 11 January 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 8 December 1998, International Express Carriers Conference ('IECC') brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance in Joined Cases T-133/95 and T-204/95 *IECC* v *Commission* [1998] ECR II-3605 ('the contested judgment'), whereby the Court of First Instance annulled in part the Commission Decision of 6 April 1995, taken upon a complaint lodged by the IECC, in so far as it concerned ABA commercial physical remail, and rejected the remainder of the IECC's application.

Facts of the case

2 The IECC is an organisation representing the interests of certain undertakings which provide express mail services. Its members, who are private operators, offer, *inter alia*, 'remail' services, consisting in the transportation of mail originating in Country A to the territory of Country B to be placed there with the local public postal operator ('public postal operator') for final transmission by the latter on its own territory ('ABB remail') or to Country A ('ABA remail') or Country C ('ABC remail').

3 Remail allows large-scale senders of crossborder mail to select the national postal administration or administrations which offer the best service at the best price for the distribution of crossborder mail. It follows that, by using private operators, remail causes the public postal operators to compete for the distribution of international mail.

4 On 13 July 1988, the IECC lodged a complaint with the Commission under Article 3(2) of Council Regulation No 17 of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty) (OJ, English Special Edition 1959-1962, p. 87).

5 The complaint consisted of two parts based, first, on Article 85 of the EC Treaty (now Article 81 EC) and, second, on Article 86 of the EC Treaty (now Article 82 EC).

6 In the first part of its complaint, the IECC alleged that certain public postal operators in the European Community and in non-member countries had in October 1987 concluded a price-fixing agreement relating to terminal dues, known as 'the CEPT Agreement'.

7 In the second part of its complaint, the only part relevant to the present appeal, the IECC claimed that a number of public postal operators were applying a system designed to allocate national postal markets on the basis of Article 23 of the Universal Postal Union Convention, adopted on 10 July 1984 under the aegis of the United Nations Organisation ('the UPU Convention'). The IECC claimed that the public postal operators in the United Kingdom, Germany and France, namely the Post Office, Deutsche Post AG ('Deutsche Post') and La Poste, were also attempting to dissuade commercial companies from using the services of

private remail operators such as the IECC's members or were trying to persuade other public postal operators not to cooperate with such private operators.

8 More particularly, the complaint criticised the conduct of certain public postal operators consisting, on the basis of Article 23 of the UPU Convention, in intercepting remail, requesting other public postal operators to intercept it and warning customers that remail might be intercepted, and that they did so in order to restrict competition in remail.

9 Article 23 of the 1984 UPU Convention, now Article 25 of the 1989 UPU Convention, provides as follows:

'1. A member country shall not be bound to forward or deliver to the addressee letter-post items which senders resident in its territory post or cause to be posted in a foreign country with the object of profiting by the lower charges in force there. The same applies to such items posted in large quantities, whether or not such postings are made with a view to benefiting from lower charges.

2. Paragraph 1 shall be applied without distinction both to correspondence made up in the country where the sender resides and then carried across the frontier and to correspondence made up in a foreign country.

3. The administration concerned may either return its items to origin or charge postage on the items at its internal rates. If the sender refuses to pay the postage, the items may be disposed of in accordance with the internal legislation of the administration concerned.

4. A member country shall not be bound to accept, forward or deliver to the addressees letter-post items which senders post or cause to be posted in large quantities in a country other than the country in which they reside. The administration concerned may send back such items to origin or return them to the senders without repaying the prepaid charge.'

Proceedings before the Commission and the contested decisions

10 By its complaint of 13 July 1988, the IECC essentially sought to have the Commission adopt a decision prohibiting the actions of the public postal operators, which would have allowed the latter, and in reality would have required them, to eliminate the cost advantages that remailing derives from the fact that the terminal dues overcompensate or undercompensate the postal administrations for the actual costs of distributing crossborder mail but which, at the same time, would have prohibited the public postal operators from restricting or distorting the competition created by remailing, which offers other advantages in terms of costs or services.

11 The public postal operators cited in the IECC's complaint submitted their answers to the questions put by the Commission in November 1988. Between June 1989 and February 1991, copious correspondence was exchanged between, on the one hand, the IECC and, on the other, various officials in the Directorate-General for Competition (DG IV) and the cabinets of Commission Members Bangemann and Brittan.

12 On 18 April 1991, the Commission informed the IECC that it 'had decided to initiate proceedings under the provisions of Council Regulation 17/62... on the basis of Articles 85(1) and 86 of the EC Treaty'. On 7 April 1993, the Commission informed the IECC that it had adopted a statement of objections on 5 April 1993, which was to be sent to the public postal operators concerned.

13 On 23 September 1994, the Commission sent a letter to the IECC under Article 6 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), in which it stated, with regard to the interception of non-physical ABA remail, that '[the Commission regards] this conduct as very serious and [intends] to have any such abuse brought to an end'.

14 On 17 February 1995, the Commission sent the IECC, *inter alia*, a letter under Article 6 of Regulation No 99/63 informing it of the reasons why it could not accede to its request concerning interception of mail under Article 23 of the UPU Convention. On 22 February 1995, the IECC sent to the Commission its observations on that letter.

15 On 6 April 1995, the Commission addressed to the IECC an initial decision concerning the second aspect of the complaint relating to the interception of mail under Article 23 of the UPU Convention ('the first contested decision').

16 In the first contested decision, the Commission, *inter alia*, stated:

'4. The comments subsequently submitted by your legal representative,..., on 22 February 1995 do not, for the reasons set out below, contain any arguments which would justify a change in the Commission's position. The purpose of the present letter is to inform you about the final decision which the Commission has reached with regard to the allegations in your complaint relating to the interception of mail on the basis of Article [23] of the UPU Convention.

5. Summarised briefly, the Commission's letter sent to you on 17 February 1995 pursuant to Article 6 of Regulation No 99/63 identified four types of mail items which have been subject to interception on the basis of the UPU Convention, namely commercial physical ABA remail, non-commercial or private physical ABA remail, so-called "non-physical" ABA remail... and normal cross-border mail...

6. With respect to commercial physical ABA remail, the Commission's position is that to the extent the commercial collection of mail from residents in country B for subsequent remailing in country A to final destinations in country B constitutes a circumvention of the national monopoly for domestic letter delivery laid down by the law of country B, the interception of such mail when it is re-entering country B may be considered to be legitimate action under the current circumstances and therefore does not constitute an abuse of a dominant position in the sense of Article 86 of the EC Treaty.... [The] Commission... has... specifically noted that such circumvention of the national monopoly is "rendered profitable because of the present unbalanced levels of terminal dues" and that it is precisely for this reason that some form of protection is justifiable at this stage. ...

7. With respect to the interception of non-commercial physical ABA remail, "non-physical" remail and normal cross-border mail, the Commission's position is that to the extent the IECC's members do not engage in activities involving this type of mail, they are not harmed in their business activities by the interception of such mail and thus have no legitimate interest as required pursuant to Article 3(2) of Regulation No 17 for applications to the Commission with respect to infringements of the competition rules.

... In the Commission's view ... so-called "non-physical remail" involves the following scenario: a multinational company, for example a bank, ... sets up a central printing and mailing facility in one particular Member State "A"; information is sent by electronic means from all the bank's subsidiaries and branches to the central service centre, where the information is transformed into

actual physical letter-items, e.g. bank statements, which are then prepared for postage and submitted to the local postal operator...

... [There] are in our view no indications as to how the IECC's members could be involved in this type of arrangement. ...

8. For the above considerations I inform you that your application of 13 July 1988 pursuant to Article 3(2) of Regulation No 17/62, as far as the interception of commercial physical ABA remail, non commercial physical ABA remail, "non-physical" remail and normal cross-border mail is concerned, is hereby rejected.'

17 On 12 April 1995, the Commission addressed to the IECC a letter pursuant to Article 6 of Regulation No 99/63 regarding application of the competition rules to the interception of ABC remail. The IECC replied to that letter on 9 June 1995.

18 On 14 August 1995, the Commission adopted a final decision concerning the interception of ABC remail by certain public postal operators ('the second contested decision'), in which it stated *inter alia* as follows:

'(A) Interception of ABA remail

3. ... [You] have received a letter dated 6 April 1995 ... indicating that the part of your complaint relating to the interception of commercial physical ABA remail, non-commercial physical ABA remail, "non-physical" remail and normal cross-border mail has been rejected. ...

...

(B) Interception of ABC remail

6. The letter from [the IECC] of 9 June 1995 states that (i) the Commission no longer has jurisdiction to take a further decision in this matter, and (ii) even if the Commission had such jurisdiction, the rejection of this aspect of the complaint... was inappropriate for a number of reasons....

...

11. On 21 April 1989, the United Kingdom Post Office gave assurances to the Commission that it had not itself used powers under Article 23(4) UPU, nor did it intend in future to do so. Likewise, the then German Bundespost Postdienst informed the Commission on 10 October 1989 that it no longer applied Article 23(4) to ABC remail between Member States. ...

...

13. Although it is true that the Commission may adopt a formal prohibition decision regarding anti-competitive behaviour which has in the meantime been terminated, it is not under an obligation to do so and will decide whether such a

step is appropriate in the specific circumstances of an individual case. In the case at hand there is no evidence that the two postal operators referred to in the IECC's complaint of 1988... have not abided by the undertaking which they each gave to the Commission in 1989 to refrain from invoking Article 23(4) with respect to ABC remail. ...

14. ... The Commission would point out that the mere existence of Article 23/25 of the UPU is not necessarily contrary to the Community competition rules: it is only the exercise of the possibilities of action granted by Article 23/25 in certain circumstances — i.e. between Member States — which may constitute a breach of those rules. ...

15. The IECC's request that strict penalties be imposed on the postal administrations in order to bring an end to the violations of EC competition law is inconsistent with the IECC's inability to produce any evidence that the infringements are continuing or that there is a real danger of their resumption.

...

18. ... The French Post Office replied on 24 October 1990 maintaining that it believed... use of Article 23 UPU to be legitimate under Community law. The incident was subsequently referred to in the Statement of Objections...: in its response to the Statement of Objections, the French Post Office reiterated its earlier position that the incident was not incompatible with Community law.

19. In the circumstances of the case, taking into account the isolated nature of the incident and that there is no evidence of recurrence of the behaviour, the Commission does not believe that it is necessary to take a prohibition decision against the French Post Office. ...

20. The Commission is not aware of any other instances of the French Post Office invoking Article 23 of the UPU Convention to intercept mail, neither after the incident referred to by TNT in its letter of 10 October 1989, nor following the issue of the Statement of Objections in 1993. As noted above, the Commission is not under any obligation to adopt a formal prohibition decision regarding an incident of anti-competitive behaviour in the past, but it may decide whether it may be appropriate to do so in the specific circumstances of the case. Given that the interception of mail by the French Post Office referred to above appears to have been an isolated incident, the Commission does not believe that there are grounds for taking further action.'

Proceedings before the Court of First Instance and the contested judgment

19 By application lodged at the Registry of the Court of First Instance on 20 June 1995 and registered as Case T-133/95, the IECC brought an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC), seeking annulment of the first contested decision.

20 By application lodged at the Registry of the Court of First Instance on 28 October 1995 and registered as Case T-204/95, the IECC brought an action under Article 173 of the Treaty seeking annulment of the second contested decision.

21 In accordance with Article 50 of the Rules of Procedure of the Court of First Instance, and after hearing the parties, the Court of First Instance decided to join Cases T-133/95 and T-204/95 for the purposes of judgment.

22 By the contested judgment, the Court of First Instance annulled the first contested decision in so far as it concerned commercial physical ABA remail and dismissed the remainder of the actions.

23 The Court of First Instance rejected all the pleas in law alleging either a lack or insufficiency of reasoning both in the first contested decision (paragraphs 67 to 70 of the contested judgment) and in the second contested decision (paragraphs 121 and 125 to 131 of the contested judgment).

24 The Court of First Instance also rejected the IECC's claim that, in adopting the contested decisions, the Commission had misused its powers (paragraphs 188 to 196 of the contested judgment) and infringed certain general principles of law (paragraphs 202 to 206 of the contested judgment).

25 With more particular regard to the first contested decision, the Court of First Instance rejected the arguments whereby the IECC sought to show that the

Commission misapplied Article 3(2)(b) of Regulation No 17 by taking the view that the members of the IECC had no legitimate interest in challenging the allegedly abusive practices of the public postal operators in regard to non-physical ABA remail (paragraphs 78 to 83 of the contested judgment).

26 On the other hand, the Court of First Instance upheld in part the IECC's plea alleging infringement of Articles 85 and 86 of the Treaty and held that the Commission had erred in law in finding that interceptions of commercial ABA remail did not constitute an abuse within the meaning of Article 86 of the Treaty; and it annulled the first contested decision in so far as it concerned commercial ABA remail (paragraphs 94 to 107 of the contested judgment).

27 With more particular regard to the second contested decision, the Court of First Instance, which had dismissed the IECC's objections relating to the scope of the contested decisions and held that the first contested decision did not relate to the Commission's final assessment of the part of the complaint relating to ABC remail (paragraphs 58 to 62 of the contested judgment), rejected the complaints alleging that the letter of 12 April 1995 and the second contested decision were non-existent (paragraphs 116 to 118 of the contested judgment).

28 The Court of First Instance also rejected the argument that the Commission made manifest errors of assessment of fact and of law in analysing the conduct of the public postal operators of which the IECC had complained in regard to ABC remail (paragraphs 145 to 165 of the contested judgment).

29 Similar complaints relating to the examination of Article 23 of the UPU Convention from the aspect of Articles 85 and 86 of the Treaty were not upheld either (paragraphs 169 to 172 and paragraphs 176 and 177 of the contested judgment) and the Court of First Instance did not therefore annul the second contested decision.

30 The Commission was ordered to bear the IECC's costs in Case T-133/95, the IECC was ordered to bear the Commission's costs in Case T-204/95 and the interveners were ordered to bear their own costs in both cases.

The appeal

31 In its appeal, the IECC claims that the Court should:

— set aside the contested judgment is so far as it concerns Case T-204/95 and paragraphs 78 to 83 of Case T-133/95;

— itself give judgment in Case T-133/95, pursuant to Article 54 of the EC Statute of the Court of Justice, and annul the first contested judgment in so far as it declares that the IECC has no legitimate interest in non-physical ABA remail and rejects the complaint relating to ABC remail without stating the reasons for doing so;

— itself give judgment in Case T-204/95, pursuant to Article 54 of the EC Statute of the Court of Justice, and declare non-existent or, in the alternative, annul the second contested decision;

— order Deutsche Post to bear the costs of its intervention before the Court of First Instance and also those incurred by the IECC in connection with the reply to Deutsche Post's statement in response before the Court of Justice;

— order the Commission to bear the costs relating to Case T-204/95 and those relating to Case T-133/95, in the event that the contested judgment should be set aside in part, and also the costs of the present proceedings;

— order the interveners before the Court of First Instance to bear the costs borne by the IECC before the Court of First Instance in connection with their intervention in those proceedings;

— in the alternative, in the event that it should not itself give judgment in the case, reserve the decision as to costs and refer the case back to the Court of First Instance.

32 The IECC sets out seven pleas in law in support of its appeal. The first plea alleges infringement of Article 3(2)(b) of Regulation No 17. The second plea alleges that

the Court of First Instance misinterpreted and distorted, *inter alia*, the first contested decision. The third plea alleges infringement of the legal concept of a non-existent act in Community law. By the fourth plea in law, which consists of three limbs, the IECC maintains that the Court of First Instance erred in law in applying the legal concept of Community interest. The fifth plea alleges infringement of Articles 85 and 86 of the Treaty, read in conjunction with Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article 89 of the EC Treaty (now, after amendment, Article 85 EC) and Article 155 of the Treaty (now Article 211 EC). The sixth plea condemns the contradictory and inadequate nature of the legal reasoning followed by the Court of First Instance, which is tantamount to a failure to state the grounds of the contested judgment. Last, the seventh plea alleges infringement of the legal concept of misuse of powers.

33 The Commission and Deutsche Post contend that the Court should dismiss the appeal as inadmissible in part and unfounded in part and order the IECC to bear the costs.

First plea in law

34 By its first plea in law, the IECC maintains that the Court of First Instance erred in law in interpreting Article 3(2)(b) of Regulation No 17. It submits that the Court of First Instance was wrong in paragraphs 78 to 83 of the contested judgment to reject the IECC's allegation that the Commission had misapplied that provision on the ground that the members of the IECC had no legitimate interest in challenging the allegedly abusive practices of the public postal operators in regard to non-physical ABA remail, as defined in the first contested decision.

35 The IECC observes that Article 3(2)(b) of Regulation No 17 reserves the possibility of submitting a complaint for infringement of Articles 85 and 86 of

the Treaty to persons able to show a legitimate interest and claims that its members are concerned by the intervention of the public postal operators in relation to non-physical ABA remail for four reasons. First, its members' interests are harmed by all interceptions of remail under Article 23 of the UPU Convention in so far as those interventions are designed to protect the public postal operators against the negative consequences of the CEPT Agreement. Second, the concept of non-physical ABA remail as interpreted by the public postal operators might also encompass the activities of members of the IECC, in particular where cases of non-physical ABC remail are classified as ABA remail. Third, interceptions even *vis-à-vis* non-members of the IECC are, owing to the threat which they represent, likely to affect the customers of the members of the IECC. Fourth, the Commission recognised the IECC's legitimate interest by accepting it, for approximately seven years, as go-between in postal matters, in particular on questions of ABA remail.

36 In that regard, it should be pointed out that the four arguments put forward by the IECC, with the exception of the part of the second argument relating to ABC remail operations, raise new matters which were not submitted at first instance. Under Article 113(2) of the Rules of Procedure, they are therefore inadmissible in this appeal.

37 As regards the part of the second argument concerning ABC remail operations, they merely reiterate the IECC's submissions to the Court of First Instance, without specifying what error the Court of First Instance is alleged to have made in the reasoning which it followed in paragraph 82 of the contested judgment in order to reject the IECC's argument. That part of the second argument is therefore also inadmissible.

38 The first plea in law must therefore be rejected in its entirety as manifestly inadmissible.

Second plea in law

39 By its second plea in law, the IECC maintains that, in rejecting in paragraphs 58 to 62 of the contested judgment its allegation that the first contested decision concerned not only ABA remail but also ABC remail, the Court distorted the meaning of four documents submitted to it, namely the Commission's letter of 17 February 1995, the IECC's letter of 22 February 1995, the first contested decision and the Commission's statement in defence, and erred in law in interpreting the first contested decision.

40 In that regard, it is sufficient to state that the IECC's allegations, which essentially reiterate an argument already put forward before the Court of First Instance, do not provide any serious support for the contention that the Court of First Instance distorted the evidence before it in such a way as to call into question the reasoning which it followed in paragraphs 58 to 62 of the contested judgment in reaching the conclusion that the first contested decision concerned only ABA remail operations.

41 This plea in law is therefore manifestly unfounded.

Third plea in law

42 By its third plea in law, the IECC claims that the Court of First Instance infringed the legal concept of a non-existent act under Community law.

43 Since the part of the complaint relating to ABC remail had, according to the IECC, already been rejected by the first contested decision, the second contested decision appears to be the second decision taken in respect of the same subject and therefore to give rise to serious confusion between the different administrative stages. Accordingly, both the Commission's letter of 12 April 1995 and the second contested decision should have been declared non-existent.

44 The Court of First Instance was therefore wrong, according to the IECC, to reject that argument as invalid in paragraph 116 of the contested judgment on the ground that the IECC's reasoning that the first contested decision already concerned ABC remail was based on a false premiss. Furthermore, the Court of First Instance was also wrong in holding, in paragraph 117 of the contested judgment, that 'the defects alleged by the IECC, even if they were well founded, would not constitute an irregularity of such a nature as to lead to the decision being declared non-existent'.

45 As may be seen from the rejection of the second plea in law, in paragraphs 40 and 41 above, the finding of the Court of First Instance that the part of the IECC's complaint relating to ABC remail was rejected by the second contested decision and not by the first contested decision could not be impugned by the IECC in the context of the present appeal. Accordingly, the Court of First Instance's conclusion that the IECC's reasoning that the second contested decision was non-existent was based on a false premiss cannot be upset either.

46 The third plea in law must therefore be rejected as unfounded, without there being any need to consider the IECC's complaint in respect of the statement of the Court of First Instance in paragraph 117 of the contested judgment, since that paragraph is in any event superabundant.

Fourth plea in law

47 By its fourth plea in law, which consists of three limbs, the IECC claims that the Court of First Instance erred in law in assessing the legal concept of Community interest and in its legal examination of the application of that concept by the Commission.

48 In that regard, it should be pointed out that, in the second contested decision, the Commission explained essentially that, faced with infringements in the past where there was no evidence that they would be repeated, there was no need for it to use its power to make a finding of infringement and that, for that reason, it rejected the part of the IECC's complaint relating to ABC remail.

49 The Commission, supported on this point by Deutsche Post, contends that this plea in law is inadmissible since it introduces new issues that were not raised in the proceedings before the Court of First Instance.

50 As to this issue, the Court finds that in the proceedings at first instance the IECC challenged both the form and the substance of the statement of reasons on which the second contested decision was based and, from the latter aspect, it criticised, *inter alia*, the absence of any reference to the criterion for the assessment of the Community interest in that statement of reasons.

51 In those circumstances, it cannot be maintained that the IECC is stepping beyond the bounds of the dispute before the Court of First Instance in criticising, in the fourth ground of its appeal, the latter's application of the concept of Community interest.

52 The fourth plea in law is therefore admissible.

First limb

53 By the first limb of the fourth plea in law, the IECC claims that the Court of First Instance erred in law in concluding, in paragraph 148 of the contested judgment, that when the Commission decides that it is unnecessary to examine a complaint any further it 'is not obliged to refer expressly to the concept of "Community interest"' and that '[i]t is sufficient, for this purpose, for this concept to underlie the reasoning on which the decision in question is based'.

54 In that regard, it should be pointed out that, when it rejects a complaint submitted to it under Article 3 of Regulation No 17, the Commission is required to set out the reasons for its decisions to reject it, and more particularly to state the reasons for its assessment of whether or not it was appropriate to examine the complaint any further, in a sufficiently precise and detailed manner to enable the Community judicature effectively to review the Commission's use of its discretion to define priorities (Case C-119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, paragraph 91). On the other hand, it is under no obligation to include in its decision an express reference to the concept of Community interest.

55 The first limb of the fourth plea in law is therefore unfounded.

Second limb

56 By the second limb of the fourth plea in law, the IECC maintains, in the alternative, that the Court of First Instance infringed the concept of Community interest and failed to fulfil its obligation to review the application of that concept by the Commission by accepting that the Commission provided a reason for rejecting the complaint for lack of Community interest in the form of a single criterion and by not ascertaining whether the reasoning on which the second contested decision was based satisfied the three criteria of Community interest defined in paragraph 86 of the judgment of the Court of First Instance in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223.

57 In that regard, it should be observed that the Commission, in the exercise of its discretion, must take into consideration all the relevant matters of law and of fact in order to decide on what action to take in response to a complaint. More particularly, it must consider attentively all the matters of fact and of law which the complainant brings to its attention (Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045, paragraph 19, Case 298/83 *CICCE* v *Commission* [1985] ECR 1105, paragraph 18, Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 20, and *Ufex and Others* v *Commission*, cited above, paragraph 86).

58 However, in view of the fact that the assessment of the Community interest raised by a complaint depends on the circumstances of each case, the number of criteria of assessment to which the Commission may refer should not be limited nor, conversely, should it be required to have recourse exclusively to certain criteria (*Ufex and Others* v *Commission*, paragraph 79).

59 Consequently, in considering that the Commission was correct to give priority to a single criterion for assessing the Community interest and did not specifically consider the criteria referred to in *Automec* v *Commission*, the Court of First Instance did not err in law.

60 The second limb of the fourth plea in law is therefore unfounded.

Third limb

61 By the third limb of the fourth plea in law, the IECC claims, further in the alternative, that the Court of First Instance infringed the concept of Community interest by not properly examining whether the complainant's rights might be satisfactorily guaranteed by the national courts. In that regard, the IECC observes that the Court of First Instance stated, in paragraph 164 of the contested judgment, that the second contested decision 'does not... affect the applicant's right to pursue any remedy it considers appropriate should it uncover evidence that practices which it considers to be unlawful have been resumed'. Since the Commission did not provide in that decision any element of law or of fact relating to the possibility that the IECC might be successful before a national court or authority, the Court of First Instance erred in law in thus justifying the Commission's rejection of the complaint.

62 It is clear from this final limb of the fourth plea in law that the IECC has misread the passage in paragraph 164 of the contested judgment to which it takes exception. That paragraph does not form part of the grounds on which the Court of First Instance, following a detailed examination of the reasons provided for the second contested decision, which rejects the complaint relating to the interception of ABC remail by certain public postal operators, reaches the conclusion that the Commission properly concluded that, for each of the public postal operators concerned, it was unnecessary to examine further that aspect of the complaint. Only after formulating that conclusion does the Court of First Instance observe, on its own initiative, that the IECC retains the right, for the future, to pursue any remedy it considers appropriate should practices which it considers to be

unlawful be resumed. There is nothing in that statement that might constitute an error of law.

63 The third limb of the fourth plea in law is therefore unfounded.

64 Consequently, the fourth plea in law must be rejected in its entirety.

Fifth plea in law

65 By its fifth plea in law, the IECC criticises the Court of First Instance for having made an error of law in its interpretation of the task conferred on the Commission by Article 89(1) of the Treaty when it stated, at paragraph 146 of the contested judgment, that the Commission 'was lawfully entitled to decide, on condition that it provided reasons for such a decision, that it was not appropriate to pursue a complaint denouncing practices which were subsequently discontinued'. The IECC submits that the Court of First Instance's reasoning contradicts the well-established principle that competition can still be distorted by the sole effects of unlawful practices even though those practices have been discontinued. In the present case, the impact of the practices complained of on the market for remail services is still being felt. It consists, in particular, in the mere possibility that the public postal operators might repeat the practices complained of.

66 Both Deutsche Post and the Commission have challenged the admissibility of the fifth plea in law, on the ground that it introduces new arguments that were not raised in the proceedings before the Court of First Instance.

67 In that regard, it is sufficient to refer to paragraphs 132 to 144 of the contested judgment, which clearly show that the risk that conduct such as that of which the IECC complains in respect of ABC remail might reappear, notwithstanding the undertakings given by the public postal operators concerned, was addressed by the parties during the proceedings before the Court of First Instance.

68 The fifth plea in law is therefore admissible.

69 As to that plea, the Court finds that the IECC is incorrect to criticise the Court of First Instance for having restricted its review of the reasons provided by the Commission for the second contested decision solely to the finding that the practices challenged in the complaint had subsequently been discontinued, without taking into consideration the fact that certain anti-competitive effects of those practices, among which the IECC refers more specifically to the risk of further infringements in the absence of a Commission decision making a finding of an infringement of Article 86 of the Treaty, might persist after the practices had been discontinued.

70 The Court of First Instance stated, in paragraph 147 of the contested judgment, that, '[i]n particular, subject to review by the Community judicature, the Commission is entitled to take the view that, where operators against which a complaint has been made have given undertakings and the applicant has failed to provide any evidence whatever that those undertakings have been disregarded, and the Commission has carefully examined the facts of the case, it is unnecessary for it to examine that complaint any further'.

71 The Court of First Instance then made a detailed assessment, in paragraphs 149 to 164 of the contested judgment, of whether the conditions set out in paragraph 147 of the contested judgment were in fact satisfied for each of the three public postal operators called in question in the complaint, and also of the risk of further infringement.

72 Thus, the Court of First Instance answered precisely each of the concerns raised by the IECC in connection with that complaint.

73 The fifth plea in law must therefore be rejected as unfounded.

Sixth plea in law

74 By its sixth plea in law, the IECC alleges a failure to state reasons for the contested judgment in three respects.

75 First, the findings of the Court of First Instance in paragraphs 69 and 121 of the contested judgment, that neither the first contested decision nor the second contested decision concerned the part of the complaint relating to the criticism of agreements contrary to Article 85 of the Treaty concluded by the public postal operators with a view to a concerted implementation of Article 23 of the UPU Agreement, are in the IECC's view contradicted by other paragraphs of the contested judgment and, more particularly, by paragraph 100, in which the Court of First Instance refers to the existence of such an agreement.

76 That complaint must be rejected, since paragraph 100 of the contested judgment refers not to an agreement within the meaning indicated by the IECC but to the CEPT Agreement on the fixing of terminal dues.

77 Second, the IECC argues that the Court of First Instance contradicted itself when it stated, in paragraph 145 of the contested judgment, that the Commission, in the second contested decision, had not undertaken a definitive examination of the lawfulness of the practices in question under Article 86 of the Treaty, while concluding in paragraph 105 of the contested judgment that 'the Commission erred in law in finding that interceptions of commercial ABA remail did not constitute an abuse within the meaning of Article 86 of the Treaty'. It follows from the latter paragraph that the Court of First Instance considered that the Commission had made a definitive assessment of the applicability of Article 86 to interceptions of ABA remail. Since the same conclusion should apply in the case of ABC remail, the Court of First Instance should have concluded that the Commission had made the same error in law in the second contested decision relating to that type of mail.

78 That argument cannot be upheld. Since the subject-matter of the two contested decisions and the grounds on which they are based are clearly distinct — the first concerns ABA remail while the second concerns ABC remail —, it cannot be accepted that the findings of the Court of First Instance in respect of one of the decisions necessarily apply to the other.

79 Furthermore, it is clear from the second sentence of paragraph 145 of the contested judgment that the Court of First Instance, in finding that the Commission had not carried out a definitive examination of the legality of the ABC remail practices under Article 86 of the Treaty, was referring to the absence of a decision making a finding of the existence or otherwise of an infringement of that article of the Treaty. The correctness of that finding has not been called into question by the IECC.

80 Third, the IECC maintains that a comparison between, on the one hand, the reasoning followed in paragraphs 169 to 171 of the contested judgment, when

the Court of First Instance assessed the position expressed by the Commission in the second contested decision and concluded that the mere fact that Article 23 of the UPU Convention existed was not necessarily contrary to Community competition rules and that only the use of the opportunities available under that provision might, in certain circumstances — that is to say, where trade between Member Sates was affected — constitute an infringement of those rules and, on the other hand, the statements which the Court of First Instance makes in paragraphs 99 to 101, clearly establishes a contradiction in the grounds of the contested judgment.

81 The third complaint must be rejected for the same reasons as the preceding complaint. The paragraphs of the contested judgment which the IECC compares in order to reveal contradictions relate to different contested decisions based on different reasons. When read in their context, those paragraphs of the contested judgment are not in any way contradictory.

82 The sixth plea in law is therefore unfounded in its entirety.

Seventh plea in law

83 By its final plea in law, the IECC claims that the Court of First Instance erred in law in applying the legal concept of misuse of powers, first by refusing to undertake a global appraisal of all the relevant and consistent factors raised by the IECC in order to establish the existence of misuse of powers in the present case and, second, by considering, in paragraph 193 of the contested judgment, that the manner in which the Commission had dealt with other complaints or legal proceedings in the same sphere of postal activities was irrelevant for the purpose of determining whether the adoption of the contested decisions was vitiated by a misuse of powers.

84 In that regard, it should be pointed out, first, that by undertaking a detailed examination of each individual factor which the IECC invoked in order to demonstrate the existence of a misuse of powers, and then by finally concluding that none of those factors constituted an objective and relevant factor establishing the existence of a misuse of powers in the present case, the Court of First Instance did not err in law in applying that legal concept.

85 Nor, second, is there any indication of such an error in the Court of First Instance's observation, in paragraph 193 of the contested judgment, that the IECC's reference to the manner in which the Commission had dealt with other complaints or legal proceedings relating to postal activities clearly distinct from remail was irrelevant.

86 The seventh plea in law is therefore unfounded.

87 As the IECC has been unsuccessful in all its pleas in law, the appeal must be dismissed in its entirety.

Costs

88 Under Article 69(2) of the Rules of Procedure, which applies to the appeal procedure by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission and Deutsche Post have requested that the IECC be ordered to pay the costs and the IECC has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT,

hereby:

1. **Dismisses the appeal;**

2. **Orders International Express Carriers Conference (IECC) to pay the costs.**

Rodríguez Iglesias	La Pergola	Wathelet
Puissochet	Jann	Sevón
Colneric	von Bahr	Timmermans

Delivered in open court in Luxembourg on 17 May 2001.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President