OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 11 January 2001 [1]

I. Introduction

1. By its appeals in Cases C-449/98 P and C-450/98 P, International Express Carriers Conference (hereinafter 'the IECC') seeks to have set aside, respectively, the judgments of the Court of First Instance of 16 September 1998 in Case T-110/95 [2] and in Joined Cases T-133/95 and T-204/95. [3]

The first of those judgments dismissed the IECC's action for annulment of the Commission decision of 17 February 1995 not to proceed with examination of its complaint concerning an agreement fixing terminal dues which various public postal operators charge each other.

The second dismissed the IECC's action for the annulment of the Commission decisions of 6 April and 14 August 1995 not to take action against allegedly anti-competitive practices engaged in by those operators in relation to various kinds of remail.

In view of the similarity of the facts underlying the two cases and, to a lesser extent, of the legal issues which they raise, I shall deal with them in a single opinion.

II. Facts

2. The facts of the case, as recorded in the contested decisions, are as follows:

A. *International Express Carriers Conference and remail*

3. The IECC is an organisation representing the interests of certain undertakings

1 — Original language: Spanish.
2 — *IECC* v *Commission* [1998] ECR II-3605.
3 — *IECC* v *Commission* [1998] ECR II-3645.

which provide express mail services. Its members, which are private operators, offer, *inter alia*, 'remail' services, consisting in the transport of mail originating in Country A to the territory of Country B to be placed there with the local public postal operator for final transmission by the latter on its own territory or to Country A or to Country C.

4. It is customary to distinguish between three categories of remail services:

— 'ABC remail', where mail originating in Country A is transported by private companies to Country B and put into the postal system there for forwarding via the traditional international postal system to Country C, where the final addressee resides;

— 'ABB remail', where mail originating in Country A is transported by private companies to Country B and put into the postal system there for delivery to final addressees in Country B; and

— 'ABA remail', where mail originating in Country A is transported by private companies to Country B and put into the postal system there in order to be sent via the traditional international postal system back to Country A, where the final addressee resides.

5. To those three types of remail should be added so-called 'non-physical remail'. In this form of remail, information from Country A is sent electronically to Country B, where, with or without processing, it is printed, transported and put into the postal system of Country B or Country C for forwarding via the traditional international postal system to Country A, B or C, where the final addressee resides.

B. *Terminal dues and the Universal Postal Union Convention*

6. The Universal Postal Union Convention (hereinafter 'the UPU Convention') which was adopted on 10 July 1964 under the aegis of the United Nations Organisation and to which all Member States of the European Community have acceded, provides the framework for relations between all postal administrations worldwide. It was also within that framework that the

European Conference of Postal and Telecommunications Administrations ('CEPT') was established, to which all the European postal administrations against which the appellant has complained belong.

7. In any postal system, the sorting of 'inward' mail and its delivery to final addressees involve significant costs for public postal operators. For that reason, UPU members adopted in 1969 a system of fixed compensation rates for each type of mail, referred to as 'terminal dues', thereby abandoning a principle that had been observed since the UPU was founded, under which each public postal operator bore the costs involved in sorting and delivering inward mail without passing on such costs to the public postal operators of the countries in which that mail originated. The economic value of the delivery service provided by the various postal administrations, their cost structures and the charges invoiced to customers were subject to considerable variation.[4] The difference between the prices charged for the delivery of national and international mail in the various Member States and the level of terminal dues in relation to the various prices in force at national level lie at the root of the remail phenomenon. Remail operators seek, *inter alia*, to take advantage of those price differences by offering to transport commercial companies' mail to the public postal operators which offer the best quality/price ratio for a particular destination.

8. 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 — Of interest are the tariffs referred to by Alejo Carpentier in *El Siglo de la Luces*, a magnificent tale of the French Revolution in the Antilles, where he writes that 'Those fields of destruction were assailed by a predatory flock of vile colonial functionaries... who, in exchange for the despatch of a letter... took a wedding ring, a locket, a family medallion — some treasured possession intended to be kept safe to the last as a reason for living' (published by Seix Barral, 4th Ed., Barcelona 1990, p. 234).

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.'

C. *The IECC's complaint and the 1987 CEPT Agreement*

9. 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 [5] (hereinafter 'Regulation No 17'). The complainant essentially alleged, first, that a number of public postal operators established in the European Community and in non-member countries, meeting in Berne in October 1987, had concluded a price-fixing agreement in regard to terminal dues ('the CEPT Agreement') and, second, that a number of public postal operators were attempting to operate a market-allocation scheme on the basis of Article 23 of the UPU Convention with a view to declining to deliver mail lodged by customers with public postal operators in countries other than those in which they reside.

10. In the part of its complaint relating to the CEPT Agreement, the IECC stated, more specifically, that in April 1987 a large number of public postal operators in the Community had, during a meeting held in the United Kingdom, considered whether a common policy ought to be adopted to respond to the challenge of competition from private companies offering remail services. A working party established within the CEPT had subsequently proposed, in substance, an increase in terminal dues, the adoption of a code of conduct and improvements in customer services. In October 1987 that working party accordingly adopted a new terminal dues arrangement (the CEPT Agreement), which proposed a new fixed rate in fact higher than the previous rate.

11. In addition, it is not disputed that, on 17 January 1995, 14 public postal operators, 12 of them from the European Community, signed a preliminary agreement on terminal dues designed to replace the 1987 CEPT Agreement. The new agreement, referred to as the 'REIMS Agreement' (System for the Remuneration of Exchanges of International Mails between Public Postal Operators with a Universal Service Obligation), essentially provides for a system whereby the receiving post office charges the originating post office a fixed percentage of the former's domestic tariff for any post received. A definitive version

5 — OJ, English Special Edition 1959-1962, p. 87.

of that agreement was signed on 13 December 1995 and notified to the Commission on 19 January 1996.[6]

D. *The handling of the complaint*

12. The first part of the IECC's complaint concerned the application of Article 85 of the EC Treaty (now Article 81 EC) to the CEPT Agreement.

13. In the second part of its complaint the IECC criticised a number of public postal operators which operated a market-allocation scheme on the basis of Article 23 of the UPU Convention. The IECC alleged that the United Kingdom, German and French operators (respectively 'the Post Office', 'Deutsche Post' and 'La Poste') were attempting to dissuade businesses from using the services of private remail operators, such as the members of the IECC, or prevent other postal administrations from cooperating with those private operators, as is apparent from, for example, a letter sent in January 1987 by the Post Office to a number of public operators, including a Community operator.

14. Similarly, the IECC alleged that in Spring 1988 Deutsche Post had attempted to discourage mailers in Germany from using remail by citing Article 23 of the UPU Convention and by intercepting and returning inbound international mail destined for addressees residing in Germany.

15. The public postal operators cited in the appellant's complaint submitted their answers to the questions put to them 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.

16. 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'.

17. On 7 April 1993 the Commission informed the IECC that it had adopted a statement of objections on 5 April 1993, and that this was to be sent to the public postal operators concerned.

6 — OJ 1996 C 42, p. 7.

18. The Commission sent a letter to the IECC on 13 July 1994 expressing concern 'about the increasing number of incidents in which mail which was physically created in, e.g., the Netherlands, for the purpose of being sent to German customers, is being intercepted and declared "non-physical ABA remail" by [Deutsche Post]...'.

19. On 26 July 1994 the IECC called on the Commission, pursuant to Article 175 of the EC Treaty (now Article 232 EC), to send it a letter under Article 6 of Commission Regulation No 99/63 of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17[7] (hereinafter 'Regulation No 99/63') should the Commission consider it unnecessary to adopt a decision prohibiting the actions of the public postal operators.

20. On 23 September 1994 the Commission informed the IECC of its intention to dismiss the part of the complaint that related to the application of Article 85 to the CEPT Agreement and asked it to submit is observations pursuant to Article 6 of Regulation No 99/63. With regard to the interception of non-physical ABA remail, the Commission stated that 'this conduct [was] very serious and [it intended] to have any such abuse brought to an end'.

21. On 23 November 1994 the IECC submitted its observations on that communication and called on the Commission to define its position on the complaint as a whole, pursuant to Article 175 of the Treaty. It also requested access to the case-file.

E. *The Decision of 17 February 1995*

22. On 15 February 1995, considering that the Commission had not defined its position pursuant to Article 175 of the Treaty, the IECC brought an action for failure to act, registered as Case T-28/95. Two days later, on 17 February 1995, the Commission sent the IECC a final decision rejecting its complaint as regards the application of Article 85 of the Treaty to the CEPT Agreement, the subject-matter of the action for annulment in Case T-110/95 and of the present appeal in Case C-449/98 P (hereinafter 'the Decision of 17 February 1995').

7 — OJ, English Special Edition 1963-1964, p. 47.

23. In its Decision of 17 February 1995 the Commission states:

'5. ... Our key objection to the system of terminal dues outlined in the 1987 CEPT agreement was that it was not based on the costs incurred by a postal administration in processing incoming international mail. ... Therefore, the Statement of Objections emphasised that charges levied by postal administrations for processing incoming international mail should be based on their costs.

6. The Commission accepted that these costs could be difficult to calculate precisely and stated that domestic letter tariffs could be deemed an adequate indication of these costs....

8. ... The Commission has been kept informed of progress towards the proposed new "System for the Remuneration of Exchanges of International Mails between Public Postal Operators with a Universal Service Obligation" (the "REIMS scheme"). On 17 January 1995, 14 public postal operators ... signed a draft agreement on terminal dues with a view to implementation on 1 January 1996. According to information provided on an informal basis by the International Post Corporation, the recently signed draft envisages a system whereby the receiving PPO [public postal operator] would charge the originating PPO a fixed percentage of the former's domestic tariff for any post received....

9. The Commission thus notes that the PPOs are actively working towards a system of new charges and at this stage believes that the parties are endeavouring to address the Commission's concerns under competition law shared by your complaint against the old system. It is the Commission's view that pursuing the infringement procedure with respect to the soon to be defunct 1987 CEPT scheme would hardly bring about a more favourable result for your clients. Indeed, the likely result of a prohibition decision would merely be to delay if not disrupt the wide-ranging reform and restructuring of the terminal dues system currently taking place, whereas the revised system should be implemented in the near future. In the light of the... judgment in the *Automec II* case, the Commission considers that it would not be in the interest of the public of the Community to devote its scarce resources to moving, at this stage, towards resolving the terminal dues related aspect of your complaint by means of a prohibition decision.

...

12. ... Nevertheless, the REIMS scheme appears to provide at least for a transitional period alternatives to the formerly restric-

tive clauses which were of concern to the Commission. Notably, the REIMS scheme, despite possible imperfections, provides a link between terminal dues and the domestic tariff structure ...

13. There is no doubt that the Commission shall thoroughly analyse the future REIMS scheme and its implementation under the competition rules. It shall notably examine the issue of Community interest both in terms of the substance of the reforms and the pace of their introduction...'.

F. *The Decision of 6 April 1995*

24. On 17 February 1995 the Commission had sent the IECC a communication under Article 6 of Regulation No 99/63 setting out the reasons for which it could not accede to its request concerning the interception of mail under Article 23 of the UPU Convention.

25. On 22 February 1995, the IECC sent to the Commission its observations on that letter. It commented, *inter alia*, that:

'So far as the IECC is aware, all of the examples of restriction cited by the IECC represented implementation of Article 23(4) of the 1984 Universal Postal Convention against ABC remail. Since your February 17 letter makes no reference to restrictions on ABC remail, the IECC cannot regard it as an adequate justification for rejecting the IECC's complaint.'

26. On 6 April 1995 the Commission addressed to the applicant a decision concerning the second aspect of the complaint, in which, *inter alia*, it 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.'

G. *The Decision of 14 August 1995*

27. 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.

28. On 14 August 1995 the Commission adopted a final decision concerning the interception of ABC remail by certain public postal operators. That measure was the subject of the action for annulment in Case T-204/95, joined with Case T-133/95, and is the subject of an appeal in Case C-450/98 P (hereinafter 'the Decision of 14 August 1995'). In that decision, the following is stated *inter alia*:

'(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 UK 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 of 5 April 1993...: 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.'

III. The judgments of 16 September 1998

29. The judgment of the Court of First Instance in Case T-110/95 rejected all the pleas in law on which the action was based and consequently ordered the IECC to pay the costs.

30. In particular, the Court of First Instance rejected the allegation that the Decision of 17 February 1995 was vitiated by misuse of powers and a defective statement of reasons and the contention that the Commission had erred in its assessment of the 'Community interest' as a criterion for its

decision whether to carry out an investigation.

31. The judgment delivered by the Court of First Instance in Joined Cases T-133/95 and T-204/95 annulled the Decision of 6 April 1995 in so far as it concerned commercial physical ABA remail and dismissed the application in all other respects. The Commission was order to pay the costs in Case T-133/95 and the applicant was ordered to pay them in Case T-204/95.

32. The partial nullity declared by the Court of First Instance was based on the fact 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 EC Treaty (now Article 82 EC).

IV. Appraisal of the grounds of appeal in Case C-449/98 P

33. In Case C-449/98 P, the IECC bases its appeal on nine pleas in law.

The first plea in law: substantive inaccuracy of findings of fact by the Court of First Instance

34. In its first ground of appeal, the appellant alleges that, in paragraphs 62 to 67 of its judgment, the Court of First Instance confused the text of the draft REIMS Agreement of 17 January 1995 with a mere 'briefing paper' which the International Post Corporation had sent to the Commission in January 1994, proposing a new system for the remuneration of exchanges in international mails between public postal operators.

35. According to the appellant, it is clear from a written answer to a question put by the Court of First Instance that, when it forwarded its decision on 17 January 1995, the Commission did not yet have in its possession the text of the draft REIMS Agreement signed on that same date. The Court of First Instance committed a manifest error of assessment, in particular in paragraph 63 of its judgment, when examining the legality of the Decision of 17 February 1995, by relying on information of which the institution from which the measure emanated had no knowledge when adopting it.

36. If this ground of appeal is to the upheld, there must be no doubt whatsoever that the distortion of evidence alleged by the appellant actually occurred, whereby the Court of First Instance, in its reasoning, confused the content of the briefing note

with the text of the draft REIMS Agreement.

37. The appellant's criticisms are based on the wording of paragraph 63 of the judgment of the Court of First Instance. However, contrary to its contention, it cannot be inferred from the wording used that the Court of First Instance intended to refer to the preliminary REIMS Agreement. On the contrary, in the Spanish version of that passage the more abstract expression 'draft REIMS Agreement' is used. The fact that, in paragraphs 64 to 67 of the Spanish version of the contested judgment, there is indeed mention of the 'preliminary REIMS Agreement', together with both a finding that that preliminary agreement was 'subsequently notified to the Commission' [8] and a reference to the 'process for the adoption of the preliminary REIMS agreement', [9] gives the impression that the Court of First Instance was aware of the distinction between an earlier stage in the negotiations — the 'draft agreement' — and the subsequent conclusion of a formal agreement.

38. It is nevertheless true that the reference at the end of paragraph 65 of the Spanish version of the judgment to the 'preliminary Agreement' (which should have been a reference to the 'draft Agreement') goes against that logic and it seems strange that in paragraph 63 of the contested judgment reference is made to '1 January 1996' as the possible date of entry into force of the new system, as stated in the text of the draft Agreement, whereas in the briefing paper of February 1994 reference is made in paragraphs A5.7 and C3 to 1995 as the 'earliest date'.

39. These minor inaccuracies have no impact at all on the reasoning relied on by the Court of First Instance in rejecting the appellant's claim, set out in the third part of the third plea in law, that the Commission erred in law in referring to the draft REIMS Agreement when rejecting its complaint. In the appellant's view, the preliminary nature of that Agreement, the long period which it covered and the discriminatory elements which it still contained should have prompted the Commission to arrive at a different assessment of the need to impose a prohibition. Far from delaying reform of the system of terminal dues, as maintained by the Commission in its decision, a prohibition would have accelerated the process of adopting a new scheme.

40. It must be observed that the contested judgment contains the information needed for the Court of First Instance, on the basis of the rigorous assessment of legality required of it in cases of this kind, to reject each of those allegations. The judgment recognises 'the intermediate but certain state of the process of negotiations among all the public postal operators concerned' (paragraph 63) and the impossibility of 'examin[ing] in detail all of the provisions of the draft REIMS Agreement... without

8 — Paragraph 64 of the contested judgment.
9 — Paragraph 66.

prejudging the analysis of that agreement which the Commission must still provide...' (paragraph 64). Finally, it considered that the conclusion that the adoption of the REIMS Agreement would be complicated by the imposition of a prohibition was reasonable, so that it would have been inappropriate to hold that the Commission had committed a manifest error of assessment.

41. In short, I see no trace of the distortion of evidence alleged in relation to the Court of First Instance's examination of the third part of the third plea in law, and accordingly the first ground of appeal should be rejected.

The second plea in law: error in law in the definition of the legal concept of Community interest and in the review of the legality of the Commission's application of that concept

42. The appellant contends that the Court of First Instance erred in law in appraising the scope, definition and application both of Article 3 of Regulation No 17 and of the legal concept of Community interest.

43. In expounding this plea, the appellant takes for granted two premisses which, to my mind, are false.

44. The IECC starts from the assumption that the Commission found that the CEPT Agreement was contrary to Article 85(1) of the EC Treaty and that the Court of First Instance approved that finding.

45. Contrary to the appellant's assumption, it is not apparent from a reading of paragraph 5 of the Decision of 17 February 1995 that the Commission definitively considered that the CEPT Agreement constituted a price-fixing agreement contrary to Article 85. In that document, the Commission confined itself to referring to its statement of objections of 5 April 1993 in which it had expressed its concern that, as a result of the CEPT Agreement, 'customers seeking service from postal administrations faced a system of artificially fixed prices rather than competitive prices reflecting the costs of different postal administrations'.

46. There is still less truth in the view that, from paragraph 74 of the contested judgment and from paragraph 100 of the judgment in Joined Cases T-133/95 and T-204/95, it can be inferred that the Court of First Instance upheld any finding of an infringement of Article 85. In the first instance, the Court of First Instance simply stated that the appellants's allegations were based 'on the assumption that, in its decision of 17 February 1995, the Commission established that the CEPT Agreement infringed Article 85(1)', and went on to undertake a hypothetical analysis. In the second instance, it merely emphasised that an imbalance between the costs which a public postal operator bears in delivering incoming mail and the remuneration which

it receives is a result of the CEPT Agreement.

47. Although it is true that there are a number of non-specific allusions to anti-competitive aspects of the CEPT Agreement dotted around the body of the Decision of 17 February 1995, the fact remains that they do not give any indication that the Commission considered the existence proved of any patent restriction of competition consisting in a price-fixing agreement, as alleged by the appellant.

48. Despite appearances, there is nothing formalistic about my assessment, which seeks only to determine the exact meaning which the Commission, on the one hand, and the appellant on the other, attribute to the terms concerned.

For the Commission, as stated in the Decision of February 1995 and other documents, the limitations on freedom of competition imposed by the CEPT Agreement have to do with the artificial method of calculating terminal dues, taking no — or only partial — account of the costs actually incurred in distributing mail. A favourable change would involve aligning those dues with those costs.

The appellant, although consciously taking a more ambiguous stance, discloses its approach in its reply to the Commission's response: the CEPT Agreement is contrary to the competition rules because its aim is to suppress the activities of the private express postal services in the area of ABC remail, where the postal administration of country A has to compete with the postal administration of country B in order to deal with mail going to country C; since the *raison d'être* of remail lies in the high price of international mail as compared with what is charged by way of terminal dues, [10] the restoration of competition desired by the IECC could not logically consist in eliminating that differential — a result of the artificial calculation of terminal dues, criticised by the Commission — but would have to be achieved thought annulment of the CEPT Agreement and a return to the pre-existing situation. [11]

49. The Commission and the appellant thus do not coincide in their view of the allegedly anti-competitive nature of the CEPT Agreement. This divergence is of particular importance in proceedings in which an individual may *request* the Commission to adopt a decision finding an infringement of the competition rules and in which the legality of the conduct of that institution must be assessed in relation to the legitimate interest which the maker of

10 — See point 7 above, in the account of the facts.

11 — At the hearing, the lawyer for the IECC stated, without retracting what he said in his reply to the Commission's response, that, in a context in which the terminal dues reflected the extent of the real costs, remail companies would secure an advantage by reason of the better quality of their services.

the request may have. It is not easy to apprehend the legitimate interest of an organisation which represents private postal operators in complaining of the artificially low calculation of those terminal dues when much of their business is accounted for by that anomaly.

50. It is not therefore appropriate to say that the Decision of 17 February 1995 contains the slightest recognition by the Commission of the anti-competitive practices in respect of which the appellant could legitimately request an infringement decision.

51. The IECC, in turn, bases its views on a misinterpretation in which, for greater clarity of exposition, I shall also deal with as a preliminary point.

52. According to the appellant, the Commission could only invoke the lack of a Community interest in relation to facts allegedly constituting an infringement of the competition rules in order to justify not commencing, or suspending, the investigation of a complaint, and not as a criterion for deciding whether to adopt a decision imposing a prohibition under Article 3 of Regulation No 17.

53. The concept of 'Community interest' or, more properly, 'lack of a Community interest' as a criterion applicable in the circumstances of the present proceedings does not appear in the Treaties and cannot be inferred from any provision of Regulation No 17. Having previously been used more or less sporadically by the Commission, it was incorporated in legal jargon at the time of the *Automec II* judgment. In the judgment delivered by the Court of First Instance in that case, the existence of a sufficient Community interest was seen only as a criterion for the attribution, by the Commission, of varying degrees of priority with a view to investigating a complaint. In that sense, it is true that the concept relates exclusively to the Commission's obligations regarding the *investigation* of conduct complained of. As regards the authority to adopt or not adopt a decision, the Court of First Instance agrees without reservation that the Commission 'is under no obligation to rule on the existence or otherwise of an infringement'.

54. As early as the judgment of 24 January 1995 in *BEMIM* v *Commission*,[12] the Court of First Instance made it clear — in response to the applicant's allegation that, since the Commission had investigated the case, it could not rely on the lack of a Community interest in order to reject its complaint — that 'the Commission may take a decision to shelve a complaint for lack of a sufficient Community interest not only before commencing an investigation of the case but also after taking investigative

12 — Case T-114/92 [1995] ECR II-147.

measures, if that course seems appropriate to it at that stage of the procedure'. [13] The Court of First Instance pointed out, absolutely correctly, that '[t]o conclude otherwise would be tantamount to placing the Commission under an obligation, once it had taken investigative measures following the submission of an application under Article 3(2) of Regulation No 17, to adopt a decision as to whether or not either Article 85 or Article 86 of the Treaty, or both, had been infringed', which would be contrary not only 'to the very wording of Article 3(1) of Regulation No 17, according to which the Commission "may" adopt a decision concerning the existence of the alleged infringement, but would also conflict with the settled case-law... according to which a complainant has no right to obtain from the Commission a decision within the meaning of Article 189 of the Treaty'. [14]

55. That approach, which was established by the Court of Justice in its judgment of 18 October 1979 in *GEMA* v *Commission* [15] and is based not just on a literal interpretation but on the nature of the procedure for investigating infringements laid down by Article 3 of Regulation No 17, [16] is primarily concerned with the Commission's power to adopt or not adopt a prohibition decision on conclusion of the investigation of a complaint. It was therefore developed in relation to the Commission's duty to uphold undistorted competition in the Community.

56. It is clear that the two lines of case-law cannot be dissociated. If we consider them together, applying minimal inductive reasoning and avoiding misleading formalism, the following position is arrived at: the Commission, within its terms of reference as the upholder of undistorted competition in the Community, has a threefold choice under Article 3 of Regulation No 17 whereby it may adopt a decision which declares (a) *the existence of an infringement* of the Community competition rules, (b) *the absence of such an infringement* or (c) *the appropriateness, at any stage in the procedure, of not proceeding with, or suspending the investigation of or shelving* a complaint *through lack of a* sufficient *Community interest.*

57. The 'lack of a Community interest' must not be seen — as claimed by the appellant — as a concept imposed by the judicature whose precise scope the Commission should assess with a view to deciding whether or not to proceed with the investigation of a complaint. It is no more than an abbreviated formula, a shortcut, to describe, succinctly, the discretion — neither unfettered nor arbitrary, since it is subject to judicial review — which the Treaties confer on the Commission for its examination of a complaint alleging the existence of anti-competitive practices. The substance of that concept varies very considerably, to the same extent as the widely differing circumstances which surround cases involving infringements of the competition rules.

13 — Paragraph 81.
14 — Ibid.
15 — Case 125/78 [1979] ECR 3173, paragraph 17.
16 — Paragraph 18.

58. It is no surprise therefore that the Court of Justice, in its judgment of 4 March 1999 in *Ufex* v *Commission*,[17] should declare that '[i]f anti-competitive effects continue after the practices which caused them have ceased, the Commission thus remains competent under Articles 2, 3(g) and 86 of the Treaty to act with a view to eliminating or neutralising them... In deciding to discontinue consideration of a complaint against those practices on the ground of lack of Community interest, the Commission therefore cannot rely solely on the fact that practices alleged to be contrary to the Treaty have ceased...'. The logical link between the extension of the Commission's powers, in the setting of Article 3 of Regulation No 17, and the limits on its appraisal of the Community interest is thus manifest.

59. Having set out those preliminary considerations, I can now examine each of the four parts of the present plea in law.

60. In the first part, the appellant criticises as incorrect the reasoning of the Court of First Instance in rejecting its allegation that the Commission could not reject the complaint for lack of a sufficient Community interest without erring in law, in view of the advanced stage of the investigation. In paragraph 49 of its judgment, the Court of First Instance considered that '[s]uch an interpretation would not only be contrary to the actual wording of Article 3(1) of Regulation No 17, under which the Commission "may" adopt a decision as to whether the alleged infringement exists, but would also be at variance with settled case-law'. According to the appellant, once it was established that there had been an infringement of the competition rules, the Commission could not decline to take a decision imposing a prohibition in an intra-Community matter, like the one with which these proceedings are concerned, in which the national court would not be able to guarantee protection against anti-competitive practices.

61. As stated earlier, there is nothing to prevent the Commission from invoking the lack of a Community interest to avoid adopting a prohibition decision at any stage of the investigation. Furthermore, its does not appear that the Commission had accepted that the infringement complained of by the appellant had been proved. This part of the plea must therefore be rejected.

62. The same reasoning applies to the second part of this plea, in which the IECC considers that the concept of 'Community interest', the purpose of which is to determine priority in dealing with complaints submitted to the Commission, cannot be validly relied on when the investigation has been concluded.

63. In the third part of the second plea, in the event of the Court of Justice consider-

17 — Case C-119/97 P [1999] ECR I-1341.

ing — as I propose — that the Commission may invoke the Community interest even when the investigation has been completed, the appellant contends that the Court of First Instance did not properly carry out the necessary review of the way in which that concept was applied.

64. In the first place, the Court of First Instance — according to the appellant — should have taken account of the criteria laid down in its judgment in *Automec II*.

65. That argument has no basis. In that judgment, it was held that '[i]n order to assess the Community interest in further investigation of a case, the Commission must take account of the circumstances of the case, and *in particular* of the legal and factual particulars set out in the complaint referred to it. The Commission should *in particular* balance the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of the infringement and the scope of the investigation required in order to fulfil, under the best possible conditions, its task of ensuring that Articles 85 and 86 are complied with'. [18] It is clear from that passage that the Court of First Instance merely wished to give a series of relevant criteria solely by way of illustration. This is borne out by the fact that, in its subsequent analysis, it focused more on the issue of the national court's competence to provide effective protection against alleged infringements of those rules.

18 — Paragraph 86 (emphasis added).

This was confirmed by the Court of Justice when it expressed the view that, in appraising the Community interest, it is inappropriate to limit or impose criteria for the Commission's assessment. [19] Otherwise, the case-law would be rigidified. [20]

66. The second allegation made in the third part of this plea must, for analytical purposes, be considered with the fourth part.

67. In the fourth part of the plea, in the above terms, the appellant claims that the Court of First Instance misinterpreted the concept of Community interest in stating that 'the Commission may decide that it is not appropriate to investigate a complaint alleging practices contrary to Article 85(1) of the Treaty where the facts under examination give it proper cause to assume that the conduct of the undertakings concerned will be amended in a manner conducive to the general interest' (paragraph 57).

68. In the appellant's opinion, that alone is not sufficient to found the conclusion that there was 'no Community interest', which the Court of First Instance should without

19 — *Ufex*, cited above, paragraph 79.
20 — Ibid., paragraph 81.

fail have examined having regard to the guidelines laid down in *Automec II*.

69. This allegation must be treated in the same way as the previous one, in so far as there is no legal requirement that the Commission's analysis take account of the matters contained in that judgment. The Court of First Instance properly interpreted the applicable law in considering, in paragraph 52, that the Commission was not required to 'to balance solely those matters which the Court listed in its judgment in *Automec II*. It is thus entitled to take account of other relevant factors when making its assessment. The assessment of the Community interest is necessarily based on an examination of the circumstances particular to each case, carried out subject to review by the Court'.

70. In the alternative, the IECC states that the criterion relied on by the Commission — and accepted by the Court of First Instance in paragraph 57 of its judgment — is in any event unlawful. Its assessment presupposes either that a change 'conducive to the general interest' is such that an infringement of Article 85(1) of the EC Treaty may be allowed, or that an exemption to that rule, justified by a wider assessment of the general interest, can be adopted outside the framework of Article 85(3).

71. The IECC bases its reasoning on the incorrect assumption that the Commission, in its Decision of 17 February 1995, recognised that the CEPT Agreement constituted an infringement of Article 85(1). Without its being necessary or lawful to make any pronouncement as to the nature of that agreement in appeal proceedings, that fact is sufficient to reject the allegation.

72. Finally, the appellant criticises the judgment under appeal for accepting, in breach of the duty of review imposed by Article 173 of the EC Treaty (now Article 230 EC), that the Commission could legitimately believe that the contested practices would cease without having examined the matters of fact and law on which that conclusion should have been based.

73. The real aim of this allegation is to contest the assessment of the facts of which the Commission had to take account in appraising the Community interest. As such, it is not admissible in appeal proceedings. In any event, I do not consider that it could serve as a basis for setting aside the judgment of the Court of First Instance. In the first place, as the Court of First Instance points out in paragraph 47 of the contested judgement, when the Commission dismisses a complaint for lack of a Community interest, the review of legality is restricted. Its aim is to verify that the contested decision is neither based on materially incorrect facts nor vitiated by any error of law, manifest error of assessment or misuse of powers.

Secondly, it is not correct to assert that the Court of First Instance failed to examine the factual and legal basis of the Commission's appraisal. In paragraphs 46 to 59 of the contested judgment there is a correct analysis of the relevant law, in the light of the Community case-law, and in paragraph 63 there is a review of the Commission's examination of the facts, which in my opinion is not vitiated by any manifest error. The Court of First Instance concluded that '[t]he Commission did not commit any error in forming the view that, when the decision was adopted, the draft REIMS Agreement provided sufficient guarantees for the overall success of the process of negotiations being conducted among the public postal operators and seeking to establish a system based on the actual costs incurred when handling mail at national level. Notwithstanding the transitional and potentially flawed nature of the draft REIMS Agreement, which was, moreover, recognised by the Commission, the document on which the Commission relied in the contested decision already described in detail the new system based on national postal rates to be introduced with effect from 1 January 1996. That document described the intermediate but certain state of the process of negotiations among all the public postal operators concerned. In that context, it should also be stressed that the Commission never claimed that the existence of the draft REIMS Agreement had in itself put an end to the anti-competitive aspects of the CEPT Agreement alleged by the applicant'.

74. I conclude that the Court of First Instance undertook an adequate examination of the matters of fact and of law which the Commission took into account in its decision of 17 February 1995 when evaluating the Community interest.

75. In view of the foregoing, this second plea should be rejected in its entirety.

The third plea in law: infringement of the combined provisions Articles 3(g), 85, 89 and 155 of the EC Treaty

76. In its third plea in law, the appellant complains of misinterpretation of the scope of the function which Articles 89 and 155 of the EC Treaty (now Articles 85 EC and 211 EC) assign to the Commission in order to ensure the correct application of Articles 3(g) and 85 of the Treaty. It can be inferred from the combined provisions of those articles that the Commission's obligation is to prevent distortion of competition, and that, it is said, is incompatible with the decision not to prosecute an infringement merely because the facts 'give it proper cause to assume that the conduct of the undertakings concerned will be amended in a manner conducive to the general interest' (end of paragraph 57). The Court of First Instance also, it is said,

misapplied the judgement of 11 April 1989 in *Ahmed Saeed Flugreisen and Silver Line Reisebüro* [21] by not drawing the correct inferences from the principle laid down in that case, to the effect that the Treaty prohibits the promotion of agreements found to be contrary to Articles 85(1) and 86.

77. The allegations made by the appellant in this third plea imply that, in its Decision of 17 February 1995 the Commission found that the infringement complained of had taken place. As I have shown above, that assumption is not correct, for which reason this plea should be rejected.

Furthermore, the appellant's argument is a separate facet of the arguments already put forward in the second plea, which have been duly examined. In short, they relate to determination of the scope of the Commission's obligations when responding to a complaint concerning anti-competitive practices. I therefore refer to what I said when analysing that plea.

21 — Case 66/86 [1989] ECR 803.

The fourth plea in law: breach of the principle whereby the legality of a decision can be assessed only in the light of the legal and factual situation existing at the time of its adoption

78. The appellant criticises the Court of First Instance for referring, in paragraph 64 of its judgment, to the draft REIMS Agreement, the text of which was subsequently notified to the Commission, in order to reject the claims for annulment of the Decision of 17 February 1995. In so doing, the Court of First Instance infringed the principle that the legality of a measure should be assessed solely in the light of matters of fact and law existing at the time of its adoption.

79. As the Commission correctly points out, the Court of First Instance's reference to a text post-dating the adoption of the contested decision takes account of the appellant's own argument which, as stated in paragraph 42 of the contested judgment, is based on that text. Moreover, it is evident that the Court of First Instance wished to stress the intermediate nature of the phase being considered and not prejudice the legality of a measure which had not been analysed by the Commission. In that regard, its reasoning is in conformity with the principle allegedly infringed.

80. The fourth plea is manifestly without foundation and should therefore be rejected.

The fifth ground of appeal: defective legal reasoning

81. In this fifth plea, the appellant draws attention to three passages in which, in its view, the reasoning in the contested judgment is contradictory or inadequate.

82. In the first part, the appellant compares two series of extracts from the judgment of the Court of First Instance, which it considers to be contradictory and in which it perceives erroneous reasoning.

The Court of First Instance states, on the one hand, that 'it is for the Commission, as part of its task to ensure that the Treaty is properly applied, to decide whether it is in the Community interest to encourage undertakings challenged in administrative proceedings to change their conduct in view of the complaints made against them... and to require from them assurances that such conduct will in fact be altered' (paragraph 58); that 'the administrative procedure provides, *inter alia*, an opportunity for the companies concerned to bring the agreements or practices complained of into conformity with the rules laid down in the Treaty, and that this possibility presupposes that the companies and the Commission can enter into confidential negotiations in order to determine which alterations are necessary to satisfy the Commission's objections' (paragraph 98); and that 'by adopting this line of conduct consistent with its policy towards the postal sector, the Commission has, in this case, also met the objections raised by the applicant in its complaint and in its subsequent correspondence regarding the former pricing system' (paragraph 61).

However, elsewhere the Court of First Instance states that '[n]otwithstanding the transitional and potentially flawed nature of the draft REIMS Agreement, which was, moreover, recognised by the Commission, the document on which the Commission relied in the contested decision already described in detail the new system based on national postal rates to be introduced with effect from 1 January 1996.... In that context, it should also be stressed that the Commission never claimed that the existence of the draft REIMS Agreement had in itself put an end to the anti-competitive aspects of the CEPT Agreement alleged by the applicant' (paragraph 63); that '[i]t has, furthermore, already been pointed out in paragraph 63 above that the Commission had in no way claimed in the contested decision that the draft REIMS Agreement had in itself put an end to the CEPT Agreement' (paragraph 65); and that '[a]s regards the argument that the replies provided by the public postal operators to the statement of objections must be regarded as reflecting a refusal on their part to bow to the Commission's wishes, an undertaking to which a statement of objections has been addressed cannot, when drafting its reply to that statement, be required simply to indicate its intention to adhere to the Commission's position. Such an undertaking must be allowed to contest the legal and factual assertions of the Commission. Any other interpretation would render nugatory the

right to reply to the statement of objections provided for in Article 3 of Regulation No 99/63' (paragraph 68).

83. In the passages cited, the appellant perceives a contradiction which, essentially, consists in approving the acceptance of the assurances given by the public postal operators after they received the statement of objections and, at the same time, recognising that those same postal administrations had refused to accept the Commission's position as expressed in the statement of objections.

84. I am persuaded that, under the cloak of an allegation of defective reasoning, the appellant is seeking again to impose its own particular definition of the specific scope of the Commission's obligations in relation to a complaint about anti-competitive practices. In analysing the second plea, I accepted that it seemed lawful for the Commission, in discharging its duty to see that competition is not distorted, to choose to ensure that definite progress is made towards a situation that is compatible with the Treaty rather than declare an infringement and impose a prohibition taking effect from a specified time. That background of a developing situation is the one against which must be seen the references, in the passages cited, to encouraging 'undertakings... to change their conduct', to bringing their 'agreements or practices... into conformity with the rules' or even to 'the failure to eliminate all anti-competitive aspects'. I also said at that point that it was not unlawful to reply to a complaint relating to a clearly defined legal situation by referring to the way in which it could be changed, in so far as the complainant is entitled, if convinced that an infringement is continuing, to submit a further complaint concerning the new situation. That is the proper construction of the Court of First Instance's statement that 'the Commission has... also met the objections raised by the applicant in its complaint and in its subsequent correspondence regarding the former pricing system'. Finally, no relevance can be attached for the present purposes to the specific reaction of the addressees to the Commission's statement of objections.

85. For the same reasons, there is no basis for the allegation, also contained in the first part of this plea, that the Court of First Instance erred in stating in paragraph 57 of the judgment that 'the Commission may decide that it is not appropriate to investigate a complaint alleging practices contrary to Article 85(1) of the Treaty where the facts under examination give it proper cause to assume that the conduct of the undertakings concerned will be amended in a manner conducive to the general interest'.

86. In the second part of the fifth plea, the appellant alleges that the grounds of the

contested judgment are inadequate in that there was no examination of the criteria laid down in *Automec II* when the question of Community interest was considered.

As I explained when analysing the second plea, those criteria are enumerated by way of illustration and are not exhaustive. This part of the plea cannot therefore succeed.

87. The third part of the plea concerns the decision by the Court of First Instance to reject the appellant's request that the oral procedure be reopened in accordance with Article 62 of the Rules of Procedure. By basing its refusal on the fact that '[t]he new factors on which the applicant relies in support of those requests either do not contain any element decisive for the outcome of the present dispute or are limited to establishing the existence of facts which clearly postdated the contested decision and which cannot therefore affect that decision's validity' (paragraph 25), it failed to give sufficient reasons for its decision.

88. The appellant confines itself to criticising, almost in the abstract, the reasons for the refusal to accede to its request that the oral procedure be reopened, without giving even an outline of how the specific circumstances of the case called for more detailed reasoning, so as to give the appellant sufficient information to determine whether the decision was well founded or to enable the Community Court to review its legality. In those circumstances, and without prejudice to any substantive complaints which the appellant has about that decision, this part of the plea must be rejected as manifestly unfounded.

89. In view of the foregoing, I suggest that the fifth plea in law be rejected.

The sixth plea in law: breach of the general principle of non-discrimination

90. The relevant part of paragraph 109 of the contested judgment, for the present purposes, states as follows:

'the applicant has not established that, in a situation identical to that of the present case, the Commission would, in contrast to its position in this case, have taken a decision against the undertakings in question. The applicant has therefore failed to establish the alleged infringement of the principle of non-discrimination'.

91. Relying on two arguments, the appellant doubts whether that statement is

legally correct. First, it contends, the Court of First Instance misinterpreted and improperly widened the scope of the concept of discrimination in requiring that the alleged defect should relate to an 'identical' and not merely a 'comparable' situation. Second, it erred in applying that concept to the case before it in that, even though a price-fixing agreement was at issue, and thus one that was automatically void under Article 85(1), it did not accord to it the treatment usually reserved for situations characterised by such agreements.

92. It is true that, in many of the language versions of the contested judgment, the Court of First Instance improperly used the term 'identical situation' to refer to a 'comparable situation'. However, there is no other evidence that a stricter criterion was applied in assessing the allegation of discrimination made by the appellant. Furthermore, in view of the specific terms of that allegation, in particular with regard to the question of price-fixing agreements, no manifest error of assessment is apparent in the Court of First Instance's decision to reject it. In fact, the appellant confined itself to enumerating a series of Commission decisions imposing prohibitions in relation to price agreements restricting competition without endeavouring to show any other similarity with the case in hand, the main feature of which was a decision as to the appropriate course of action based on the expectation that the situation would be changed in a manner conducive to the general interest. [22]

22 — See paragraph 57 of the contested judgment.

93. The sixth plea should therefore also be rejected.

The seventh plea: breach of the principle of legal certainty

94. According to the IECC, for the reasons set out in relation to the foregoing plea in law, the Court of First Instance also failed to observe the requirements of legal certainty.

95. I share the Commission's view that this mere allegation cannot undermine the conclusion arrived at after examination of the sixth plea.

96. The seventh plea must therefore also be rejected.

The eighth plea in law: misapplication of the concept of misuse of powers

97. The appellant considers that the Court of First Instance erred in law both in appraising separately each of the factors

put forward to show that the Commission had misused its powers and in failing properly to examine some of them, amongst which the appellant cites the fact that the statement of objections could have been sent as early as April 1991 and the allegation that the way in which the case was dealt with was inconsistent with the Commission's past practice.

98. I do not share the appellant's view.

First, there is nothing to justify the assumption that the separate examination undertaken by the Court of First Instance constituted an omission to examine the overall position. On the contrary, in paragraph 84 of its judgment the Court of First Instance states in general terms that '[i]t does not appear from the facts, the documents submitted or from the applicant's arguments that the Commission diverted the administrative procedure concerned from its avowed object'.

Moreover, neither from the approach taken by the Court of First Instance to the argument concerning the considerable time that elapsed before notification of the statement of objections nor from the allegation that the Commission treated the present case in an exceptional manner — already examined in connection with the seventh plea — can any trace of a manifest error of appraisal by the Court of First Instance be deduced.

99. I therefore suggest that the eighth plea be rejected.

The ninth plea in law: infringement of Article 62 of the Rules of Procedure of the Court of First Instance

100. In paragraph 25 of the contested judgment the Court of First Instance decline to reopen the oral procedure, as requested by the appellant, on the ground that the new factors relied on 'either do not contain any element decisive for the outcome of the present dispute or are limited to establishing the existence of facts which clearly postdated the contested decision and which cannot therefore affect that decision's validity'.

101. According to the appellant, the Court of First Instance, in declining to take account of the documents produced on the ground that they postdated the contested decision, infringed Article 62 of its Rules of Procedure [23] since, at least in order

23 — 'The Court of First Instance may, after hearing the Advocate General, order the reopening of the oral procedure.'

to show that the Commission committed a manifest error of assessment, a party must be allowed to rely on events postdating the contested measure.

102. The scope of this allegation is such that it merges with the third part of the fifth plea in law. Once again, the abstract nature of the appellant's criticism of the contested judgment, to the effect that it does not indicate the factors making it necessary or appropriate to reopen the oral procedure, prevents me from identifying any manifest error of appraisal on the part of the Court of First Instance which might provide a basis for setting aside its judgment. Appeal proceedings are not a means of merely amending the wording of the contested judgment but provide an opportunity for allegations to be voiced in order to prove errors of law which may render it invalid.

V. Examination of the pleas in law in Case C-450/98 P

103. In Case C-450/98 P, the IECC relies on seven pleas in law.

The first plea in law: infringement of Article 3(2)(b) of Regulation No 17/64

104. In paragraphs 78 to 83 of the contested judgment, the Court of First Instance confirms the validity of the Commission's assessment that the appellant could not claim any legitimate interest in complaining of the practices of public postal operators in relation to non-physical remail.

105. The appellant considers that finding to be in breach of Article 3(2)(b) of Regulation No 17, which allows submission to the Commission of allegations of infringements of Articles 85 and 86 by 'natural or legal persons who can claim a legitimate interest', a term which must be interpreted in accordance with the approach defined in the *Metro* judgment. [24] It considers that the Court of First Instance should have borne in mind: (a) that interception of any kind under Article 25 of the UPU Convention affects the interests of the members of the IECC in so far as its object it to protect public postal operators against the adverse effects of the CEPT Agreement; (b) that the concept of 'non-physical remail' applied by the postal administrations covers part of the business of IECC members; (c) that even interceptions not made against IECC members may affect them since they entail

24 — Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 13.

a general threat; and (d) that by accepting the IECC for seven years as an interlocutor on all postal matters, and particularly in relation to ABA remail, the Commission recognised the legitimate interest of its members.

106. It should be pointed out that, under the case-law relied on by the appellant, persons entitled to submit an application under Article 3(2)(b) of Regulation No 17 may appeal only when their complaint has been rejected wholly or in part. It gives no relevant guidance as to how, on the basis of the fourth paragraph of Article 173 of the EC Treaty, the concept of legitimate interest contained in the regulation should be defined. In any event, it is likewise uncertain that the circumstances described by the appellant disclose any effect of direct and individual concern covered by Article 173.

107. The allegations mentioned under (a) and (d) above cannot be relied on to attack the appraisal of the Court of First Instance since they have been raised for the first time in an appeal. They are therefore inadmissible.

108. The arguments summarised under (c) above do not in any way clarify those put forward at first instance and, lacking specificity, cannot undermine the conclusion reached by the lower court.

109. Finally, by the allegation outlined at (b) above, the appellant purports to show that reliance by public postal operators on an extensive interpretation of the concept of 'non-physical remail', which takes no account of the place where the mail actually originated, means that part of the business of IECC members may be classified as non-physical remail. That is the case, for example, where mail is dispatched from country B to country A. If it is considered that the mail originated in country B in accordance with instructions from a company which is established ('or resides', in postal terminology) in country A, that would be equivalent to non-physical ABA remail and could be the subject of interception under Article 25 of the UPU Convention. Accordingly, IECC members should be treated as having a legitimate interest in the part of the complaint relating to remail of that kind, thus defined.

110. In appeal proceedings, only pleas intended to show that the judgment of the Court of First Instance erred in law are admissible.

The Court of First Instance, after finding, in paragraph 81 of its judgment, that IECC

members are, by definition, not involved in non-physical remail transactions, referred to the ABCA form of non-physical remail, interpreted in a manner allegedly peculiar to public postal operators. As the Commission rightly points out, only that form, and not ABA non-physical remail — again understood in those terms — can be of concern to IECC members.[25] For that reason, in paragraph 82 of the contested judgment, the Court of First Instance states that the fact that ABCA non-physical remail has an impact on IECC members 'cannot affect the conclusion reached by the Commission in regard to non-physical ABA remail'. The Court goes on to say: 'The applicant also confirms that non-physical ABCA remail is in reality equivalent to ABC remail, which was examined by the Commission in its decision 14 August 1995 and will therefore be examined by the Court in the context of the action brought against that decision.'

111. It must be concluded that, in view of those statements in the contested judgment, the appellant is merely repeating and expanding upon the argument which it put forward at first instance, without even attempting to question the validity of the reasoning of that judgment, for which reason this part of the plea must be declared inadmissible.

25 — The circumstances are these: a company resident in country A — in accordance with the broad rule which the appellant attributes to the postal administrations — generates a large amount of mail in country B, sends it to country C — with the cooperation of operators such as IECC members — and entrusts it to the public postal operator in that country for dispatch to country A.

112. I thus reach the conclusion that the first plea must be declared inadmissible for the most part and, and for the rest, unfounded.

The second plea in law: misreading of the Decision of 6 April 1995

113. According to the appellant, the contested judgment, in defining in paragraphs 58 to 62 the scope of the decisions of 6 April and 14 August 1995 respectively, distorted the meaning of various documents before it. In particular, the Court of First Instance could only have reached the conclusion that the part of the complaint relating to ABC remail was not covered by the Decision of 6 April 1995 by misinterpreting the Commission document of 17 February 1995, the IECC letter of 22 February 1995, the contested decision itself and the defence lodged by the Commission.

114. The pedantic argument put forward by the appellant in this plea is a rare example of vacuousness and formalism, as the Commission rightly points out, which can be seen only as a peculiar procedural strategy. It does not, in any event, deserve detailed rebuttal. It need merely be stated that, from a reading of the Decision of 6 April 1995, it can be reasonably inferred — as was inferred by the Court of First Instance — that the part of the com-

plaint concerning ABC remail was not covered by that decision.

115. I consider that this plea must also be rejected as manifestly unfounded.

The third plea in law: non-observance of the legal concept of non-existent act

116. The appellant considers that the Court of First Instance misinterpreted the decisive criteria for classifying a measure as non-existent, in that it did not draw the requisite legal inferences from the superfluous nature either of the document sent under Article 6 of Regulation No 99/63, on 12 April 1995, or of the decision of 14 August 1995.

117. Without embarking upon a pointless discourse, I shall do no more than state that the allegedly superfluous nature of those measures — which, as will be remembered, are concerned with ABC remail operations — derives from the fact, the alleged fact, that the Decision of 6 April 1995 rejected the part of the complaint relating to ABC remail. As is confirmed by my analysis of the second ground of appeal, it is clear from the very text of that decision that that was not the case, with the result that the appellant's premiss is erroneous.

118. The third plea in law, being ineffectual, must be rejected as manifestly unfounded.

The fourth plea in law: misapplication of the legal concept of Community interest

119. The Commission considers that the fourth plea should be declared wholly inadmissible since it purports to raise new issues not covered by the application for annulment in Case T-204/95.

120. Although it is true that, at first instance, the IECC did not seek to challenge the Commission decision of 14 August 1995 on the ground of misapplication of the concept of Community interest, the fact remains that it did at that time challenge the legality of the rejection of its complaint on the basis of the assurances given by the public postal operators that they would not invoke Article 25(4) of the UPU Convention in order to intercept ABC remail. The allegations made in connection with this plea are within the scope of the legal appraisal undertaken by the Court of First Instance and do not in my opinion constitute an unacceptable widening of the scope of the dispute.

121. The appellant divides this plea into three parts.

122. In the first part, the IECC alleges that the Court of First Instance erred in law, in paragraph 148 of the contested judgment, in stating that the Commission was entitled to base its decision on the absence of a Community interest without expressly referring to that concept.

123. As I have already explained in considering the second ground of appeal in Case C-449/98 P, the reference to the lack of a Community interest is no more than an abbreviated way of referring succinctly to the set of situations in which the Commission may properly exercise its discretion not to investigate a complaint submitted under Article 3 of Regulation No 17. It is not therefore necessary for it to be specifically mentioned in the body of a decision. Furthermore, that was the view taken by the Court of Justice when it stated, in a response to a similar argument, that 'the Court of First Instance was entitled to consider that lack of Community interest underlay the entire contested decision'. [26]

124. In the second part of this fourth plea, the appellant alleges, in the alternative, that the Court of First Instance relied on only one criterion in appraising the Community interest, without analysing the factors set out in its judgment in *Automec II*.

125. For the reasons set out in paragraph 65 et seq., that allegation must be rejected.

126. By the third part of this plea, the appellant alleges that the Court of First Instance misapplied the concept of Community interest in not properly considering whether the complainant's rights could be sufficiently protected by the national courts.

127. Paragraph 164 of the contested judgment, after pointing out that, in its decision of 14 August 1995, the Commission did not take a definite position on the practices of public postal operators in relation to ABC remail in the light of Article 86 of the EC Treaty, added that '[t]he decision does not therefore 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'.

128. According to the appellant, the passage cited must be seen as containing a

26 — Paragraph 52 of the judgment in *Ufex*, cited above.

factor for assessing the Community interest which does not appear in the decision and which the Court of First Instance unlawfully added to justify rejecting the complaint, without verifying — as it was required to do — whether the national courts could offer satisfactory protection for the complainant's rights.

129. As I said earlier, it cannot be inferred from the case-law of the Court of Justice that an examination of the Community interest in a complaint lodged under Article 3 of Regulation No 17 requires assessment of any particular factor. The omission which the appellant attributes to the reasoning of the Court of First Instance cannot, in any case, serve as a basis for setting aside the contested judgment, because the view was not expressed that the rejection of the complaint was justified by the possibility that the complainants could seek a remedy in the national courts.

130. For all the above reasons, the fourth plea must be rejected in its entirety.

The fifth plea in law: infringement of the combined provisions of Article 3(g), 85, 86, 89 and 155 of the EC Treaty

131. The appellant complains of misinterpretation of the precise scope of the function which Articles 89 and 155 of the Treaty assign to the Commission in order to guarantee the proper application of Articles 3(g), 85 and 86 of the EC Treaty. Those provisions, read in combination, show that the Commission's obligation is to ensure that competition is not distorted, and that precludes a decision not to prosecute an infringement merely because the facts allow it to believe 'that it was not appropriate to pursue a complaint denouncing practices which were subsequently discontinued' (end of paragraph 146 of the contested judgment). It refers, in support, to the Opinion delivered in *Ufex*, cited above, and the judgment in that case.

132. The appellant infers from the judgment in *GEMA*, cited above, that the power which Article 3(1) of Regulation No 17 grants the Commission to adopt a decision prohibiting a practice contrary to the competition rules, whose existence has been established, means that only in certain circumstances may the Commission decline to adopt a decision in such a situation.

133. From the judgment of the Court of First Instance in *BEMIM*, cited above, the appellant infers that the authority which Regulation No 17 confers on the Commission not to adopt a decision as to the existence of an infringement of Articles 85 and 86 of the EC Treaty is justified in

situations where its powers are not exclusive, they being shared with the judicial authorities of the Member States. Conversely, where the Commission's powers are exclusive, it cannot exercise that authority.

The appellant considers that the action which must be taken in order to investigate a complaint against the postal administrations of the Member States for infringement of Articles 85 and 86 of the EC Treaty by acting in concert in applying Article 25 of the UPU Convention and intercepting postal remail goes beyond the jurisdiction of the national courts or even that of several national courts acting individually in various Member States. That means, in its view, that the Commission has exclusive *de facto* powers to examine a complaint of that kind.

134. With regard to the admissibility of this fifth plea, I refer to what I said in relation to the fourth.

135. The IECC's allegations in the relation to the fifth plea constitute, to a considerable extent, a separate facet of those already put forward in the fourth plea, which have been duly examined. In short, the issue is the scope of the Commission's obligations when confronted with a complaint concerning practices restrictive of competition. I therefore abide by what I said in examining that plea.

136. In my view, the only original issue raised by this plea lies in the comparison between the circumstances of the present case and those of the *Ufex* case, in which judgment was delivered on 4 March 1999 and to which the appellant has made abundant reference in its reply.

According to the IECC's view, in both cases the Commission declined to prohibit proven infringements of the competition rules, in view of the fact that they had ceased, without evaluating the possible continuing effects of such practices when appraising the Community interest.

137. The appellant's interpretation, although engaging, is intentionally simplistic.

138. In *Ufex*, the Court of Justice set aside the judgment of the Court of First Instance because it accepted that the investigation of a complaint relating to, admittedly, past infringements did not correspond to the task entrusted to the Commission by the Treaty but served essentially to make it

easier for the complainants to obtain damages in the national courts. [27]

139. In the Opinion which I delivered in that case, I was above all concerned to discredit the assessment, in general terms, contained in the decision contested in that case and upheld by the Court of First Instance to the effect that — to put it briefly — the Commission could decline to investigate any complaint relating to anti-competitive practices as soon as they had ceased. The argument that, in such situations, the only interest at stake is the private interest of the complainant in gaining easier access to compensation for damage resulting from those practices struck me as a particularly erroneous feature of that approach.

140. As I said on that occasion, '[t]he Commission should not tolerate such a situation and has an obligation to restore freedom of competition in the sector concerned, provided that the other factors justifying a "Community interest" in intervention by the Commission are present'. I also considered that that aim was perfectly compatible with the fact that the complainants, for their part, were acting in pursuit of their private interest.

141. To summarise, I was of the opinion on that occasion that the Commission could not 'refrain' from examining a complaint on the pretext that the practices to which it related, whose incompatibility with the competition rules had been established, had definitively ceased without verifying whether the effects thereof were continuing.

142. The judgment given by the Court of Justice seems to have accepted that interpretation, when it stated that 'when deciding the order of priority for dealing with the complaints brought before it, the Commission may not regard as excluded in principle from its purview certain situations which come under the task entrusted to it by the Treaty'. [28] It thereby responded to the preoccupying way in which the Commission interpreted its own function as enabling it to avoid examining past practices without indicating any other reasons.

143. The Court of Justice added that '[i]n deciding to discontinue consideration of a complaint against those practices on the ground of lack of Community interest, the Commission therefore cannot rely solely on the fact that practices alleged to be contrary to the Treaty have ceased, without having ascertained that anti-competitive effects no longer continue and, if appropriate, that the seriousness of the alleged interferences with competition or the persistence of their consequences has not been such as to give the complaint a Community interest'. [29]

27 — Paragraph 96 of *Ufex*

28 — Paragraph 92.

29 — Paragraph 95.

144. The review of legality undertaken by the Court of First Instance in the present case does not display the same features.

145. First, the Court of First Instance found that the Commission had not carried out a definitive examination of the legality of the practices criticised under Article 86.[30] It cannot therefore be simply inferred that the interceptions at issue constituted infringements of that provision. The judgment of 10 February 2000 in *Deutsche Post*,[31] in which the Court of Justice held to be compatible with the competition rules certain ways in which a public postal operator exercised the authority conferred on it by Article 25(3) of the UPU Convention, may serve to put a brake on any precipitate inference. The fundamental rationale of that judgment is that the performance in economically balanced conditions of a service in the general interest based on the universal service obligation required of public operators would otherwise be jeopardised.[32] Although that judgment related to non-physical ABA remail, the same may probably be said of any type of remail.

On the contrary, in the *Ufex* case, the Commission had indeed, in its GD-Net decision, definitively classified the practices at issue as distorting competition.

146. Second, the contested judgment does not contain the reasoning contained in paragraph 58 of the judgment of the Court of First Instance in *SFEI and Others* v *Commission*,[33] set aside by the *Ufex* judgment, according to which, 'investigating the matter and establishing that infringements have taken place in the past would no longer help to ensure undistorted competition in the common market and would thus not represent fulfilment of the function conferred on the Commission by the Treaty', an argument which served as a basis for unlawful 'inhibition' of the Community executive as I indicated earlier.

In this case, paragraph 146 et seq. of the contested judgment suggest that the fact that the practices had ceased does not give the Commission licence not to act. More modestly, it is described as a factor to be taken into account in assessing the Community interest in investigating the complaint.

147. Finally, in the present case, the Court of First Instance made a detailed evaluation, in paragraphs 150 to 153 of the contested judgment, of another matter which the Commission took into account when deciding not to pursue investigation

30 — Paragraph 145 of the contested judgment.

31 — Joined Cases C-147/97 and C-148/97 [2000] ECR I-825.

32 — Ibid., paragraph 50.

33 — Case T-77/95 [1997] ECR II-1.

of the complaint, namely the unlikelihood, given the assurances obtained from the various public postal operators, that there would be any recurrence of certain practices which — I repeat — the Commission declined to classify in the light of Article 86 of the EC Treaty. And that risk constitutes the main continuing distortion alleged by the appellant.

148. On the basis of the foregoing three clarifications, I conclude that the dicta in *Ufex* are not applicable to the present case.

149. This plea should be therefore be rejected.

The sixth plea in law: defective statement of reasons

150. According to the appellant, the contested judgment is vitiated by three contradictions which give rise to defective reasoning.

151. First, the statement by the Court of First Instance in paragraph 121 of its judgment, in relation to paragraph 69, finds that the Decision of 6 April 1995 does not relate to the infringements of Article 85 of the EC Treaty allegedly committed by the public post operators, whereas the opposite conclusion could be reached from a reading of paragraphs 97 to 100 of the same judgment.

152. This first (and artificial) argument is at best ineffectual, since a complainant of the kind with which Article 3 of Regulation No 17 is concerned, has no right whatsoever to force upon the Commission a particular framework for the examination of its complaint or for the legal characterisation of the conduct complained of. Moreover, only the appellant is able to perceive, in the passages cited, the contradictory conclusion which it alleges on the basis of various factors and inferences which are alien to the reasoning of the Court of First Instance and are clearly insufficient to support its argument.

153. The second alleged contradiction is between the part of paragraph 145 of the contested judgment in which the Court of First Instance finds that '[i]t is clear from the decision of 14 August 1995 concerning ABC remail that the Commission did not carry out a definitive examination of the lawfulness of the practices in question under Article 86 of the Treaty' and paragraph 105, according to which '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'.

154. The alleged incompatibility cannot be substantiated, since in the first passage cited the Court of First Instance was examining the legality of the Commission

decision of 14 August 1995 not to make use immediately of its power to declare an infringement and, in the second passage, it concluded that the definitive decision of 6 April 1995 as to the compatibility of certain practices with Article 86 of the EC Treaty was unlawful.

The alleged contradiction is based solely on arguments which relate either to the respective scope of the decisions of 6 April and 14 August 1995 or to the limits on the authority of the Commission not to adopt a definitive decision declaring an infringement. They are, therefore, substantive allegations which, quite apart from the fact that they have been examined in connection with other grounds of appeal, are not appropriate to an allegation of infringement of essential procedural requirements.

155. The appellant alleges a third instance of incompatibility of reasoning between certain parts of the contested judgment. On the one hand, in paragraphs 169 to 171, the Court of First Instance states that the mere existence of Article 25 of the UPU Convention does not constitute an infringement by the public postal operators of the Community rules on competition; only reliance upon it could, provided that trade between Member States was affected, come within the scope of Community law. On the other hand, in paragraphs 99 to 101, it allegedly recognised the link existing between the CEPT Agreement and the need to apply the mechanism provided for in Article 25 of the UPU Convention, and the fact that the public postal operators actually relied on that provision when carrying out the interceptions at issue.

156. I am unable to identify the contradiction attributed by the appellant to the reasoning contained in those two sets of paragraphs.

In the first, namely 169 to 171, the Court of First Instance, reviewing legality, disposes of the applicant's claim that the very existence of Article 25 of the UPU Convention constitutes a collusive practice. The Court of First Instance concludes — correctly, in my opinion — that only specific reliance by the public postal operators on that provision, which, moreover, forms part of a universally applicable international treaty, can raise questions of compatibility with the Community competition rules, provided that trade between Member States is affected. In that connection, decisive importance attaches to the main part of the first sentence of paragraph 171, which the appellant chose to exclude from its comparison. There it is pointed out that the said Article 25 'does not impose an obligation to intercept mail which has been remailed'.

In paragraphs 99 to 101 of the contested judgment, the Court of First Instance properly criticises the interpretation of

Article 86 adopted by the Commission in its decision of 6 April 1995 in connection with one of the cases in which Article 25 of the UPU Convention was invoked.

157. The sixth plea must be rejected in its entirety.

The seventh plea in law: misapplication of the legal concept of misuse of powers

158. The appellant, finally, challenges the Court of First Instance's assessment of its allegations of misuse of powers in the adoption of the decisions of 6 April and 14 August 1995.

159. First, the Court of First Instance, it is said, erred by not undertaking an overall examination of the evidence placed before it, and moreover, failed to carry out any examination of certain parts of it.

160. The fact that the Court of First Instance chose to consider each of the factors put forward individually does not mean that it did not also consider them together as a whole. Furthermore, it must be borne in mind that the misuse of powers complained of at first instance consisted in the exercise, by the Commission, of its powers with a view to promoting the sectoral interests of the public postal operators. At the end of paragraph 190 of the contested judgment, the Court of First Instance considered it lawful that the Commission's conduct, in the postal sector, pursued the twofold objective of ensuring the application of the competition rules and at the same time achieving progress with liberalisation of the sector, there being nothing to justify the view that the pursuit of that twofold objective reflected any misuse of powers in the adoption of the contested decisions.

None of the factors which the Court of First Instance allegedly failed to take into account detracts from that appraisal, even assuming that they were relevant and objective.

161. Second, the appellant criticises the Court of First Instance for stating, in paragraph 193 of the judgment, that it is not appropriate, when determining whether there has been any misuse of powers, to examine how the Commission dealt with other cases in the same sector.

162. I shall merely observe that the Court of First Instance considered that the applicant had referred to other complaints and legal proceedings relating to postal activities which were 'clearly distinct from

remail'. Its assessment of relevance is perfectly consistent with the legal definition of the factors that can be relied on to support an allegation of misuse of powers.

163. The seventh plea in law must therefore be rejected.

Costs

164. Under Article 69(2) of the Rules of Procedure, which apply to appeals by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs. Consequently, if, as I propose, all the pleas put forward by the appellant in both cases are rejected or declared inadmissible, the appellant should be ordered to pay the costs.

Conclusion

165. Having proposed that none of the pleas relied on to contest the judgments of the Court of First Instance of 16 September 1998 in Case T-110/95 and Joined Cases T-133/95 and T-204/95 should be upheld, I suggest that the Court of Justice dismiss the appeal and order the appellant to pay the costs.