JUDGMENT OF THE COURT (Fifth Chamber)
16 June 1994 *

In Case C-39/93 P,

Syndicat Français de l'Express international (SFEI), established in Roissy, France,

DHL International SA, a company incorporated according to French law established in Roissy,

Service Crie-LFAL SA, a company incorporated according to French law established in Paris,

May Courier International SARL, a company incorporated according to French law established in Paris, represented by Eric Morgan de Rivery, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 Avenue Guillaume,

appellants,

APPEAL against the judgment of the Court of First Instance of the European Communities of 30 November 1992 in Case T-36/92 between Syndicat Français de l'Express International (SFEI), DHL International SA, Service Crie-LFAL SA and May Courier International SARL, and the Commission of the European Communities ([1992] ECR II-2479), seeking to have that judgment set aside,

* Language of the case: French.

the other party to the proceedings being:

Commission of the European Communities, represented by Giulano Marenco, Legal Adviser, and by Francisco Enrique González-Díaz, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, D. A. O. Edward, R. Joliet (Rapporteur), G. C. Rodríguez Iglesias and M. Zuleeg, Judges,

Advocate General: C. O. Lenz,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 25 November 1993,

after hearing the Opinion of the Advocate General at the sitting on 10 February 1994,

gives the following

Judgment

1 By application lodged at the Court Registry on 8 February 1993, Syndicat Français de l'Express International (SFEI), DHL International SA (DHL), Service Crie-

LFAL SA (Service Crie) and May Courier International SARL, (May Courier) brought an appeal under Article 49 of the EEC Statute of the Court of Justice, and the corresponding provisions of the ECSC and EAEC Statutes, against the order of the Court of First Instance in Case T-36/92 *SFEI and Others* v *Commission* [1992] ECR II-2479 dismissing as inadmissible their action against letter No 000978 of 10 March 1992 in which the Commission stated that it did not envisage pursuing inquiries under Article 86 of the EEC Treaty.

2 The Court of First Instance found as facts (paragraphs 1 to 3 of its order) that SFEI had lodged a complaint with the Commission on 21 December 1990 challenging the logistical and commercial assistance which the French Post Office is said to provide to the Société Française de Messagerie Internationale (SFMI): availability of the whole post office network, preferential customs clearance procedure, preferential financial terms, conduct of promotional and advertising operations by La Poste in favour of SFMI.

3 It is undisputed that the complaint lodged on 21 December 1990 was in any event directed against the French State and, in that respect, based on Articles 92 et seq. of the Treaty. It is also common ground that at the latest on 18 March 1991, at a meeting between the Commission and representatives of SFEI the question was raised of a possible infringement of Article 86 by La Poste *qua* undertaking. The Commission at that stage undertook to examine the information in its possession in the light of that provision as well.

4 By letter of 15 November 1991 SFEI asked the Commission whether it intended to open an investigation on the basis of the facts set out in its complaint and, if so, on what legal basis it intended to act, Article 92 et seq. or Articles 85 and 86 of the Treaty.

5 On 9 January 1992 the Director-General of Directorate-General IV replied to that letter in the following terms:

'We also undertook to consider the available information and take a view in principle on the application of Article 86.

Whilst these investigations were continuing, the international express services of La Poste were affected by the joint venture announced between TNT, La Poste, and four other postal administrations. We carried out an investigation under the provisions of the Merger Regulation into these arrangements, and the Commission's decision of 2 December has recently been published. The outcome clearly has a bearing on our consideration of SFEI's complaint.

We shall shortly write to you more fully with our conclusions on the matter.'

6 The joint venture to which the Director-General referred was an international rapid-mail service established between the German, Canadian, French, Netherlands and Swedish postal services, on the one hand, and the Australian company TNT Ltd, on the other. The creation of that joint venture was notified to the Commission on 28 October 1991 under Article 4 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentration between undertakings (OJ 1989 L 395, p. 1, the 'Merger Regulation' and corrigendum, OJ 1990 L 257, p. 13). By decision of 2 December 1989 the Commission declared the operation of that venture compatible with the common market, and that on that ground it was not opposed to it (Commission Decision 91/C322/14, OJ 1991 C 322, p. 19).

7 On 10 March 1992 the Commission sent two letters to SFEI. The first, letter No 06873, informed it of the decision by its competent departments to close the 'State aids' dossier.

8 The second, letter No 000978, concerning the application of Article 86 of the Treaty stated that an investigation had been carried out under the provisions of the Merger Regulation, and that the investigation had necessarily covered the most important points raised by SFEI in relation to a potential infringement of Article 86 by La Poste (benefits to the joint venture provided by access to the general facilities of La Poste and to the privileges enjoyed by the latter).

9 The end of the letter was worded as follows:

'I am aware that you had hoped that the Commission would follow the full procedure of an Article 86 investigation. This procedure would only have dealt with the situation regarding France. However, this investigation under the Merger Regulation has dealt with significant changes in the wider Community market. The competitive conditions facilitated by previous Commission decisions on international express have now been effectively extended. I am satisfied that the result is the best framework that could be obtained at this time in order to ensure that SFEI members and other operators all have a full opportunity to compete.

While we do not propose to pursue enquiries under Article 86 in these circumstances, I can assure you that we shall maintain a close watch on developments in this market. In a separate letter we are informing you of the outcome of our consideration of the linked case presented under the State aid rules.'

10 By application lodged on 16 May 1992 SFEI and three undertakings belonging to the business consortium, DHL International, Service Crie and May Courier, brought proceedings before the Court of First Instance for the annulment of Commission letter No 06873 of 10 March 1992 concerning the State aids dossier. By letter of 9 July 1992 the Commission informed the applicants that it had withdrawn that decision.

11 By application also lodged on 16 May 1992 SFEI and those three undertakings brought another application before the Court of First Instance for the annulment of the Commission decision contained in the contested letter concerning the investigation under Article 86 of the Treaty.

12 In a document of 17 June 1992 the Commission raised several objections of inadmissibility to the second application.

13 In particular, it contended that the contested letter constituted no more than an initial reaction by its services and therefore formed part of the first stage in the investigation of complaints, as analysed by the Court of First Instance in the *Automec I* judgment in Case T-64/89 (*Automec* v *Commission* [1990] ECR II-367). In view of its preparatory nature it is not an actionable decision.

14 In order to assess the relevance of the Commission's plea of inadmissibility, the Court of First Instance considered it necessary first to examine whether the complaint of 21 December 1990 was based on Article 86 and, secondly, whether the contested act contained a decision capable of producing legal effects (paragraph 31).

15 In examining the basis of the complaint of 21 December 1990, the Court of First Instance found that it comprised three distinct parts: a covering letter addressed to the Director-General for Competition, a summary of the complaint, and the complaint proper (paragraph 32). It found that the complaint proper contained no reference to Article 86 (paragraph 35). It considered that the fact that a document other than the complaint proper, namely the letter conveying it to the Director-General for Competition, expressly reserved the possibility of a further application to the Commission under Articles 85 and 86 merely served to confirm that the initial complaint to the Commission was made exclusively under Article 92 (paragraph 37).

16 As to the legal effects of the contested letter from the Commission, the Court of First Instance considered that the document merely explained the decision as to compatibility taken by the Commission on 2 December 1991 under the Merger Regulation and the connections between the problems encountered during the investigation carried out under the Merger Regulation and those described in the complaint. The Court of First Instance further found that the contested letter contained no evaluation in the light of Article 86 of the Treaty of the facts alleged, and concluded that it fell to be regarded as a document established at a preliminary stage in the investigation, which merely expressed an initial reaction by the Commission's services having no legal effects (paragraphs 42 and 43).

17 Again as to the legal effects of the Commission's contested letter, the Court of First Instance likewise rejected the applicants' arguments that there had been a breach of the resolutions adopted by the Commission following the abovementioned *Automec I* judgment. In its XXth report on competition policy the Commission stated that:

'Letters stating the Commission's preliminary objections will be drafted so as to make it clear that they represent only an initial Commission reaction on the basis of the information in the Commission's possession. Complainants will in any event always be asked to submit any further comments within a reasonable time,

failing which the case may be considered closed' (XXth annual report on competition policy, 1990, para. 165, p. 138).

18 According to the applicants, the last sentence of that passage meant that, if the Commission did not invite the parties to submit observations, the file on the complaint was to be regarded as definitively closed. By reference to the adage 'tu patere legem quem fecisti' they concluded that since SFEI had not been invited to submit supplementary observations the contested letter constituted a definitive rejection of the complaint.

19 The Court of First Instance considered that argument to be based on a misinterpretation of the final sentence of the report in question. In the words of the Court of First Instance the 'meaning of the sentence in question is only that the file on an application under Article 3 of Regulation No 17 (Regulation No 17 of the Council of 6 February 1962, first regulation implementing Articles 85 and 86 of the Treaty, Official Journal, English Special Edition 1959-62, p. 87) will be closed should the complainant's comments not reach the Commission within the period set in the provisional communication made under Article 6 of Regulation No 99/63' (of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17, Official Journal, English Special Edition 1963-64, p. 47) (paragraph 45).

20 Consequently, the Court of First Instance on 30 November 1992 dismissed the application as inadmissible and ordered the applicants to bear all the costs.

The appeal

21 In support of their appeal the appellants, SFEI, DHL, Service Crie and May Courier raise three pleas: the first alleges misconstruction of the legal concept of a complaint, the second alleges misconstruction of the legal concept of an actionable decision, and the third alleges an infringement of the principles of good faith and legal certainty.

The first plea: misconstruction of the legal concept of a complaint

22 First, the applicants maintain that at Community law a complaint may be said to consist of all the factual and legal elements brought to the Commission's notice by a complainant (judgments of the Court in Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045; and of the Court of First Instance in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, which cites the Court's case-law on this point). By regarding the covering letter to the Director-General for Competition as extraneous to the complaint of 21 December 1990 the Court of First Instance, it is alleged, wrongly restricted the scope of the complaint, thereby misconstruing the legal concept thereof. Secondly, they claim that the Court of First Instance was not legally entitled to infer from the documents before it that the complaint was not based on Article 86. More than half of the covering letter was taken up in showing that the anticompetitive conduct of La Poste of which complaint was made to the French competition authority also ran counter to that Treaty provision. Thirdly, the appellants point to a contradiction in the assessment by the Court of First Instance of the elements constituting the complaint. At paragraph 32 of the order the covering letter is considered to form part of the complaint, whereas, at paragraph 37 the complaint is regarded as being made solely under Article 92.

23 As is clear from paragraphs 16 and 17 of the order, the Court of First Instance pointed out that the Commission in the end considered that a complaint had been made to it under Article 86. Consequently, its reasoning on the original scope of the complaint is otiose. Since the appellants' first plea is directed against superfluous reasoning contained in the order, it must be rejected as inoperative.

The second plea: misconstruction of the concept of actionable decision

24 By classifying the contested letter as a preliminary document, the Court of First Instance is alleged by the appellants to have misconstrued the concept of an action-

able decision. That letter in fact contained an assessment under Article 86 of the Treaty of the conduct complained of, terminated the investigation, and precluded the appellants from demanding the resumption of the investigation unless they brought forward new evidence. Thus, it is said to be a decision rejecting the complaint and as such amenable to annulment proceedings.

25 The Commission considers this second plea to be inadmissible. The appellants, it contends, are relying on the circumstances in which the contested letter was drawn up, its tenor and its wording, and thus are raising only questions of fact.

26 That line of argument cannot be followed. In analysing the contested letter as a document without legal effects, the Court of First Instance not only assessed the facts but also assigned to them a classification. The Court therefore has jurisdiction to examine this plea.

27 First of all, an institution empowered to find that there has been an infringement and to inflict a sanction in respect of it and to which private persons may make complaint, as is the case with the Commission in the field of competition, necessarily adopts a measure producing legal effects when it terminates an investigation initiated upon a complaint by such a person (see judgments in *Demo-Studio Schmidt* cited above; and in Joined cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487).

28 A decision to close the file on a complaint cannot be described as preliminary or preparatory. In fact, unlike a communication which is intended to afford to the undertakings concerned the opportunity of making known their point of view on the Commission's statement of objections and which does not prevent the Commission from altering its position (see judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639), the decision to close the file on a complaint is the final step in the procedure; it cannot be followed by any other decision amenable to annulment proceedings (see judgment in Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965).

29 The terms 'I am aware that you had hoped that the Commission would follow the full procedure of an Article 86 investigation' indicate that the Commission had decided to terminate the investigation under Article 86. Moreover, in the contested letter the Commission also stated why it had decided not to proceed with the investigation. In its view any fresh investigation would be pointless since 'the result (in the context of the joint venture) is the best framework that could be obtained at this time in order to ensure that SFEI members and other operators all have a full opportunity to compete'.

30 In those circumstances a letter closing the file on a complaint may be analysed as a preliminary or preparatory statement of position only if the Commission has clearly indicated that its conclusion is valid only subject to the submission by the parties of supplementary observations, which was not so in this case.

31 Finally, contrary to the adjudication of the Court of First Instance (paragraphs 42 and 43 of the order referred to at paragraph 16 above), it matters little whether the contested letter contains an assessment under Article 86 of the Treaty of the conduct complained of. That question does not arise at the admissibility stage of an application and is of relevance only in order to verify in the course of the examination as to substance whether the Commission has performed its duty to provide a statement of reasons.

32 It follows from the foregoing that the Court of First instance misdirected itself in law by analysing the contested letter as a document having no legal effects and by declaring the application inadmissible.

33 The appellants' second plea is therefore well founded.

The third plea: infringement of the principles of good faith and legal certainty

34 The applicants claim that they could not but regard the contested letter as a decision rejecting their complaint, given that, on the one hand, it did not call on them to react to the Commission's observations and, secondly, it was sent on the same day as the letter concerning State aids which the Commission acknowledged as being in the nature of a decision.

35 Since this plea is ancillary to the second plea by the appellants, which has been held to be well founded, no further consideration of it is called for.

36 It follows from the foregoing considerations that the Court must grant the application for the annulment of the order of the Court of First Instance in *SFEI and Others* v *Commission* dismissing as inadmissible the action brought by SFEI, DHL International, Service Crie and May Courier against Commission letter No 000978 of 10 March 1992.

Referral of the case back to the Court of First Instance

37 The first paragraph of Article 54 of the EEC Statute of the Court of Justice provides that

'If the appeal is well founded, the Court of Justice shall quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First instance for judgment.'

38 The state of the proceedings does not so permit since the Court of First Instance gave judgment only on one of the objections of inadmissibility raised by the Commission; the case must therefore be referred back to it.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Annuls the order of the Court of First Instance of 30 November 1992 in Case T-36/92 (*SFEI and Others* v *Commission*);**

2. **Refers the case back to the Court of First Instance;**

3. **Reserves the costs.**

Moitinho de Almeida Edward Joliet

Rodríguez Iglesias Zuleeg

Delivered in open court in Luxembourg on 16 June 1994.

R. Grass
Registrar

J. C. Moitinho de Almeida
President of the Fifth Chamber