JUDGMENT OF THE COURT
12 February 1992 *

In Joined Cases C-48/90 and C-66/90,

Kingdom of the Netherlands, represented by A. Bos and J. W. de Zwaan, Legal Adviser and Assistant Legal Adviser respectively, at the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C. M. Spoo, (Case C-48/90), and

Koninklijke PTT Nederland NV and **PTT-Post BV,** represented by P. V. F. Bos and C. E. J. Bronckers, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of Messrs Loesch and Wolter, 8 Rue Zithe, (Case C-66/90),

applicants,

v

Commission of the European Communities, represented by J. H. J. Bourgeois, Principal Legal Adviser, B. Jansen and B. J. Drijber, members of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Legal Service, Wagner Centre, Kirchberg,

defendants,

supported in Case C-66/90, by

Nederlandse Vereniging van Internationale Koeriers- en Expresbedrijven and **Nationale Organisatie voor het Beroepsgoederenvervoer Wegtransport,** associations governed by Netherlands law, having their registered offices in Amsterdam and

* Language of the case: Dutch.

Rijswijk respectively, represented by J. Geus, of the Bar of The Hague, with an address for service in Luxembourg at the Chambers of L. Dupong, 14a Rue des Bains,

European Express Organisation, an association governed by French law, having its registered office in Paris, represented by R. Wojtek, Rechtsanwalt, Hamburg, and E. Grabitz, Professor at the Freie Universität Berlin, with an address for service in Luxembourg at the address of P. Palinkas, 38 Rue Paul Wilwertz, and

Association of European Express Carriers, an association governed by Belgian law, represented by I. G. F. Cath, of the Bar of The Hague, with an address for service in Luxembourg at the Chambers of L. Dupong, 14a Rue des Bains,

interveners,

APPLICATION for a declaration that Commission Decision 90/16/EEC of 20 December 1989 concerning the provision in the Netherlands of express delivery services (Official Journal 1990 L 10, p. 47) is void,

THE COURT,

composed of: O. Due, President, Sir Gordon Slynn, R. Joliet, F. A. Schockweiler and F. Grévisse (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Díez de Velasco and M. Zuleeg, Judges,

Advocate General: W. Van Gerven,
Registrar: J.-G. Giraud,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 10 July 1991,

after hearing the Opinion of the Advocate General at the sitting on 16 October 1991,

gives the following

Judgment

1 By application lodged at the Court Registry on 2 March 1990, the Kingdom of the Netherlands brought an action under the first paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision 90/16/EEC of 20 December 1989 concerning the provision in the Netherlands of express delivery services (Official Journal 1990 L 10, p. 47) was void (Case C-48/90).

2 By application lodged at the Court Registry on 15 March 1990, Koninklijke PTT Nederland NV and PTT-Post BV (hereinafter referred to as 'PTT') brought an action under the second paragraph of Article 173 of the Treaty for a declaration that the same Decision 90/16/EEC was void (Case C-66/90).

3 By order of 5 December 1990, the Court granted the Nederlandse Vereniging van Internationale Koeriers- en Expresbedrijven, the Nationale Organisatie voor het Beroepsgoederenvervoer Wegtransport, the European Express Organisation and the Association of European Express Carriers leave to intervene in support of the Commission in Case C-66/90.

4 By order of 4 June 1991 the Court referred Case C-66/90 to the Court of First Instance of the European Communities.

5 By order of 21 June 1991 the Court of First Instance declined jurisdiction in order that the Court of Justice might give judgment on the application for a declaration that the decision in question was void.

6 By order of 22 June 1991 the Court decided to join Cases C-48/90 and C-66/90 for the purposes of the oral procedure and judgment.

7 Article 2 of the Netherlands Law of 26 October 1988 amending the legislation on the operation of the postal service — Postal Law (*Staatsblad*, 1988, 522) (hereinafter referred to as 'the Postal Law') substituted a system of exclusive franchise for the statutory monopoly formerly vested in the State undertaking PTT for all transport of letters not exceeding 500 g within the Netherlands, from and to the Netherlands Antilles and Aruba, and from and to foreign countries.

8 The holder of that exclusive franchise, PTT Nederland NV, is required to provide for all persons throughout the country, against payment, transport of letters and other packages under conditions laid down by ministerial decree. PTT Nederland NV has entrusted its subsidiary, PTT-Post BV, with the performance of its duties under that franchise.

9 Under Article 12(1) of the Postal Law persons other than the franchise holder are forbidden to transport, against payment, letters not exceeding 500 g unless the three conditions specified in points 1 to 3 of Article 12(2)(a) are satisfied, that is, unless:

— the service offered is significantly better, as regards speed of transport, the guarantee of such speed and the possibility of keeping track of items during transport, than the service provided by normal express transport;

— transport is effected at a tariff which, for transport within the Netherlands or to destinations abroad, is higher than that fixed by general administrative order for normal express transport, namely HFL 11.90 for letters to destinations

within the Netherlands or the Community and HFL 17.50 for letters to other destinations; and finally

— transport is effected by a registered undertaking.

10 After informal discussions with PTT on 5 October 1988, the Commission informed them on 7 November 1988 that the Postal Law raised certain problems with regard to the competition rules of the Treaty.

11 By telex message of 29 November 1988 the Commission informed the Netherlands Government that after a first investigation its officers had come to the conclusion that Articles 2 and 12 of the Postal Law were incompatible with Article 90 of the Treaty read in conjunction with Articles 30, 59, 85 and 86 thereof.

12 The Commission stated in particular that the Postal Law subjected messenger undertakings to restrictive conditions which put them at a considerable disadvantage as compared with the PTT messenger services and prevented them from continuing to offer certain of their services, in particular those supplied at a lower price than those laid down by Royal Decree. The condition laid down in point 1 of Article 12(2)(a) of the Postal Law did not offer the least legal certainty to the international messenger services. The condition set out in point 2 would make any price competition impossible in many cases and have the same effect as a price agreement. Article 90(2) of the Treaty would not be applicable in view of the fact that the revenue derived by PTT from consignments by express delivery service was not essential to allow PTT to perform their task. After inviting the Netherlands Government to give its views the Commission indicated that if the factors mentioned in its telex message were confirmed it might consider itself bound to adopt a decision under Article 90(3) of the Treaty.

13 In a letter of 16 January 1989 the Netherlands Government submitted observations which in its view justified the provisions at issue.

14 The Commission also had contacts with messenger service trade organizations, which provided their comments on the position adopted by the Netherlands Government on 16 January 1989.

15 On 20 December 1989 the Commission adopted the contested decision without any further exchange of views in the meantime with the Netherlands Government.

16 Article 1 of the operative part of the decision, which is addressed to the Netherlands, is as follows:

'The provisions of Articles 2 and 12 of the Netherlands Law of 26 October 1988 on the operation of the postal service, together with the provisions of the implementing Decree of 19 December 1988, which reserves for PTT-Post BV the express collection, transport and distribution of postal items weighing up to 500 grammes, at a price not exceeding Fl 11.9 for EEC destinations and Fl 17.5 for non-EEC destinations, and the obligation to register all tariffs beforehand, imposed by the Decree of 12 May 1989, are incompatible with Article 90(1) of the EEC Treaty, read in conjunction with Article 86 of that Treaty.'

17 In the preamble to the decision, the Commission states that PTT-Post BV has a dominant position on the market for delivery from anywhere in the Netherlands of letters up to 500 g and explains in what respect the Postal Law leads to abuse of that dominant position. The Postal Law results in an extension of the dominant position existing on the market for basic postal services to that for messenger services; for express deliveries up to 500 g, in the price category not exceeding

HFL 11.90, the Postal Law requires customers to use the services of PTT-Post BV and thus leads to the imposition of unfair prices and conditions; finally the Postal Law leads to a restriction of supply on the market. The Commission further considers that the Postal Law adversely affects trade between Member States. On the other hand, the conditions for the application of Article 90(2) of the Treaty are not met, since in particular the extension of a dominant position was not necessary to guarantee sufficient revenue for PTT to perform the tasks assigned to them.

18 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the pleas in law and arguments of the parties, which are hereinafter mentioned or discussed only in so far as is necessary for the reasoning of the Court.

19 The Kingdom of the Netherlands and PTT put forward a number of pleas in law in support of their application for a declaration that the decision is void, claiming essentially that the Commission was not empowered to adopt the contested decision under Article 90(3) of the Treaty, that the Commission has infringed the rights of the defence, that it has infringed essential procedural requirements, that the statement of the reasons on which the contested decision is based is insufficient and that Articles 86 and 90(1) and (2) of the Treaty have been infringed.

The claim of lack of powers on the part of the Commission

20 The applicants claim essentially that the Commission was not empowered to adopt the contested decision on the basis of Article 90(3) of the Treaty. Since that provision contains no express derogation from Articles 169 and 170 of the Treaty, it does not allow the Commission to find that a Member State has infringed the rules of the Treaty but at most authorizes it, as the Court declared in its judgment in Case C-202/88 *France* v *Commission* [1991] ECR I-1223 (the so-called 'Telecom' judgment) to specify in general terms the obligations arising for Member States under Article 90(1) of the Treaty.

21 The Commission's reply is that Article 90(3) may constitute the legal basis of a measure designed to make a finding of an infringement of Article 90(1) of the Treaty and to bring it to an end.

22 With a view to determining the scope of the powers conferred on the Commission under Article 90(3), that provision must be seen in the context of Article 90 as a whole and of the task imposed upon the Commission by virtue of Articles 85 to 93 of the Treaty.

23 Article 90(1) of the Treaty requires the Member States, with regard to public undertakings and undertakings to which they grant special or exclusive rights, not to enact or maintain in force any measure contrary to the rules of the Treaty, in particular the rules on competition.

24 Article 90(2) provides that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are exempt from the rules of the Treaty, in particular the rules on competition, in so far as the application of such rules of competition would obstruct the performance, in law or in fact, of the particular tasks assigned to them.

25 Article 90(3) requires the Commission to ensure that Member States comply with their obligations as regards the undertakings referred to in Article 90(1) and expressly empowers it to take action for that purpose by two different legal instruments, namely directives and decisions.

26 With regard to directives, the Court declared, in the judgment in Case C-202/88 *France* v *Commission*, previously cited, that the Commission was empowered to specify in general terms the obligations arising for Member States under the Treaty with regard to the undertakings referred to in Article 90(1).

27 The powers which Article 90(3) authorizes the Commission to exercise by means of decisions differ from those which it may exercise by means of directives. A decision is adopted in respect of a specific situation in one or more Member States and necessarily involves an appreciation of that situation in the light of Community law; it specifies the consequences arising for the Member State concerned, regard being had to the requirements which the performance of the particular task assigned to an undertaking imposes upon it if it is entrusted with the operation of services of general economic interest.

28 If the power to adopt decisions, conferred on the Commission by Article 90(3), is not to be deprived of all practical effect, the Commission must be empowered to determine that a given State measure is incompatible with the rules of the Treaty and to indicate what measures the State to which the decision is addressed must adopt in order to comply with its obligations under Community law.

29 Such powers are also essential for the Commission so as to allow it to discharge the duty imposed upon it by Articles 85 to 93 of the Treaty to ensure the application of the rules on competition and thus to contribute to the institution, within the meaning of Article 3(f) of the Treaty, of a system of undistorted competition in the common market.

30 It would be impossible for the Commission to discharge its duty completely if, by virtue of the powers of decision conferred upon it by the Council in pursuance of

Article 87 of the Treaty, it could impose penalties only in respect of anti-competitive conduct of undertakings and could not take action directly, on the basis of Article 90(3) of the Treaty, against Member States enacting or maintaining in force, as regards public undertakings and undertakings to which they grant special or exclusive rights, measures having the same anti-competitive effect.

31 In addition, the powers which the Commission may exercise in respect of Member States by means of decisions under Article 90(3) of the Treaty are to be compared with the powers, conferred upon it by Article 93 of the Treaty, to find that a State aid which distorts or threatens to distort competition is not compatible with the common market.

32 In both cases the Commission is empowered to take action, not with regard to the undertaking which has been enabled to obstruct the rules of competition, but with regard to the Member State which is responsible for the impairment of competition.

33 In putting forward this plea in law the applicants also contend that to acknowledge that the Commission possesses this power would amount to allowing it to find, by the use of a procedure which deprives a Member State of the guarantees provided for it by Article 169 of the Treaty, that the State concerned has failed to fulfil its obligations under the Treaty and would thus encroach upon the powers which that provision reserves to the Court.

34 To the extent to which that argument represents a claim that the Commission has misused its power, it should be recalled, as has already been stated, that, like Article 93 of the Treaty, which envisages a constant review by the Commission of State aids, Article 90(3) allows it to make an assessment, by way of decision, of the compatibility with the Treaty of measures enacted or maintained in force by States as regards the undertakings referred to in Article 90(1).

15 Such a power of assessment on the one hand in no way encroaches upon the powers which Article 169 of the Treaty confers upon the Court; on the other hand it does not prejudice the rights of the defence which that provision guarantees for Member States.

16 In fact, as regards the first aspect, as the Court recognized in the judgment in Case 226/87 *Commission* v *Greece* [1988] ECR 3611, the Member State to which the Commission decision is addressed may bring before the Court an application for a declaration that the decision is void, whilst on the other hand the decision may form the basis for an application under Article 169 of the Treaty for failure to fulfil an obligation if the Member State to which it is addressed does not comply with it.

17 As regards the argument with regard to respect for the rights of the defence of the Member State addressed, it must be pointed out that the mere fact that Article 90(3) does not, unlike Article 93, provide for a procedure ensuring that these rights are observed is no reason for denying the Commission the power to adopt the contested decision; as the Court has consistently held, it is clear that even in the absence of express provisions, the general principle of respect for the rights of the defence is one which every Community institution must observe in adopting a measure capable of adversely affecting the addressee (see, for example, the judgment in Case C-301/87 *France* v *Commission* [1990] ECR I-307).

18 The question whether in this case the Commission respected that principle will be examined in the context of the plea in law relating to infringement of the rights of the defence.

19 In these circumstances, the first plea in law relating to the Commission's lack of power to adopt the contested decision must be rejected in both cases.

The pleas in law relating to infringement of the rights of the defence

40 The applicants claim that, in adopting the contested decision, the Commission disregarded the rights of the defence, which form one of the general principles of Community law.

41 The Kingdom of the Netherlands argues that the Commission's telex message of 29 November 1988 cannot be regarded as a genuine communication of objections setting out all the considerations on which the contested decision was based. Furthermore, it claims that during the period which elapsed between its stating its position on 16 January 1989 and 20 December 1989, when the contested decision was adopted, it did not have the opportunity to present its point of view, although the Commission had in the meantime acquainted itself with the standpoint of the private messenger service undertakings.

42 PTT state that before adopting a decision such as that in this case, the Commission should have heard the undertakings concerned in the same way as it is required to do for the adoption of a decision under 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 1959-1962, p. 87). However, the Commission made contact with the applicants only once, in October 1988.

43 The Commission denies infringing the rights of the defence in adopting the contested decision. The Netherlands Government was, it claims, heard in connection with each of the objections specified in the contested decision. In view of the fact that the procedure under Article 90(3) takes place between the Commission and the Member State concerned, the Commission was not required to hear PTT separately.

44 As regards the plea in law relating to an infringement of the rights of the defence in the case of the Kingdom of the Netherlands, it must be stressed that the Court has consistently held that respect for the rights of the defence, in all proceedings which are initiated against a person and which are liable to culminate in a measure

adversely affecting that person is a fundamental principle of Community law which must be guaranteed even in the absence of any specific rules (see, for example, the judgment in Case C-301/87 *France* v *Commission*, previously cited).

45 That principle requires that, before the decision under Article 90(3) of the Treaty is adopted, the Member State in question must receive an exact and complete statement of the objections which the Commission intends to raise against it.

46 The Court has held that that principle also requires that the Member State in question be placed in a position in which it may effectively make known its views on the observations submitted by interested third parties (see the judgment in Case C-301/87 *France* v *Commission*, previously cited).

47 In this case it must be stated, however, that the telex message of 29 November 1988 does not contain an exact and complete statement of the objections which the Commission intended to raise in the contested decision. In fact the Commission simply raised in general terms the question of the incompatibility of the Postal Law with Article 90(1) read in conjunction with Article 86 of the Treaty without setting out the various features which constituted an infringement of that article as they were subsequently set out in the contested decision.

48 It must be added that the Kingdom of the Netherlands, after its letter of 16 January 1989, was not given a further hearing by the Commission and in particular had no opportunity to make known its standpoint on the consultations which the Commission had had with the messenger service trade organizations. However, the Commission itself admitted during the written procedure that those consultations had been necessary to allow it to form an opinion on the foreseeable effects of the Postal Law on the operations of the private messenger undertakings.

49 In these circumstances, it must be declared that the rights of the defence were infringed in the case of the Kingdom of the Netherlands inasmuch as the Commission failed to communicate to it an exact and complete statement of the objections raised in the contested decision and inasmuch as the Netherlands Government was not given a hearing between 16 January 1989 and the date on which the contested decision was adopted, in particular with regard to the consultations which the Commission had had with the messenger service trade organizations.

50 As regards the plea in law regarding an infringement of the rights of the defence in respect of PTT, which complain of never having been heard by the Commission, it should be stated first that these undertakings are the direct beneficiaries of the State measure at issue and that they are expressly named in the Postal Law, that the contested decision relates directly to them and that the economic consequences of that decision directly affect them.

51 In these circumstances, it must be stated that these undertakings are entitled to be heard.

52 It must next be observed that the Commission had only informal discussions with PTT in October 1988, that it merely informed them of the problems raised by the Postal Law with regard to the competition rules of the Treaty and that it never informed them in precise terms of its specific objections to the State measure at issue.

53 In these circumstances, it must be declared that the Commission has infringed the right of PTT to be heard.

54 From the foregoing considerations it follows that the applications brought by the Kingdom of the Netherlands in Case C-48/90 and by PTT in Case C-66/90 are well founded and that the contested decision must be declared void.

Costs

55 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful in its pleas in law in Cases C-48/90 and C-66/90, it must be ordered to pay the costs in both cases. The parties intervening in support of the Commission must be ordered to pay their own costs.

On those grounds,

THE COURT

hereby:

1. Declares void Commission Decision 90/16/EEC of 20 December 1989 concerning the provision in the Netherlands of express delivery services;

2. Orders the Commission to pay the costs in Cases C-48/90 and C-66/90;

3. Orders the interveners to bear their own costs.

Due Slynn Joliet Schockweiler Grévisse Mancini

Kakouris Moitinho de Almeida Rodríguez Iglesias Díez de Velasco Zuleeg

Delivered in open court in Luxembourg on 12 February 1992.

J.-G. Giraud
Registrar

O. Due
President