REPORT FOR THE HEARING
in Joined Cases C-48/90 and C-66/90 *

I — Summary of the facts

1. By the 'Wet van 26 oktober 1988, houdende regels met betrekking tot de oprichting van de naamloze vennootschap PTT Nederland NV — Machtigingswet PTT Nederland NV', *Staatsblad*, 1988, 521 (Law of 26 October 1988 containing rules for the establishment of the limited liability company PTT Nederland NV — Enabling Law PTT Nederland NV), (hereinafter referred to as 'the Enabling Law'), the State post office undertaking was replaced by a company established under private law whose capital is wholly owned by the Netherlands State, PTT Nederland NV. That company in turn set up, in pursuance of Article 2(4) of the Law, the undertaking established under private law, PTT-Post BV, of which it owns all the capital.

2. The former State post office undertaking's statutory monopoly for all transport of letters not exceeding 500 g was replaced under Article 2(1) of the 'Wet van 26 oktober 1988, houdende herziening van de wetgeving met betrekking tot de uitvoering van de postdienst — Postwet', *Staatsblad*, 1988, 522 (Law of 26 October 1988 amending the legislation with regard to the administration of the postal service — Postal Law) (hereinafter referred to as 'the Postal Law') by an exclusive franchise relating to the transport, against payment, of letters up to 500 g, within the Netherlands, from and to the Netherlands Antilles and Aruba and from and to destinations abroad, subject to the exceptions provided for in Article 12(2).

3. The holder of that exclusive franchise has, under Article 12(2) of the Postal Law, the duty to provide for all persons throughout the country, against payment, transport of letters and other packages up to the limits of weight and dimensions laid down by the Decree on consignments by post.

4. Under Article 5 of the Enabling Law, PTT Nederland NV is to be regarded as the holder of the exclusive franchise granted under Article 2(1) of the Postal Law.

In pursuance of the authority conferred by Article 4(1) of the Postal Law, PTT Nederland NV entrusted its subsidiary, PTT-Post BV, with the performance of the duties imposed upon it by the Postal Law.

5. Article 12(1) of the Postal Law prohibits any person other than the franchise holder from transporting letters not exceeding 500 g against payment.

6. Under points 1 to 3 of Article 12(2)(a) that prohibition does not apply to the transport of letters within the Netherlands or to foreign destinations if three conditions are all met:

* Language of the case: Dutch.

— The service provided must be significantly better, as regards speed of delivery, a guarantee of such speed and the possibility of keeping track of items during transport, than the services provided by 'normaal versneld vervoer' (normal express transport).

— Transport must be effected at a tariff which, for transport within the Netherlands or to destinations abroad, is higher than that fixed for such service (that is, normal express transport) by general administrative order.

The 'Besluit van 19 december 1988, houdende vaststelling van tarieven bedoeld in artikel 12, lid 2, sub a, punt 2, van de Postwet — Besluit minimumtarieven koeriersdiensten', *Staatsblad*, 1988, 605, (Decree laying down the minimum tariffs for postal services) (hereinafter referred to as 'the Besluit') fixes the rates at HFL 11.90 per letter for destinations within the Netherlands or the Community and at HFL 17.50 per letter for other destinations. According to the explanatory note to the Besluit, the rate of HFL 11.90 is fixed on the basis of the rate for the 'spoedbestel-dienst' (express mail service) for letters weighing between 250 and 500 g within the Netherlands and the Benelux countries, namely HFL 9.50, increased by 25%.

— Finally transport must be effected by a registered undertaking.

Under the 'Regeling registratie koeriers-diensten', *Staatscourant*, 109 (Regulation on registration of messenger services), any messenger undertaking must be registered as such with the Ministry of Transport and Water Control and must register its rates annually.

7. Under Article 12(2)(b) and (d), the prohibition under Article 12(1) does not apply to letters which are transported by order of the franchise holder or are clearly intended to be transported or delivered after transport by the franchise holder, or both.

8. Article 17(1) prescribes penalties *inter alia* for infringements of Article 12(1) of the Postal Law.

9. Since the 1970s PTT have been operating the Express Mail Service (EMS), which is an international 'koeriersdienst' (messenger service). The domestic service 'snelpost' (rapid mail), instituted in 1978 for the districts of Amsterdam, The Hague, Rotterdam and Utrecht, was abolished as an independent service in 1983; apart from the traditional 'expressepost' (express delivery service), in which the sender hands his consignment in at the post office, there was, until 1 June 1990, the 'afhaalservice' (collection from home), in which letters were collected from the sender and taken to the post office, where they were treated as express mail.

10. During summer 1990, that is, after the contested decision was adopted, three rapid

services were instituted as sub-divisions of the EMS: EMS Express, an exclusively domestic rapid service, EMS Time Net, a more rapid service, both domestic and international, and EMS Courier, the most rapid service, domestic and international.

11. Following informal discussions with PTT on 5 October 1988, the Commission informed them by letter of 7 November 1988 that Article 12 of the draft postal law raised certain problems with regard to the rules on competition by reason of the narrow scope left for international messenger undertakings.

12. By telex message of 29 November 1988, the Commission informed the Netherlands Government that it had come to the provisional conclusion that Articles 2 and 12 of the Postal Law were incompatible with Article 90 of the Treaty.

The Commission stated *inter alia* that the Postal Law subjected the messenger undertakings to restrictive conditions which put them at a considerable disadvantage as against PTT's messenger services and prevented them from continuing to offer some of their services, in particular those provided at a price less than the minimum price 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 made any price competition impossible in many cases and had the same effect as an agreement on prices. Article 90(2) of the Treaty was not applicable since the revenue which PTT drew from consignments sent by express delivery was not indispensable to allow them to perform their task. After inviting the Netherlands Government to give its point of view, the Commission stated that, should the factors set out in the telex message be confirmed, it might feel itself bound to adopt a decision under Article 90(3) of the Treaty.

13. In a letter of 16 January 1989 the Netherlands Government justified the two provisions to which exception had been taken, on the ground that the monopoly was necessary for the performance of the duty to transport the post; it was necessary for the opportunities offered to the 'koeriersdienst' (messenger service) undertakings to be restricted in such a way that neither the normal standardized transport of letters nor the 'normaal versneld vervoer' (normal express transport) was jeopardized. The Netherlands Government also stated that for their 'koeriersdiensten' PTT also were required to comply with Article 12 of the Postal Law.

14. In the meantime the Commission had also had contacts with the organizations of 'koeriersdiensten' (messenger services: the Nationale Vereniging voor het Beroepsgoederenvervoer and the Nederlandse Vereniging van Internationale Koerierdiensten) which provided their comments on the Netherlands Government's letter of 16 January 1989.

15. On 20 December 1989 the Commission adopted Decision 90/16/EEC concerning the provision in the Netherlands of express delivery services ('koeriersdiensten', in the authentic Dutch version) (Official Journal 1990 L 10, p. 47). On 2 February 1990 the

Commission published a corrigendum in Dutch to the said Decision 90/16 relating to the terminology used (Official Journal 1990 L 31, p. 46).

16. In the preamble to the decision, the Commission pointed out that under the former legislation, in spite of a theoretical monopoly in favour of PTT there had been competition as regards the 'koeriersdienst' (messenger service) between PTT, with its EMS service, and the private undertakings, and explained that the Postal Law imposed the restrictive conditions of Article 12(1) on the private undertakings only.

In the section entitled 'Legal Assessment', the Commission states that the public undertaking concerned within the meaning of Article 90(1) is PTT-Post BV.

The markets concerned by the Postal Law are the market for the basic postal service for letters up to 500 g from Netherlands territory and the associated but separate market for the 'koeriersdienst' (messenger service) for letters up to 500 g, which is characterized not only by its speed and greater security but by additional services such as home collection of packages, delivery to the addressee in person, the possibility to change the destination or addressee in transit, confirmation to the sender of the receipt of his consignment, keeping track of packages or personal attention to customers.

On the market for the basic postal service, according to the decision, PTT-Post BV, which has exclusive rights for collecting, transporting and distributing all letters not exceeding 500 g from anywhere in the Netherlands, has a dominant position.

The Postal Law commits an abuse of a dominant position by extending it, by allowing the imposition of unfair prices and conditions and by restricting supply.

— By reserving to PTT-Post BV the share of the market for 'koeriersdiensten' (messenger services, described as 'express delivery services' in the English version of the decision) for mail handled for a charge less than HFL 11.90, the Postal Law extends the dominant position on the market for basic postal services to that for the 'koeriersdiensten'.

— For express delivery up to 500 g in the category of prices not exceeding HFL 11.90 the Postal Law requires business undertakings to use the 'expressepost' (express mail, described as 'express services' in the English version of the decision) run by PTT-Post BV on conditions laid down by them and also imposes on those undertakings unfair prices and conditions.

— The Postal Law restricts supply on the market: it adversely affects the number of providers and the quality of the service and prevents competitors of the post office in the field of 'koeriers-diensten' (messenger services; described as 'fast delivery services' in the English version of the decision) for less than 500 g from offering a full range of services.

By reserving to a single undertaking the 'expressepost' up to 500 g at a price below HFL 11.90 to destinations in other Member States the Postal Law adversely affects

'koeriersdiensten' between the Member States.

Finally the Commission states that the conditions for the application of Article 90(2) are not met.

In these circumstances the Commission adopted the following decision:

'*Article 1*

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 Treaty, read in conjunction with Article 86 of that Treaty.

Article 2

The Netherlands shall inform the Commission, within two months from the date of notification of this decision, of the measures it has taken to comply therewith.

Article 3

...'

II — Written procedure and forms of order sought by the parties

1. The application by the Kingdom of the Netherlands was lodged at the Court Registry on 2 March 1990.

2. The application by Koninklijke PTT Nederland BV and PTT-Post BV was lodged at the Court Registry on 15 March 1990.

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 [1991] ECR I-2723.

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. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

7. 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.

8. The Kingdom of the Netherlands, the applicant in Case C-48/90, claims that the Court should:

(i) declare void Commission Decision C(89)1930 def. of 20 December 1989, concerning the provision in the Netherlands of express delivery services, which was notified to the Netherlands Government on 3 January 1990 and the text of which was published under No 90/16/EEC (Official Journal 1990 L 10, p. 47);

(ii) declare void, either separately or jointly with Decision C(89)1930 def. of 20 December 1989, the 'corrigenda' to the contested decision (Official Journal 1990 L 31, p. 46), with the exception of the word 'opgelegt' in the 11th line of Article 1, or, in so far as those 'corrigenda' are to be regarded as a separate decision, declare that decision void;

(iii) order the defendant to pay the costs.

9. Koninklijke PTT Nederland NV and PTT-Post BV (hereinafter referred to as 'PTT'), the applicants in Case C-66/90, claim that the Court should:

(i) declare the decision void together with the corrigendum (in so far as it constitutes a separate decision within the meaning of Article 189 of the EEC Treaty;

(ii) order the Commission to pay the costs.

10. The Commission, the defendant in both cases, contends that the Court should:

(i) dismiss the applications;

(ii) order the applicants to pay the costs.

11. Nederlandse Vereniging van Internationale Koeriers- en Expresbedrijven (hereinafter referred to as 'NVIK') and Nationale Organisatie voor het Beroepsgoederenvervoer Wegtransport (hereinafter referred to as 'NOB'), European Express Organisation (hereinafter referred to as 'EEO') and Association of European Express Carriers (hereinafter referred to as 'AEEC'), parties intervening in support of the Commission in Case C-66/90, contend that the Court should:

(i) dismiss the action brought by Koninklijke PTT Nederland NV and PTT-Post BV;

(ii) order Koninklijke PTT Nederland NV and PTT-Post BV to pay the costs, including those of the interveners.

III — Pleas in law and arguments of the parties

Admissibility of the action in Case C-66/90

1. The *Commission* does not deny that an undertaking, within the meaning of Article 90(1) of the EEC Treaty, may bring an action against a Commission decision adopted under Article 90(3), just as it may bring an action against a decision under Article 93(2). In this case, however, PTT deny that they have a privileged position under the Postal Law and cannot therefore contend that the contested decision has altered their legal position so that they have a legal interest in contesting it. An applicant who is not the addressee of a decision must show that his legal position has been changed. On those grounds the Commission leaves to the Court the question of the admissibility of the action.

2. *PTT* reply that they have never stated that the decision has altered their legal position. To challenge a decision it is sufficient for a third party to show that it is of direct and individual concern to him. The Commission's statement that the Postal Law confers on the applicants a privileged position which is incompatible with the Treaty and the conclusions which the Commission draws from it are of direct and individual concern to the applicants' interests.

The pleas in law relating to illegality

— The plea in law relating to misuse of the powers conferred by Article 90(3) of the Treaty

1. The *Kingdom of the Netherlands* and *PTT* claim that the Commission has misused the powers conferred upon it by Article 90(3), which do not allow it to exercise a repressive control. Any failure by a State to comply with its obligations should have been dealt with under Article 169 of the Treaty which, moreover, provides for certain procedural guarantees for the State concerned. Procedure under Article 90(3) is not amongst the exceptions to Article 169 expressly laid down in the Treaty, such as Article 93(2), 100a(4) or 225.

As the Court emphasized in the judgment in Joined Cases 188 to 190/80 *France* v *Commission* [1982] ECR 2545, the power conferred upon the Commission by Article 90(3) is limited to the directives and decisions which are necessary to perform effectively the duty of surveillance imposed upon it by that paragraph. In that judgment the Court did not deal with the question whether the Commission could have taken action under Article 90(3) if there had been an infringement of the Treaty. In his Opinion delivered on 13 February 1990 in Case C-202/88 *France* v *Commission* [1991] ECR I-1239, the Advocate General even stressed that Article 90(3) allows the Commission to adopt at most decisions or directives of an administrative or technical nature which might help it to carry out its

repressive control on the appropriate legal basis, for example Article 169 or 93(2).

It was all the more essential to follow the normal procedure for establishing a failure to comply with obligations, with the procedural guarantees for the State concerned, since the decision relates to legislation.

A power by the Commission to take repressive action on the basis of Article 90(3) would be tantamount to a power to declare provisions of national law void by an administrative measure.

The Commission cannot deduce repressive powers from Article 90(2) or from the need to safeguard the effectiveness of Article 90. According to PTT, even if it is accepted that the Commission may exercise repressive control on the basis of Article 90(3), it has committed a misuse of power by failing to specify the obligations imposed by the Treaty on the national authorities in the matter.

2. The *Commission* replies that Article 90(3) is a provision serving as the legal basis for measures designed to determine and bring to an end an infringement of Article 90(1). The position is different with Article 169, which cannot serve as the legal basis for a legislative measure but is a procedural provision.

The *intervener EEO* states that the procedure under Article 90(3) is of an administrative nature, like the procedures under Article 87 or 93(2). The procedure under Article 169, which is a means of ensuring that Member States comply with Community law, is a provision conferring rights.

According to the Commission, Article 90(3), like Article 93(2), is distinguished from Article 169 inasmuch as it allows the Commission to adopt a measure of binding force, in this case a decision. Article 169 becomes relevant only when the Member State concerned does not comply with a decision based on Article 90(3).

In the judgment in Joined Cases 188 to 190/80 *France* v *Commission*, previously cited, the Court recognized the Commission's authority to take precautionary action by means of a directive. The same reasoning applies, *a fortiori*, to the adoption for repressive purposes of a decision.

Application by the Commission of Article 90(2) pre-supposes the possibility of proceeding under Article 90(3).

The applicants' point of view would deprive Article 90 of all effect inasmuch as the Commission could not take action against a measure by a Member State affecting an undertaking enjoying special or exclusive rights. It would also mean that there would

be an incongruity between the Commission's action under Article 87, 89 or 93 on the one hand and that under Article 90 on the other.

The fact that Articles 93(2), 100a and 225 make an express derogation from Article 169 does not prevent Article 90(3) from providing a legal remedy making it possible to ensure compliance with a statutory requirement.

— The plea in law relating to an infringement of procedural requirements because those concerned were not heard and to a misuse of procedure

1. According to the *Kingdom of the Netherlands* and *PTT*, the Commission has ignored the basic right to a hearing for both sides.

The Kingdom of the Netherlands points out that the exchange of letters with the Commission between 29 November 1988 and 16 January 1989 was not followed by any further discussion and that the telex message of 29 November 1988 was not sufficiently supported from the legal point of view. A discussion was all the more necessary because the Commission allowed the messenger service trade organizations to give their views on the Netherlands Government's letter.

The Kingdom of the Netherlands repeats its statement that the decision, even on the assumption that it could be based on Article 90(3), has the immediate effect of depriving the national statutory measures of all binding force; in that situation a hearing for both sides on the model of the procedure under Article 169 was essential.

PTT point out that the only contact with the Commission was as long ago as October 1988. A public undertaking charged with infringing Article 86, ought to have the same rights of defence as an undertaking directly concerned in competition proceedings. In these circumstances the Commission cannot say in its defence that PTT's arguments are largely identical to those put forward by the Netherlands Government in its letter of 16 January 1989. Moreover the application in Case C-66/90 mentions other facts, and in any event a hearing for both sides should relate also to the legal conclusions. In a case of infringement of a basic procedural right the aggrieved party does not have to show that the actual result of the proceedings would have been different if his procedural rights had been observed.

2. The *Commission*, supported by the *intervener EEO*, denies that, in the proceedings under Article 90(3) it ignored the rights of the defence, which form part of the fundamental principles of Community law. The Netherlands Government was heard on the subject of all the objections figuring in the decision. The non-binding nature of the contested national provisions results from their incompatibility with Article 90(1), which has direct effect, and not from the contested decision.

The Commission cannot be criticized for having had discussions with the private messenger undertakings' organizations since it had to form an impression of the foreseeable effects of the Postal Law on those undertakings' operations.

As the procedure under Article 90(3) is a matter between the Commission and the Member State concerned, the Commission was not required to hear PTT separately in addition. Moreover consultations did take place with PTT and there was nothing to prevent them submitting their observations to the Commission.

— *The plea in law relating to the defective statement of reasons on which the contested decision was based*

1. The *Kingdom of the Netherlands* and *PTT* put forward, under this head, various complaints to the effect that the decision confuses essential concepts, is based on incorrect conceptions of fact and on a wrong interpretation of the provisions in question and that the operative part is too vague and too wide.

2. The *Commission* denies all these complaints.

— The claim that the Commission has confused concepts

1. The *Kingdom of the Netherlands* and *PTT* complain that the Commission is working on the basis of a confusion between the essential concepts of 'expressepost' (express delivery service), 'spoedbesteldienst' (express mail service) and 'koerierdienst' (messenger service), and that this confusion has been reflected in the determination of the markets concerned. Even when account is taken of the corrigenda, the decision does not make a clear distinction between the basic postal service, of which the 'spoedbesteldienst' (express mail service) forms part, together with the normal 'expressepost' (express delivery service) and that with home collection, and the 'koeriersdienst' (messenger service).

In the written procedure, it is claimed, the Commission wrongly tries to assimilate PTT's 'expressepost' with home collection to a 'koeriersdienst'. In the proper sense of the expression, 'koeriersdiensten' only refers to the super-express transport by a carrier direct from point A to point B of the territory without unloading and reloading; in the wider sense of the expression it might also involve express transport services complying with the criteria of the Postal Law.

2. The Commission, supported by the interveners NVIK and NOB, states that the concepts of 'normaal versneld vervoer' (normal express transport), 'expressepost' (express delivery service), 'exprespost' (express post) and the concept of 'koeriersdienst' (messenger service, express delivery service in the English version of the decision), are not defined anywhere and that the applicants for their part do not use the terminology consistently. Thus the expression 'expressepost' is used both to describe the normal express letter and that with home collection. The applicants adopt too restricted a view of the concept of 'koeriersdienst' (messenger service) by excluding any post which is unloaded and

reloaded. In any case these terminological peculiarities cannot alter the fact that the decision relates essentially to the consequences which the Postal Law involves for the private messenger services in the Netherlands.

The *intervener EEO* states that a distinction should be made between the compulsory postal services involving all the transport services which PTT are statutorily bound to effect, the ordinary postal services and the 'spoedbesteldiensten' (express mail services) on the one hand and the 'koeriersdiensten' (messenger services) on the other. The historical development of the postal services shows that the express delivery services, as a type of express transport, differs greatly from the ordinary postal service and is in direct competition with express services provided by private undertakings.

— The claim that the decision is badly founded in fact

1. The *Kingdom of the Netherlands* and *PTT* claim that the decision is badly founded in fact. The Commission starts from the incorrect premise that PTT are not bound to comply with the conditions of Article 12 of the Postal Law as concerns their 'koeriersdiensten' (messenger services).

It follows from the history of the Postal Law and the statement of the reasons on which the Besluit is based that for their 'koeriersdiensten' (messenger services) PTT are required to comply with the conditions of Article 12. PTT have ensured that the international service EMS meets the qualitative requirements and tariffs provided for in the Law. Similarly PTT are required to register their tariffs. The Commission's reference to the new express services set up by PTT in 1990 is irrelevant to the legality of the decision.

The Commission's complaint that the EMS service is exempt from VAT is not only out of time but unfounded; the sixth VAT directive contains a general exemption for the provision of services effected by the public postal services; in any event, services provided by private undertakings for foreign destinations have a zero-rating, which is even more favourable from the tax point of view.

The arguments relating to the 'Kilopak' postal option, by which the consignor is entitled to send an unspecified number of letters up to a weight of 1 kg at a uniform rate do not appear in the decision; moreover they are unfounded, as 'Kilopak' is rightly regarded as a single consignment.

The advantages which PTT-Post BV can allegedly enjoy are partly not available for the provision of messenger services and partly inherent in the performance by PTT-Post BV of its statutory task.

The tariff quoted by the Commission for compulsory transport, including express mail, and for express mail with home collection is deliberately underestimated.

The decision does not show clearly whether it concerns the national and international market for 'koeriersdiensten' (messenger services).

2. The *Commission*, supported by the *interveners NVIK, NOB, AEEC* and *EEO*, points out that for the 'koeriersdiensten' (messenger services), PTT are not bound to comply with the restrictive conditions of the Postal Law.

Article 12(1) is addressed to persons other than the franchise holder and Article 12(2)(b) and (d) provides for a derogation from the prohibition contained in the text where transport by third persons is carried out on behalf of the franchise holder. Similarly Article 17(1) of the Law, which imposes penalties in the event of infringement of Article 12, does not apply to the franchise holder. The preamble to the Besluit contradicts the letter and the spirit of the Postal Law and in any case cannot be relied on against a law.

According to the Commission, supported by the interveners, the EMS messenger service does not meet the quality conditions required under Article 12(2)(a).

PTT are also exempt from the provisions of the law as regards the minimum tariff. The exemption from VAT, the 'Kilopak' option and the derogations provided for by various Netherlands laws, that is, either the law on transport of goods by road, the decree on driving hours, the law on contracts for transport by road or the labour law, as well as the economies of scale allow the PTT to offer tariffs lower than those laid down by the Law. Even though the Commission did not mention expressly in the contested decision the 'Kilopak' option within the EMS service, it emphasized in Recital (11) that the 'expressepost' (express delivery service, express delivery in the English version of the decision) not exceeding HFL 11.90 was reserved for PTT. The tariff for the 'expressepost' (express delivery service) with home collection is moreover also less than the minimum tariff laid down by the Law.

PTT are also exempt from the requirement to register, which implies a heavy burden for the messenger undertakings and prevents them from adopting a flexible structure for tariffs.

The introduction of new services in 1990 by PTT confirms that the statements in the decision are correct.

As the Netherlands legislation does not distinguish between domestic and international 'koeriersdiensten' (messenger services), the decision does not do so either.

The *intervener AEEC* emphasizes that the restrictive conditions are also imposed on undertakings established in other Member States which provide services to or from the Netherlands. Thus the Netherlands export their own postal system without taking

account of the laws in force in other Member States. As regards quality conditions the intervener AEEC observes that the Netherlands PTT do not offer an 'expressepost' (express delivery service) from abroad for the Netherlands and only operate a defective service for such transport from the Netherlands for destinations abroad, which makes it difficult to draw comparisons. As regards the minimum tariff, the Postal Law prevents foreign undertakings from passing any price advantages on to their customers and requires them to use a special system of tariffs for the Netherlands. The conditions of registration require those undertakings to maintain a special administration for all services proposed to or from the Netherlands.

— The claim that the Commission misinterpreted the provisions in question

1. The *Kingdom of the Netherlands* and *PTT* further claim that the decision fails to recognize the link existing between the exclusive franchise and the legal duty of transport. To allow the private undertakings to offer their services without complying at the same time with the quality and minimum tariff conditions would be to allow them to compete with PTT on profitable destinations and would call in question the exclusive franchise as the mainstay of the system of the legal duty to transport at uniform rates. Moreover the rate does not present any problem for the 'koeriersdiensten' (messenger services) properly so called, whose price is far higher. The minimum rate on the other hand is necessary to avoid the private undertakings offering services capable of taking the place of those the PTT are legally bound to provide, and at more competitive prices, amongst which are the 'spoedbesteldiensten' (express mail services).

2. The *Commission* refers to the provisions of the Postal Law and states that the decision is critical of the fact that the 'koeriersdiensten' (messenger services, express delivery services in the English version of the decision), as defined in the decision, can no longer be freely provided by the private undertakings and that only the PTT can provide them, for letters not exceeding 500 g, below the minimum rate. The quality requirement is defined in the Law on the basis of the concept of 'normaal versneld vervoer' (normal express transport), which itself is not defined anywhere. In defending the minimum rate the applicants take as their basis too narrow a concept of the 'koeriersdiensten' (messenger services). Moreover PTT's reasoning is contradictory in the sense that they claim simultaneously that the real rates of the 'koeriersdiensten' (messenger services) are above the minimum legal rate and that that minimum rate is essential for the protection of the basic postal service.

The *intervener EEO* also stresses the consequences of the over-restrictive interpretation of the concept of 'koeriersdienst' (messenger service). The applicants are wrong to rely on Recital (3) to the decision, in which the Commission admits that the 'spoedbesteldienst' (express delivery service, express mail service in the English version of the

decision) may be regarded as a part of the basic postal service, to prove that the express delivery service and any other postal service coming within the same price category are covered by the monopoly. A more attentive reading of the decision would make it clear that the Commission is basically taking exception to the application of the Netherlands postal monopoly to the market for express transport services in the price category for the express delivery service.

— The claim that the operative part of the decision is too vague and too wide

1. The *Kingdom of the Netherlands* and *PTT* claim that the operative part of the contested decision is at once too vague and too wide. Article 1 of the decision, which condemns a number of Netherlands legal provisions in very general terms, has implications for PTT's exclusive powers other than those relating to 'koeriersdiensten'. However, the Commission does not specify what measures might bring the infringement to an end. It does not indicate whether, or to what extent, it is permissible to prescribe a minimum rate or registration, or whether or to what extent the decision relates also to the quality condition. The recitals to the decision do not repair this omission.

As Article 1 does not require the Netherlands to adopt any very specific measures it is hard to see what is the scope of Article 2, which requires the Netherlands to inform the Commission within two months of the measures it has taken. In any event it is not possible to amend the Postal Law within two months.

2. The *Commission*, supported by the *intervener EEO*, emphasizes that the operative part of the decision, like that of a judgment given under Article 169 of the Treaty, represents a finding of an infringement and is not required to specify how the Member State is to put an end to it. However, it is clear from the decision that the minimum rate is regarded as being too high; it goes beyond what is necessary to protect the basic postal service and obstructs the operations of the private 'koeriersdiensten' (messenger services) as compared with the 'expressepost' (express delivery service) with home collection and with PTT's 'koeriersdienst'. It is for the State to prove that Article 90(2) is applicable.

The period of two months referred to in Article 2 relates to the period within which the Netherlands Government is to communicate to the Commission the measures it intends to take to comply with the decision.

— *The plea in law relating to misuse of power or at least an infringement of essential procedural requirements as a result of the 'corrigenda' issued by the Commission*

1. According to the *Kingdom of the Netherlands* and *PTT*, the procedure of a corrigendum is permissible only for correcting obvious verbal mistakes or spelling errors, and not for amendments of substance to the operative part or to concepts which are essential to the statement of the reasons on which the decision is based, such as 'expressepost'

(express delivery service), 'koeriersdienst' (messenger service) or 'spoedbesteldienst' (express mail service). The only correct procedure would have been to adopt a fresh decision or to issue a formal amendment of the existing decision.

The Kingdom of the Netherlands denies, however, that it asked for a corrigendum. Even if the government's request for clarification were to be interpreted as such, the Commission misused its powers in altering the substance of the decision.

2. The *Commission* contends on the other hand that the Netherlands Government itself requested the corrigenda so as to avoid third parties interpreting the decision as calling in question the postal monopoly on points other than those mentioned in the decision. The corrigenda in no way altered the content of the decision and the terminological corrections maintained the essential distinction between the basic postal service and the 'koeriersdienst' (messenger service).

— *The plea in law relating to an infringement of Articles 86 and 90(1) of the Treaty since there is no conduct by an undertaking*

1. The *Kingdom of the Netherlands* and *PTT* claim that there can be no grounds for the application of Article 90(1) in conjunction with Article 86 except in the case of conduct by an undertaking which, combined with a State measure, adversely affects the rules of competition (see judgments in Case 13/77 *INNO* v *ATAB* [1977] ECR 2115; in Case 267/86 *Van Eycke* v *ASPA* [1988] ECR 4769; and in Case 66/86 *Ahmed Saeed* [1989] ECR 803. This point of view is confirmed by the case-law relating to the second paragraph of Article 5 in conjunction with Article 3(f), 85 or 86 (see, with regard to Article 86, the judgments in Cases 13/77, 267/86 and 66/86, previously cited; with regard to Article 85, the judgment in Case 231/83 *Cullet* v *Leclerc* [1985] ECR 305). The decision relates exclusively to the Postal Law, which has in no way given rise to abuse on the part of PTT. In these circumstances it is wrong for the Commission to give as an example the judgment in Case 30/87 *Bodson* [1988] ECR 2479, which related to individual conduct by undertakings.

Even if the premise that the Postal Law had the effect of extending PTT's exclusive rights is accepted, that extension is not, as such, incompatible with the combined provisions of Articles 86 and 90 (see the judgment in Case 155/73 *Sacchi* [1974] ECR 409).

2. The *Commission*, supported by the *intervener EEO*, states that Article 90(1) allows action to be taken not only against a State measure which requires or encourages a public undertaking to act in infringement of Article 85 et seq. of the Treaty (see judgment in Case 226/87 *Commission* v *Greece* [1988] ECR 3611, but also in all cases in which State measures concern public undertakings compromising the objectives of those articles. To forbid Member States to encourage public undertakings to engage in anti-competitive conduct whilst authorizing them to achieve

the same result by their legislation would be to deprive Article 90(1) of all effectiveness. Although this is a different situation, the judgment in Case 30/87 *Bodson*, previously cited, confirms that idea inasmuch as the Court condemned State measures giving advantages to the holder of a franchise and prejudicing its competitors.

The case-law relating to Article 5 is irrelevant; in fact, Article 90 is a *lex specialis* in relation to Article 5 and the Court could take action on that basis where measures concerning undertakings are at issue. The judgment in Case 321/83 *Cullet*, previously cited, concerned a provision imposing a minimum price which applied without distinction, whereas this case concerns a price provision distorting competition between an undertaking such as referred to in Article 90(1) of the Treaty and competing undertakings. The judgment in Case 155/73 *Sacchi*, previously cited, also differs from this case inasmuch as it dealt with the extension of an existing monopoly so as to leave only the holder of the monopoly on the market. That extension was brought about for non-economic reasons of public interest, whereas in this case economic reasons predominate.

The intervener EEO thinks it may well be possible to refer to conduct on the part of PTT, as they profit from the competitive advantage conferred on them by the Postal Law in applying rates lower than those imposed upon the private undertakings.

— The plea in law relating to an infringement of Article 86 of the Treaty inasmuch as the Commission has not demonstrated abuse of a dominant position

1. The *Kingdom of the Netherlands* and *PTT* claim that the Commission has failed to demonstrate that there is a dominant position on the market in question or abuse of such a position.

(a) As regards the existence of a dominant position it is claimed that the Commission adopted too restricted a view of the market in question by defining it as that of the compulsory postal services for conveyance of letters not exceeding 500 g. It would be arbitrary to associate the market in question and PTT's exclusive franchise. Furthermore, the Commission decision contains contradictions inasmuch as it presents the basic postal services and the 'koeriersdiensten' (messenger services) as separate markets, whilst recognizing that certain basic postal services and in particular the 'expressepost' (express delivery service) are in competition with the private undertakings' services. The Commission ignores the fact that PTT have a statutory duty to ensure transport of consignments of all kinds up to 10 kg. The market defined by the Commission is only part of that wider market which moreover includes amongst the services it provides both the ordinary postal service, the rapid delivery service and the messenger services.

The Commission has not defined the market correctly and furthermore it has not shown that PTT-Post BV has a dominant position on it. Moreover the description of exclusive

rights in the decision is inconsistent, as the Commission refers now to the basic postal services as a whole, now to the field of basic postal services for letters up to 500 g or to the messenger services.

(b) As regards the contention concerning abuse of a dominant position, the Kingdom of the Netherlands and PTT claim that the Commission has failed to establish the extension of the dominant position, the imposition of unfair prices and conditions and the restriction of supply.

— The applicants deny the objection that the dominant position of the basic postal service has been extended to the associated but separate market of 'koeriersdiensten' (messenger services). First of all the Commission has failed to demonstrate the existence of a market for messenger services forming only part of the wider market for high-speed transmission of information. Even on the supposition that it exists, that market would include far wider operations than conveyance of letters up to 500 g. Next, the Commission ought to recognize that, far from extending the PTT monopoly, the Postal Law permits third parties to provide 'koeriersdiensten' (messenger services) henceforward for letters up to 500 g. As regards such services moreover, the minimum rate imposed applies to PTT-Post BV as well as to the private undertakings.

In addition it follows from the judgment in Case 311/84 *CBEM* v *CLT and IPB* [1985] ECR 3261 that the extension of a dominant position to an associated but separate market constitutes an abuse of a dominant position only when it occurs without any objective necessity and when there is in addition a risk of entirely eliminating the competition of third parties from the market. In this case it is impossible to speak of elimination of competition since the Postal Law actually authorizes competition by the 'koeriersdiensten' undertakings. The conditions laid down by the Law are, moreover, objectively necessary to avoid a penetration by the private messenger services into the sector of the market for letters up to 500 g, which is the basic postal service exclusively reserved to PTT-Post BV.

— The objection concerning the imposition of unfair prices and conditions within the meaning of subparagraph (a) of the second paragraph of Article 86 is unfounded. According to the Kingdom of the Netherlands it may be seen from the judgments in Case 30/87 *Bodson* and Case 66/86 *Ahmed Saeed*, previously cited, that an undertaking having a dominant position cannot be encouraged or obliged by the authorities to abuse that position by applying unreasonable charges; there was no such conduct on the part of PTT. If the Commission wishes to take exception to the Postal Law in so far as it requires PTT's competitors to charge excessively high prices, it cannot rely on Articles 90(1) and 86, since national price rules cannot be compared with competition rules applying to undertakings.

In addition the applicants claim that the decision is wrong in concluding that the Postal Law requires customers to use the PTT 'expressepost' (express delivery service) for their express delivery of letters up to 500 g in the price category not exceeding HFL 11.90. If by that expression the

Commission meant the 'koeriersdiensten' (messenger services) the conclusion in the decision is inaccurate as those services are also subject to the minimum rate. If it meant the 'spoedbesteldiensten' (express mail service), forming part of the compulsory postal service, the objection is incomprehensible because the charges for those services are either above or below the statutory tariff according to the country of destination. The minimum rate is too low to make a real messenger service profitable; it is, however, high enough to prevent the undertakings offering, under cover of the 'koeriersdienst', services coming under PTT's exclusive franchise.

PTT add that it is pointless for the Commission to try, in the written procedure, to state how the minimum rate amounts to an unfair practice by stating that the private messenger undertakings are obliged to apply increases in their charges amounting to 300%. That statement, apart from being based on the mistaken premise that the Netherlands authorities had given up making rules for postal transport services under the old law, amounts to calling in question the very principle of a minimum rate.

— As regards the objection of a restriction of supply contrary to subparagraph (b) of the second paragraph of Article 86 of the Treaty, the applicants stress that the Commission is wrong in accepting that that provision also relates to restriction of supply by undertakings which are not in a dominant position, in this case the private messenger services.

The Commission ignores the fact that PTT-Post BV is subject to the minimum rate for its 'koeriersdiensten' (messenger services). The Commission cannot rely on the alleged toleration of illegal services under the former legislation so as to draw the conclusion that the new law, which legalized and liberalized the operations of messenger undertakings in fact brought about a restriction of supply.

Nor can the Commission state that the quality conditions prevent the private undertakings from performing messenger services from the Netherlands for consignments under 500 g. In fact the quality comparison is between the 'koeriersdiensten' and the 'expressepost' (express delivery service), which comes under the PTT's compulsory postal service and the quality level of which is laid down by ministerial decree. PTT-Post BV's EMS service, moreover, is of a quality comparable to that of the private undertakings.

2. The *Commission*, supported by the *intervener EEO*, states that it is right in accepting that PTT-Post BV has a dominant position on the market concerned and that the Postal Law leads to an abuse of that position.

(a) As regards the dominant position, the Commission states that the demarcation between the basic postal service, which might be compared to the traditional 'expressepost' (express delivery service), and the 'koeriersdienst' (messenger service), which might be compared to the express mail with home collection, is in accord with the criterion of interchangeability from the consumer's point of view, as formulated in the judgment in Case 66/86 *Ahmed Saeed*,

previously cited. The two markets are composed, however, of two sub-markets, in terms of the weight of consignments, below or above 500 g. The Commission's definition is fully in accord with the concept advocated in the judgments in Case 26/75 *General Motors* v *Commission* [1975] ECR 1367 and in Case 226/84 *British Leyland* v *Commission* [1986] ECR 3263; it has moreover been accepted in the case-law that national laws may be decisive for the demarcation of a given market for products or services.

On the market for the basic postal service, PTT-Post BV operates by virtue of an exclusive franchise and is therefore, by definition, in a dominant position.

(b) The objection of abuse of a dominant position is justified.

— There is in fact an extension of the dominant position of the basic postal service to that of the 'koeriersdiensten' (messenger services) inasmuch as PTT, which did not apply as against the private undertakings, the statutory monopoly they enjoyed under the previous legislation on this second market, are henceforward in a position to charge on that market prices below those of their competitors and thus acquire a dominant position. In that connection the intervener EEO states that the concept of domination of the market is an economic one and that the statutory monopoly available to PTT under the former law, for the entire market for consignments up to 500 g, did not mean that they had a dominant position on that market since the monopoly was maintained only for the ordinary postal service.

The Commission points out that according to the judgment in Case 311/84 *CBEM*, previously cited (delivered on 3 October 1985), the extension of a dominant position to another, associated, market may constitute abuse of a dominant position. It is irrelevant whether the extension is caused by the conduct of an undertaking or is made possible by a State measure or is the direct consequence of such a measure. The only derogation from Article 90(1) consists of Article 90(2) and not of any alleged objective necessity.

— As regards the objection of the imposition of unfair prices and conditions, the Commission, supported by the intervener EEO, emphasizes that it may be deduced from the judgments in Case 30/87 *Bodson* and in Case 66/86 *Ahmed Saeed*, previously cited, that the enactment or maintenance in force by a Member State or other public authorities of a measure imposing unfair prices constitutes an infringement of the provisions of Article 90(1) in conjunction with those of subparagraph (a) of the first paragraph of Article 86 where undertakings within the meaning of Article 90 are concerned. In this case the high level of the minimum rate compelled the private undertakings in certain cases to increase their rates considerably and prevented them from granting rebates or lower rates for consignments under 500 g. The fair conditions referred to by the Commission are those of the system applied de facto prior to the Postal Law.

— As regards the objection of restriction of supply, the Commission, supported by the intervener EEO, states that following the adoption of the Postal

Law the structure of competition on the market for express mail services has been severely restricted. There is no judgment confirming the applicants' statement that subparagraph (b) of the first paragraph of Article 86 of the Treaty relates only to situations in which the dominant undertaking restricts its supply. It is quite probable, moreover, that PTT, being no longer exposed to competition, are reducing their own services. The private 'koeriersdiensten' (messenger services) ought to be compared to the 'expressepost' (express delivery service) under the former PTT system, which, moreover, is by no means precisely defined.

— The plea in law relating to an infringement of Article 90(2)

1. The *Kingdom of the Netherlands* and *PTT* point out that the Commission is responsible for seeing to the appropriate application of Article 90 as a whole and that it is not for the Member State to show that the conditions for the application of Article 90(2) are met.

PTT are undertakings entrusted with the operation of services of general economic interest; the conditions laid down in the Postal Law and in the minimum rate in particular are justified under paragraph 90(2).

The Postal Law extended the opportunities for the private undertakings to offer a quicker and better quality transport service than the ordinary postal service for letters up to 500 g; to prevent such undertakings from being able to offer rates below those charged by PTT for profitable destinations the Law laid down a minimum rate the observance of which is guaranteed by the requirement to register.

The making of profit is normal for a private undertaking established for the purpose of pecuniary gain and is a decisive factor for purposes of the application of Article 90(2) only if the profit becomes excessive. The Commission fails to prove that the alleged statutory advantages of PTT put them in a privileged competitive position as against the private undertakings on the market for 'koeriersdiensten' (messenger services). Finally the Commission is wrong to quote the fact that PTT grant discounts since it is not the discount policy which is at issue but the minimum tariff imposed by the Postal Law.

2. The *Commission*, supported by the *interveners NVIK, NOB* and *EEO*, claims that the burden of proof that the conditions for the application of Article 90(2) are met falls upon the State concerned. The ordinary postal service is of course a service of general economic interest but the restrictions made by the Postal Law are not necessary for the performance of that service.

The *intervener EEO* points out that the application of Article 90(2) is subject to

three conditions: there must be a service of general economic interest, the application of the normal rules of competition must obstruct the performance of that service and the interests of the Community must be safeguarded.

The ordinary postal service is a service of general economic interest. To justify the extension of the monopoly to the market for 'spoedbesteldiensten' (express mail services) PTT should consider either that a monopoly on that market is necessary to ensure the protection of the ordinary postal service or that the express delivery service itself is a service of general economic interest to be protected by a monopoly. It cannot be inferred from the compulsory nature of the express delivery service that it is a service of general economic interest. That assessment is moreover confirmed by the reduced volume of that type of traffic and by its diminishing importance in view of other services for the transmission of information.

According to the Commission, the application of Article 90(2) first raises the question whether it is impossible for PTT to perform their task correctly unless not only the traditional postal service but also the traditional 'expressepost' (express delivery service) are protected against all competition, and if so at what level the minimum rate ought to be fixed. As regards the first question, it may be seen from the statistics that the development of the 'koeriersdienst' (messenger service) undertakings during the 1980s did not prevent expansion of PTT's 'expressepost' (express delivery service); as regards the minimum rate, the applicants have not produced any justification for the rates laid down. PTT's profitability also shows that they can discharge their duties even without imposing restrictive conditions on the private undertakings. PTT have, moreover, various material and legal advantages to safeguard their 'koeriers-diensten' (messenger services), namely exemption from the obligations resulting from the law on road transport and from the decree on driving hours, and economies of scale from the use of the same workforce and the same infrastructure for the various services.

The intervener EEO also stresses the fact that the extension of the monopoly to the express delivery service is unnecessary for the performance of PTT's task. In fact the express delivery service is too small in size and revenue to make it possible to claim that the monopoly on that market is necessary to protect the existence of the ordinary postal service. Similarly a monopoly on the express delivery service market is unnecessary to ensure the performance of that service on the whole territory at a uniform rate. In that connection the intervener EEO points out that PTT were able to withstand the competition on the market under the former legislation and states that the extra costs arising from the express conveyance of a single letter from one part to another of the territory do not differ perceptibly according to the destination.

The *interveners NVIK* and *NOB* also emphasize that the Netherlands Government is wrong in trying to justify the Postal Law by the need to protect the 'spoedbesteldienst' (express mail service); they point out in this connection that the level of service of the domestic 'expressepost' (express delivery service), which moreover is not uniform, depends on PTT themselves. An international 'expressepost' as such does not exist in view of the fact that, on national territory, such consignments are treated as ordinary post.

The Commission and the interveners NOB and NVIK point out that the discounts which these economies of scale make possible are not allowed, as regards transport effected within the monopoly, unless the customer also entrusts to PTT the portion of his post outside the monopoly.

As regards the criteria for compatibility with the Community interests, the intervener EEO stresses the negative effect of the Postal Law on 'koeriersdienst' traffic within the Community. For outgoing mail the postal administration of the State of despatch has a commercial monopoly for the whole of the service performed, from collection to delivery of the mail. Nevertheless, it has absolutely no control over the quality of the delivery service in the Member State of destination. The situation is the same for incoming mail, which proves that the two types of local distribution services (PTT and private), which are efficient at local level, are not in a position to guarantee equally efficient services on the transport market within the Community.

The intervener EEO points out that during the 1970s the so-called 'remail' system developed; it consisted in sending mail by a private undertaking from State A to a post office in a State B, where the postal authorities of that country delivered it to the addressee, so that on the basis of the Postal Law PTT can now obstruct the development of this type of cross-border traffic.

F. A. Schockweiler
Judge-Rapporteur