COMPLAINTS (POSTAL SERVICES): THE IEEC CASE

Subject: Complaints
Procedure

Industry: Postal services; remail
Implications for most industries

Parties: International Express Carriers Conference (IECC)
Commission of the European Communities
La Poste (intervener)
United Kingdom (intervener)
The Post Office (intervener)

Source: Judgment of the Court of Justice of the European Communities, dated 17 May 2001, in Case C-449/98 P (*International Express Carriers Conference (IECC) v Commission of the European Communities*)

(Note. In view of the continued importance of the complaints procedure under the EC Rules on Competition, any case shedding light on the legal aspects of formal complaints is also likely to be important. The present case is useful in parts, which have been carefully selected for the purposes of the report below. It is one of those cases in which the appellants have submitted a multitude of pleas, perhaps in the hope that, even if only one of them succeeds, the Commission's contested Decision may be annulled. There were nine pleas, several with a number of "limbs": they are of unequal importance. The Court dismissed most of them fairly perfunctorily. The remaining pleas, though unsuccessful, were discussed by the Court in some detail and contain a warning to future complainants about some of the hazards of basing a case on a misreading of the earlier case-law. This is particularly true of the criteria for assessment of the Community interest laid down in the Automec case: see paragraph 44 below. The scheme of the report below is as follows:

Paragraphs 1 to 10:	*Background and Facts*
Paragraph 25:	*The Appellants' nine Pleas in Law*
Paragraphs 30 to 41:	*The 1st Limb of the 2nd Plea (Community interest)*
Paragraphs 44 to 54:	*The 3rd and 4th Limbs (Commission discretion)*
Paragraphs 73 to 77:	*The 6th Plea (discrimination)*
Paragraphs 85 to 98:	*The 9th Plea (retrospective assessment)*

Background

1. By application lodged at the Court Registry on 8 December 1998, International Express Carriers Conference (the IECC) brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance in Case T-110/95, *IECC* v *Commission* (the contested judgment), whereby the Court of First Instance dismissed as unfounded the IECC's

application for annulment of the Commission Decision of 17 February 1995 rejecting its complaint in respect of the application of Article 85 of the EC Treaty (now Article 81 EC) to the CEPT Agreement (the contested decision).

Facts of the case

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

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

4. On 13 July 1988, the IECC lodged a complaint with the Commission under Article 3(2) of Council Regulation 17 of 6 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty).

5. The complaint consisted of two parts based, first, on Article 85 of the EC Treaty and, second, on Article 86 of the Treaty (now Article 82 EC). In the first part of the complaint, the only part relevant to the present appeal, the IECC alleged that a number of public postal operators established in the European Community and in non-member countries, meeting in Berne in October 1987, had concluded a price-fixing agreement in regard to terminal dues, called 'the CEPT Agreement.

6. The IECC stated, more specifically, that in April 1987 a large number of public postal operators in the Community had, during a meeting held in the United Kingdom, considered whether a common policy ought to be adopted to face the challenge of competition from private companies offering remail services. A working party established within the European Conference of Postal and Telecommunications Administrations had subsequently proposed, in substance, an increase in terminal dues, the adoption of a code of conduct and improvements in customer services. The IECC claimed that in October 1987 this working party had accordingly adopted a new terminal dues arrangement, the CEPT Agreement, which proposed a new fixed rate which was in fact higher than the previous rate but which did not reflect the differences in distribution costs borne by the receiving postal administrations.

7. The public postal operators parties to the CEPT Agreement agreed to increase the rates of terminal dues by 10% in 1991, 5% in 1992 and a further 5% in 1993. Following the last increase, the CEPT rate was established at 1.491 DTS (droits de tirage spéciaux - special sorting dues) per kilogramme and 0.147 DTS per item.

8. The CEPT agreement on terminal dues remained in force until 31 December 1995.

9. On 17 January 1995, 14 public postal operators, 12 of them from the European Community, signed a preliminary agreement on terminal dues designed to replace the 1987 CEPT Agreement. The new agreement, referred to as the REIMS Agreement (System for the Remuneration of Exchanges of International Mails between Public Postal Operators with a Universal Service Obligation) (the preliminary REIMS Agreement), essentially provides for a system whereby the receiving post office would charge the originating post office a fixed percentage of the former's domestic tariff for any post received. A definitive version of this agreement was signed on 13 December 1995 and notified to the Commission on 19 January 1996 for exemption under Article 85(3) of the Treaty. The agreement entered into force on 1 January 1996.

[Paragraphs 10 to 24 cover the procedure before the Commission and the contested decision]

The appellants' nine pleas in law

25. The IECC puts forward nine pleas in law in support of its appeal. The first plea alleges that certain findings made by the Court of First Instance were factually incorrect. By the second plea, which consists of four limbs, the IECC submits insubstance that the Court of First Instance erred in law in defining the legal concept of Community interest and in examining the lawfulness of the application of that concept by the Commission. The third plea alleges infringement of Article 85 of the Treaty, read in conjunction with Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article 89 of the EC Treaty (now, after amendment, Article 85 EC) and Article 155 of the EC Treaty (now Article 211 EC). The fourth plea alleges breach of the principle that the lawfulness of a contested decision can be assessed only in the light of the elements of law and of fact in existence on the date of adoption of the decision. By the fifth plea, which consists of three limbs, the IECC criticises the inconsistency and inadequacy of the legal reasoning followed by the Court of First Instance, which is tantamount to a failure to state the full reasons for the contested judgment. The sixth plea alleges a breach of the general principle of non-discrimination. The seventh plea relies on a breach of the general principle of legal certainty. The eighth plea alleges a breach of the legal concept of misuse of powers. Last, by the ninth plea the IECC alleges that there has been an infringement of Article 62 of the Rules of Procedure.

[Paragraphs 26 to 29 cover the first plea]

The Community interest

30. By its second plea in law, which consists of four limbs, the IECC maintains that the Court of First Instance committed an error of law as regards the scope,

the definition and the application of Article 3 of Regulation 17 and the legal concept of Community interest.

31. In the first limb of this plea, the IECC maintains that the Court of First Instance erred in relying on Article 3 of Regulation 17 in order to justify the Commission's rejection of its complaint for lack of Community interest when the complaint had already been thoroughly examined.

32. The IECC submits, first, that, in accordance with Case T-24/90 *Automec* v *Commission*, it is with a view to determining whether or not it is necessary to investigate a complaint that the Commission may consider it appropriate to assess whether or not a Community interest exists. Article 3 of Regulation 17 does not deal with the Commission's obligations in relation to the investigation of a complaint. The Court of First Instance therefore erred in paragraph 49 of the contested judgment in relying on that provision in order to reject the IECC's argument based on the advanced state of the investigation.

33. Second, Article 3 of Regulation 17 does not confer on the Commission an unlimited discretion not to adopt a decision on whether or not there is an infringement of Article 85 or 86 of the Treaty. Having regard to the existence of a restriction on competition as manifest as a price-fixing agreement - in this case the CEPT Agreement -, the Commission had exclusive power to deal with the matter, the exercise of which could not involve the use of any discretion.

34. In that regard, it should be pointed out that, according to the actual wording of Article 3(1) of Regulation No 17, where the Commission finds that there is infringement of Article 85 or Article 86 of the Treaty, it 'may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

35. Admittedly, it is settled case-law that a complainant is entitled to have any uncertainty as to the outcome of his complaint dispelled by means of a Commission decision, which may be the subject-matter of an application for judicial review (Case C-282/95 P, *Guérin automobiles* v *Commission* (paragraph 36). However, Article 3 of Regulation 17 does not give a person making an application under that article the right to insist that the Commission take a final decision as to the existence or non-existence of the alleged infringement and does not oblige the Commission to continue the proceedings, whatever the circumstances, right up to the stage of a final decision (Case 125/78, *GEMA* v *Commission*, paragraph 18, and Case *Ufex and Others* v *Commission*, paragraph 87).

36. The Commission, entrusted by Article 89(1) of the Treaty with the task of ensuring application of the principles laid down in Articles 85 and 86, is responsible for defining and implementing the orientation of Community competition policy. In order to perform that task effectively, it is entitled to give differing degrees of priority to the complaints brought before it (*Ufex and Others* v *Commission*, paragraphs 88 and 89).

37. The existence of that discretion does not depend on the more or less advanced stage of the investigation of a case. However, that element forms part of the circumstances of the case which the Commission is required to take into consideration when exercising its discretion.

38. In those circumstances, the Court of First Instance did not err in law when, in paragraph 49 of the contested judgment, it relied on Article 3 of Regulation No 17 in dismissing the plea that the Commission was not entitled to reject IECC's complaint on the ground of insufficient Community interest.

39. Nor did the Court of First Instance, in following such an interpretation, confer unlimited discretion on the Commission, as the IECC claims. In the contested judgment, the Court of First Instance properly drew attention to the existence and scope of the review of the legality of a decision rejecting a complaint which it must undertake.

40. As regards the IECC's argument that the Commission has no discretion in the matter and is required to take a final decision as to the existence or otherwise of an alleged infringement of Article 85 of the Treaty in a case such as the present, where there was a manifest restriction of competition following a price-fixing agreement, it is sufficient to observe, as the Advocate General has done in points 44 to 47 of his Opinion, that, contrary to what the IECC claims, the existence of such an agreement was not established by the Commission in the contested decision.

41. The first limb of the second plea in law is therefore unfounded.

[Paragraphs 42 and 43 cover the second limb of the second plea]

The Commission's discretion

44. By the third and fourth limbs of the second plea in law, which can be examined together, the IECC claims essentially that the Court of First Instance infringed the concept of Community interest in limiting its review of the Commission's assessment of the Community interest to a single, and not entirely clear, criterion, relating to the amendment in a manner conducive to the general interest of the anti-competitive conduct of the undertakings to which the complaint was addressed, instead of verifying the criteria for assessment of the Community interest set out in paragraph 86 of *Automec* v *Commission*, cited above, and referred to by the Court of First Instance itself in paragraph 51 of the contested judgment. The Court of First Instance also failed to fulfil its obligation to review the Commission's application of the concept of Community interest and, more particularly, to ascertain whether the impugned anti-competitive conduct had actually been brought to an end and whether the effects of the anti-competitive agreement forming the subject-matter of the complaint were continuing.

45. In that regard, it should first be observed that the Commission, in the exercise of its discretion, must take into consideration all the relevant matters of law and

of fact in order to decide what action to take in response to a complaint. More particularly, it must consider attentively all the matters of fact and of law which the complainant brings to its attention (Case 210/81 *Demo-Studio Schmidt* v *Commission*, paragraph 19; Case 298/83, *CICCE* v *Commission*, paragraph 18; Joined Cases 142/84 and 156/84, *BAT and Reynolds* v *Commission*, paragraph 20; and *Ufex and Others* v *Commission*, cited above, paragraph 86).

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

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

48. Next, it should be pointed out that, in paragraph 57 of the contested judgment, the Court of First Instance considered that, subject to the requirement that it give reasons for such a decision, the Commission may decide that it is not appropriate to investigate a complaint alleging practices contrary to Article 85(1) of the Treaty where the facts under examination give it proper cause to assume that the conduct of the undertakings concerned will be amended in a manner conducive to the general interest.

49. In the circumstances of the present case, the Court of First Instance was able, without erring in law, to take the view that such a criterion, which is in itself sufficiently clear and complete, could serve as a valid basis for the Commission's assessment of the Community interest, subject to the express reservation that it give reasons for applying it.

50. Last, the IECC is wrong to criticise the Court of First Instance for having failed to fulfil its obligation to check the application of that criterion, more particularly as regards the end of the anti-competitive conduct forming the subject-matter of the complaint and the effects thereof.

51. In that regard, it should first of all be stated that the chosen criterion required that the facts under examination allowed the Commission to found a legitimate belief that the conduct of the undertakings concerned would be amended. It was not therefore necessary for the amendment of that conduct to be fully completed by the time of the contested decision.

52. Second, in paragraph 63 of the contested judgment the Court of First Instance considered whether the Commission had complied with that condition when examining and rejecting the IECC's complaint alleging a manifest error of assessment by the Commission in that regard. The finding made by the Court of First Instance on that point was a finding of fact and cannot therefore be challenged in an appeal.

53. The third and fourth limbs of the second plea in law are accordingly unfounded in part and inadmissible in part.

54. In those circumstances, the second plea in law must be dismissed in its entirety.

[Paragraphs 55 to 72 cover the third, fourth and fifth pleas]

Discrimination: cases with identical or comparable situations

73. By its sixth plea in law, the IECC maintains that, by rejecting, in paragraph 109 of the contested judgment, the complaint alleging a breach of the principle of non-discrimination on the ground that the IECC had not established that, in a situation identical to that of the present case, the Commission would, in contrast to its position in this case, have taken a decision against the undertakings in question, the Court of First Instance committed a double error.

74. First, by comparing the Commission's conduct in the present case with what it would have been in an "identical situation", and not in a "comparable situation", it extended to the extreme the concept of the principle of non-discrimination.

75. Second, both the Commission and the Court of First Instance, in paragraphs 99 and 100 of the judgment in Joined Cases T-133/95 and T-204/95, *IECC* v *Commission*, delivered on the same day as the contested judgment, expressly recognised that the CEPT Agreement was a price-fixing agreement. Such agreements are generally regarded as void. Since the draft REIMS Agreement belonged to the same category of agreements, it too should have been regarded as void. The Commission, in adopting the contested decision, and then the Court of First Instance, in upholding it, therefore discriminated against the IECC by weighing the allegedly pro-competitive effects of that draft agreement.

76. In that regard, while the adjective "comparable" would admittedly have been more appropriate than the adjective "identical" in paragraph 109 of the contested judgment, the IECC's arguments are not of such a kind as to call into question the validity of the Court of First Instance's conclusion that the IECC had not established that the Commission would have taken a different approach in comparable cases. The IECC's argument that the CEPT Agreement was expressly recognised by the Commission as a price-fixing agreement, and as thus coming within a category of agreements that are automatically void, cannot be upheld. As already stated in paragraph 40 above, the Commission did not make such a finding.

77. The sixth plea in law must therefore be rejected as unfounded.

[Paragraphs 78 to 84 cover the seventh and eighth pleas. The ninth plea is IECC's "final plea in law".]]

Retrospection: facts arising after the Decision

85. By its final plea in law, the IECC criticises the Court of First Instance for having rejected, in paragraph 25 of the contested judgment, its requests that the oral procedure be re-opened pursuant to Article 62 of the Rules of Procedure of the Court of First Instance on the ground, in particular, that certain documents produced in support of those requests are limited to establishing the existence of facts which clearly postdated the contested decision and ... cannot therefore affect that decision's validity. The IECC claims that the refusal to take those documents into consideration, on the sole ground that they postdated the contested decision and without have sought to establish whether any developments subsequent to that decision were capable of shedding light on the factual and/or legal situation existing when it was adopted, was contrary to Article 62 of the Rules of Procedure.

86. In that regard, it should be pointed out that the Court of First Instance, in the part of its reasoning challenged by this plea in law, referred to evidence produced by the IECC which merely showed the existence of facts which clearly postdated the adoption of the contested decision. Thus, the IECC, by criticising the Court of First Instance for having refused to take into consideration the documents produced by the IECC on the sole ground that they postdated the contested decision, has misread paragraph 25 of the contested judgment.

87. Furthermore, in the context of an application for annulment under Article 173 of the Treaty the legality of a Community measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see Joined Cases 15/76 and 16/76, *France* v *Commission*, paragraph 7), and cannot depend on retrospective considerations of its efficacy (see Joined Cases C-133/93, C-300/93 and C-362/93, *Crispoltoni and Others*, paragraph 43, and Case C-375/96, *Zaninotto*, paragraph 66).

88. In the present case, the Court of First Instance's finding that the documents produced by the IECC related to facts which clearly postdated the contested decision was made in the context of a purely factual assessment that cannot be challenged in an appeal and, having regard to what is stated in the preceding paragraph of this judgment, the Court of First Instance did not err in law in excluding such documents from consideration.

89. The ninth plea in law must therefore be rejected as unfounded.

[Paragraphs 90 and 91 deal with dismissal and costs]

Court's ruling

The Court hereby: 1.Dismisses the appeal;

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