Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

14 July 2016*

(State aid — Postal services — Funding of the additional salary and social costs relating to some of the staff of Deutsche Post by means of subsidies and revenue generated by remuneration for price-regulated services — Decision declaring the aid incompatible with the internal market — Concept of advantage — The 'Combus' judgment — Proof of the existence of an economic and selective advantage — None))

In Case T-143/12,

Federal Republic of Germany, represented initially by T. Henze and K. Petersen, and subsequently by T. Henze and K. Stranz, acting as Agents, and by U. Soltész, lawyer,

applicant,

v

European Commission, represented by D. Grespan, T. Maxian Rusche and R. Sauer, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for annulment of Articles 1 and 4 to 6 of Commission Decision 2012/636/EU of 25 January 2012 Measures C 36/07 (ex NN 25/07) implemented by Germany for Deutsche Post AG (OJ 2012 L 289, p. 1),

THE GENERAL COURT (Eighth Chamber),

composed of D. Gratsias, President, M. Kancheva and C. Wetter (Rapporteur), Judges,

Registrar: S. Bukšek Tomac, Administrator,

Having regard to the written procedure and further to the hearing on 10 December 2015,

gives the following

* Language of the case: German.

Judgment

Background to the dispute

1 In 1950 the Federal Republic of Germany, the applicant in the present case, set up a postal institution, Deutsche Bundespost, with the status of 'special asset of the State'; thus, under German administrative law it did not have legal personality but nonetheless had its own budget and was not liable for the general debts of the State. Article 15 of the Gesetz über die Verwaltung der Deutschen Bundespost (Law on the organisation of the German Federal Post) of 24 July 1953 (BGBl. 1953 I, p. 676) in principle prohibited the grant of subsidies to Deutsche Bundespost from the State budget.

2 Subsequently, the Haushaltsgrundsätzegesetz (Law on budgetary principles) of 19 August 1969 (BGBl. 1969 I, p. 1273) confirmed that Deutsche Bundespost had its own budget and its own accounting system.

3 In 1989, the Federal Republic of Germany undertook a first significant restructuring of Deutsche Bundespost. That restructuring was brought about by two laws, the Gesetz über die Unternehmensverfassung der Deutschen Bundespost (Law on the corporate governance of the German Federal Post Office) of 8 June 1989 (BGBl. 1989 I, p. 1026) and the Gesetz über das Postwesen (Law on the postal system) of 3 July 1989 (BGBl. 1989 I, p. 1450). That restructuring did not confer legal personality on Deutsche Bundespost, but it divided the special asset of the State which it constituted into three separate entities in its place, still with the status of special asset of the State; that is to say, in particular, they did not have legal personality, although they were classified as 'public undertakings'. They were the Postdienst (postal activity), the Postbank (banking activity) and Telekom (telecommunications activity).

4 Under Article 37(2) and (3) of the Law on the corporate governance of the German Federal Post Office, each of those three entities was to fund from its own revenues all the services which it offered, but cross-funding between them was permitted if they incurred losses as a result of the universal service obligation. In addition, under Article 54(2) of the Law on the corporate governance of the German Federal Post Office Postdienst, Postbank and Telekom were required to fund the full amount of the pensions and the reimbursement of health costs of retired officials previously employed by Deutsche Bundespost. That charge was apportioned among the three entities on the basis of the nature of the former activities carried out by each retired official. As for officials still in service, that provision guaranteed them rights vis-à-vis against the Federal State, without prejudice to the possibility that the Federal State could require Postdienst, Postbank and Telekom to pay in full the amount corresponding to those rights.

5 On 7 July 1994, the Commission of the European Communities received a complaint from UPS Europe NV/SA ('UPS'), which claimed that unlawful aid had been granted to Postdienst by the Federal Republic of Germany.

6 1994 also saw the second significant restructuring of the German postal system, first of all by the Verordnung zur Regelung der Pflichtleistungen der Deutschen Bundespost Postdienst (Regulation on the compulsory contributions of the postal activity of the German Federal Post Office) of 12 January 1994 (BGBl. 1994 I, p. 86, 'the regulation on compulsory contributions'), then by two laws adopted on the same date, the Gesetz zum Personalrecht der Beschäftigten der früheren Deutschen Bundespost (Law on the personal rights of employees of the former German Federal Post Office) of 14 September 1994 (BGBl. 1994 I, p. 2325, 'the Law on the terms and conditions of post office employees') and the Gesetz zur Umwandlung von Unternehmen der Deutschen Bundespost in die Rechtsform der Aktiengesellschaft (Law on the transformation of the undertaking of the German Federal Post Office into a joint stock company) of 14 September 1994 (BGBl. 1994 I, p. 2325).

7 The regulation on compulsory contributions allocated to Postdienst, in its capacity as a supplier of universal services, the task of transporting letters and parcels not exceeding 20 kg and providing the corresponding services throughout German territory, at uniform rates. That obligation remained unaltered when, in application of the Law on the transformation of the undertaking of the German Federal Post Office into a joint stock company, Postdienst became Deutsche Post AG, while Postbank and Telekom also acquired the legal form of joint stock companies, with effect from 1 January 1995.

8 Article 1(1) of the Law on the terms and conditions of post office employees provided that Deutsche Post was to assume all the rights and obligations of the Federal State as employer. In application of that principle, Article 2(1) of that law stated that officials who had been employed by Postdienst would be transferred to Deutsche Post, which would maintain their legal status and the economic rights attaching thereto (Article 2(3) of the Law on the terms and conditions of post office employees). As regards officials' pensions and reimbursement of the health costs of retired officials, a pension fund was set up for officials of Deutsche Post, in accordance with Article 15 of that law. As regards the commitments entered into by Deutsche Bundespost, and then by each of the three entities that succeeded it as a special asset of the State, Article 2(2) of the Law on the transformation of the German Federal Post Office into a joint stock company transferred those commitments in full to Telekom. That provision also made it possible for Telekom to bring an action in indemnity against Postdienst and Postbank. However, Article 7 of that law, in derogation from Article 2(2), extinguished Telekom's rights to exercise that action in respect of claims up to the amount of Postdienst's accumulated losses on 31 December 1994. The extinction of those debts entailed a transfer of assets of the same amount to Deutsche Post.

9 The Law on the transformation of the German Federal Post Office into a joint stock company had also provided that the Federal State would guarantee all commitments entered into by Deutsche Bundespost before 1995 and subsequently transferred to Postdienst or to one of the other two entities created in 1989. On the other hand, the Federal State did not guarantee the securities issued by Deutsche Post as from 1 January 1995.

10 The Law on the terms and conditions of Post Office employees had also apportioned the charges between the Federal State and Deutsche Post as regards the sums to be allocated annually to the pension fund established by Article 15 of that law. Thus, Article 16 of that law provided, for the period from 1 January 1995 until 31 December 1999, for payment by Deutsche Post of an annual lump sum of EUR 2 045 millions. From 1 January 2000, that annual lump sum was replaced by an amount corresponding to 33% of the total salaries of officials employed by Deutsche Post. In each case Article 16 provided that the balance of the costs of pensions would be borne by the Federal State (from 1 January 1995).

11 In 1997, the Postgesetz (Postal Law) of 22 December 1997 (BGBl. 1997 I, p. 3294) supplemented the regulation on compulsory contributions and, in particular, extended the tasks to be carried out by Deutsche Post in the context of the universal service. Article 11 of the Postal Law defined the universal service as consisting, in particular, in the carriage of letters, parcels of less than 20 kg, books, catalogues, newspapers and periodicals of a maximum weight of 200 g; Article 52 of that law extended Deutsche Post's mandate to provide the universal service until 31 December 2007, that is to say, until the date of expiry of its exclusive licence to provide postal services. The weight limit applicable to letters and catalogues was gradually reduced between 1 January 1998, the date on which the Postal Law entered into force, and the date of expiry of the exclusive licence, eventually reaching 50 g.

12 1997 also marks a turning point in Deutsche Post's management of its staff, since members of the contract staff recruited before that date had the benefit not only of the compulsory social security scheme but also of the possibility of a supplementary retirement insurance that would allow them to attain a level of pension comparable to that of retired officials of Deutsche Post. Until 1997, the supplementary pension of members of the contract staff was funded by Deutsche Post on the basis of

a contribution of between 5% and 10% of the gross salary of a serving member of the contract staff. From that date, Deutsche Post (i) made provisions to cover the latent commitments concerning payments to be made to the Provident Fund of Deutsche Post and (ii) agreed to a lower supplementary retirement insurance for newly-recruited members of the contract staff, which it funded on the basis of a contribution of between 0% and 5% of the gross salary of a serving member of the contract staff.

13 Following UPS's complaint, the Commission decided to initiate, on 17 August 1999, a formal examination procedure against the Federal Republic of Germany concerning several types of aid granted to Postdienst, and then to Deutsche Post ('the 1999 initiation decision'. Those measures included, first, State guarantees pursuant to which the Federal Republic of Germany guaranteed debts incurred by Deutsche Bundespost before its transformation into three joint stock companies; second, the existence of public funding of the pensions of employees of Postdienst and Deutsch Post ('the public financing of the pensions') and, third, possible State aid to Deutsche Post. By letter of 16 September 1999, the Federal Republic of Germany submitted its observations and provided the requested information. The 1999 initiation decision was published in the *Official Journal of the European Communities* on 23 October 1999.

14 In response to the publication of the 1999 initiation decision, 14 interested parties submitted observations, which the Commission forwarded to the Federal Republic of Germany on 15 December 1999. The Federal Republic of Germany replied by letter of 1 February 2000.

15 By Decision 2002/753/EC of 19 June 2002 on measures implemented by the Federal Republic of Germany for Deutsche Post AG (OJ 2002 L 247, p. 27), the Commission considered that that Member State had granted Deutsche Post aid incompatible with the common market totalling EUR 572 million, which had enabled it to cover the losses caused by a rebate policy on door-to-door parcel transport services open to competition.

16 As a result of Decision 2002/753, the German authorities recovered the sum of EUR 572 million from Deutsche Post. Deutsche Post brought an action before the General Court on 4 September 2002, seeking annulment of that decision (Case T-266/02).

17 Between 1 January 2003 and 31 December 2007, the Bundesnetzagentur (Federal Networks Agency) set up by the Postal Law capped the prices of a basket of services corresponding to those to which the regulated postal prices applied.

18 On 13 May 2004, UPS lodged a further complaint with the Commission, claiming that the Commission had not examined in Decision 2002/753 all the measures listed in the complaint lodged on 7 July 1994 and that unlawful aid had been granted after that decision had been adopted.

19 On 16 July 2004, TNT Post AG & Co. KG also lodged a complaint with the Commission, on the ground that Deutsche Post was charging very low prices for the services provided for Postbank and that Postbank was paying only the variable costs for the services supplied.

20 In November 2004 and April 2005, the Commission sent requests for information, concerning both the complaint lodged on 13 May 2004 by UPS and that lodged on 16 July 2004 by TNT Post, to the Federal Republic of Germany, which replied in December 2004 and June 2005.

21 By letter of 12 September 2007, the Commission informed the Federal Republic of Germany of its decision to initiate the procedure laid down in Article 88(2) EC in respect of State aid granted by the German authorities to Deutsche Post AG (State aid C 36/07 (ex NN 25/07)) ('the 2007 decision'). In that decision, which was published in the authentic language in the *Official Journal* of 19 October 2007 (OJ 2007 C 245, p. 21), the Commission referred to the procedure initiated in relation to postal matters against the Federal Republic of Germany pursuant to Article 87 EC since 1994 and, referring to the

need to carry out a comprehensive investigation of all the distortions of competition resulting from the public funds granted to Deutsche Post, stated that the proceedings initiated by the 1999 initiation decision would be supplemented in order to incorporate the recently communicated information and to adopt a definitive position on the compatibility of those funds with the EC Treaty.

22 By application lodged on 22 November 2007, Deutsche Post asked the Court to annul the 2007 decision (Case T-421/07).

23 By judgment of 1 July 2008, *Deutsche Post* v *Commission* (T-266/02, EU:T:2008:235), the General Court annulled Decision 2002/753, on the ground that the Commission had not demonstrated that Deutsche Post had received an advantage, by failing, in particular, to carry out a detailed analysis of all transfers of State resources to Deutsche Post and of all the costs associated with the supply of the universal service which Deutsche Post was required to bear, in order to establish whether the transfers at issue corresponded to overcompensation or undercompensation to its advantage or disadvantage. In application of that judgment, against which an appeal was lodged by the Commission, the Federal Republic of Germany reimbursed to Deutsche Post the sum of EUR 572 million, plus interest.

24 On 30 October 2008, following numerous exchanges with the Federal Republic of Germany concerning the merits of the 2007 decision, the Commission enjoined that Member State to deliver all necessary accounting information for the whole period from 1990 until 2007. That injunction ('the 2008 injunction') was the subject of applications for annulment brought by both the Federal Republic of Germany (Case T-571/08) and Deutsche Post (Case T-570/08). Pending the General Court's decision, the Federal Republic of Germany complied with the 2008 injunction and produced, first in November and December 2008, then in March 2009, the requested accounting information.

25 By orders of 14 July 2010, *Deutsche Post* v *Commission* (T-570/08, not published, EU:T:2010:311) and *Germany* v *Commission* (T-571/08, not published, EU:T:2010:312), the General Court dismissed the actions brought against the 2008 injunction as inadmissible. Appeals against those orders were lodged before the Court of Justice by the Federal Republic of Germany (Case C-465/10 P) and by Deutsche Post (Case C-463/10 P).

26 By judgment of 2 September 2010, *Commission* v *Deutsche Post* (C-399/08 P, EU:C:2010:481), the Court of Justice dismissed the appeal against the judgment of 1 July 2008, *Deutsche Post* v *Commission* (T-266/02, EU:T:2008:235).

27 By letter of 10 May 2011, the Commission notified the Federal Republic of Germany of its decision to 'extend' again the proceedings initiated in 1999 ('the 2011 decision'), in order to conduct an in-depth investigation with regard to the pension subsidies that Deutsche Post had received since 1995. On 22 July 2011 the Federal Republic of Germany asked the Court to annul the 2011 decision (Case T-388/11).

28 By judgment of 13 October 2011, *Deutsche Post and Germany* v *Commission* (C-463/10 P and C-465/10 P, EU:C:2011:656), the Court of Justice set aside the orders of 14 July 2010, *Deutsche Post* v *Commission* (T-570/08, not published, EU:T:2010:311) and *Germany* v *Commission* (T-571/08, not published, EU:T:2010:312), on the ground that the 2008 injunction was of direct and individual concern to Deutsche Post, and referred the cases back to the General Court (Cases T-570/08 RENV and T-571/08 RENV).

29 Pursuant to the 2011 decision, the Commission requested the Federal Republic of Germany, on 18 November 2011, for information concerning the public financing of pensions for the period after 2007; that information was supplied.

30 By judgment of 8 December 2011, *Deutsche Post* v *Commission* (T-421/07, EU:T:2011:720), the General Court considered that Deutsche Post's action against the 2007 decision was inadmissible, on the ground that that decision had not altered its legal position and was therefore not an act open to challenge.

31 By Decision 2012/636/EU of 25 January 2012, concerning Measure C 36/07 (ex NN 25/07) implemented by Germany for Deutsche Post AG (OJ 2012 L 289, p. 1) ('the contested decision'), the Commission considered, in particular, that the public funding / financing of pensions constituted unlawful State aid incompatible with the internal market. On the other hand, it considered that certain public transfers to Deutsche Post were State aid compatible with the internal market and that the State guarantees whereby the Federal Republic of Germany guaranteed the debt obligations entered into by Deutsche Bundespost before it was transformed into three joint stock companies must be analysed as existing aid.

32 The contested decision was notified to the Federal Republic of Germany on the following day.

33 By letter lodged at the Court Registry on 4 April 2012, the Federal Republic of Germany informed the Court that it was withdrawing its action in Case T-571/08 RENV, which was removed from the Court's register (order of 10 May 2012, *Germany* v *Commission*, T-571/08 RENV, not published, EU:T:2012:228).

34 By judgment of 24 October 2013, *Deutsche Post* v *Commission* (C-77/12 P, not published, EU:C:2013:695), the Court of Justice set aside the judgment of 8 December 2011, *Deutsche Post* v *Commission* (T-421/07, EU:T:2011:720), finding that the General Court had erred in law in holding that the 2007 decision was not an act open to challenge. It also referred the case back to the General Court for determination.

35 By judgment of 12 November 2013, *Deutsche Post* v *Commission* (T-570/08 RENV, not published, EU:T:2013:589), the General Court dismissed the action brought by Deutsche Post against the 2008 injunction. That judgment was the subject of a rectification of a material error (order of 15 November 2013, *Deutsche Post* v *Commission*, T-570/08 RENV, not published, EU:T:2013:606).

36 Last, by judgment of 18 September 2015, *Deutsche Post* v *Commission* (T-421/07 RENV, EU:T:2015:654), the Court annulled the 2007 decision on the ground that its adoption had infringed Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1) and the principle of legal certainty, in that it had re-initiated a formal investigation procedure which had been terminated in order for a new decision to be taken without the termination decision being revoked or withdrawn.

Procedure and forms of order sought

37 By application lodged at the Court Registry Court on 30 March 2012, the Federal Republic of Germany brought the present action.

38 On 13 June 2012, the Commission lodged its defence.

39 By document lodged at the Court Registry on 27 July 2012, UPS and United Parcel Service Deutschland Inc. & Co. sought leave to intervene in the present proceedings in support of the form of order sought by the Commission.

40 On 24 August 2012, the Federal Republic of Germany lodged an application for confidential treatment of the application and the defence vis-à-vis UPS and United Parcel Service Deutschland and for that purpose produced a non-confidential version of the application and the defence.

41 By order of the President of the Sixth Chamber of the General Court of 11 September 2012, the application for leave to intervene submitted by UPS and United Parcel Service Deutschland was dismissed and the question relating to the confidential treatment of the application and the defence was thus settled by operation of law.

42 The Federal Republic of Germany's reply was lodged at the Court Registry on 24 September 2012. The rejoinder was received at the Court Registry on 13 December 2012.

43 Subsequently, the present case was assigned to a new Judge-Rapporteur sitting in the same Chamber.

44 Following the partial renewal of the Court, the Judge-Rapporteur was assigned to the Eighth Chamber, to which the present case was therefore re-assigned.

45 The Court put a number of questions to the parties in the context of measures of organisation of procedure, pursuant to Article 64 of the Rules of Procedure of the General Court of 2 May 1991, which the parties answered within the prescribed period. The Court wished, in particular, in the interest of the smooth administration of justice and the optimum management of Cases T-421/07 RENV, T-388/11, T-152/12, between Deutsche Post and the Commission, and also of the present case, to ascertain the parties' views on what could or should be the priorities as regards the order in which those cases were dealt with and the possibility that one or more cases might be stayed pending judgment in the remaining cases.

46 Following receipt of the parties' observations, by orders of 15 September 2014 of the President of the First Chamber of the Court in Case T-388/11, *Deutsche Post* v *Commission*, and of the President of the Eighth Chamber of the Court in the present case and in Case T-152/12, *Deutsche Post* v *Commission*, those three cases were stayed pending the final decision in Case T-421/07 RENV, which was delivered on 18 September 2015, as stated in paragraph 36 above.

47 In the context of a measure of organisation of procedure, pursuant to Article 89 of the Rules of Procedure of the General Court, the parties were requested to inform the Court of the consequences which in their view the judgment of 18 September 2015, *Deutsche Post* v *Commission* (T-421/07 RENV, EU:T:2015:654), might have on the way in which the present case was dealt with. On 3 and 30 November 2015, respectively, the Federal Republic of Germany and the Commission submitted their observations to the Court Registry.

48 On 1 December 2015, the Court invited the parties to submit any observations they might have on whether the hearing should be held partly *in camera*, in so far as certain data that might be addressed overlapped with the data which the main parties in Cases T-388/11, *Deutsche Post* v *Commission*, and T-152/12, *Deutsche Post* v *Commission*, had invoked and in respect of which Deutsche Post had requested confidential treatment vis-à-vis the interveners in those two cases.

49 On 4 December 2015, the Commission informed the Court Registry that it had no observations and on the same day the Federal Republic of Germany submitted its observations to the Court Registry, stating that it had no objection to the hearing taking place in camera, but that it reserved the right to submit new pleadings if any data not contained in the public version of the contested decision should be mentioned at the hearing.

50 The parties presented oral argument and answered the questions put by the Court at the hearing on 13 December 2005, which were held partly *in camera*.

51 The Federal Republic of Germany claims that the Court should:

— annul Articles 1 and 4 to 6 of the contested decision;

— order the Commission to pay the costs.

52 The Commission contends that the Court should:

— primarily, dismiss the action as unfounded;

— in the alternative, in the event that one of the parts of the sixth plea, or one of the arguments set out therein, should be upheld, or in the event the seventh plea should be upheld, annul the contested decision only in part, according to the merits of those pleas, parts and arguments;

— order the Federal Republic of Germany to pay the costs.

Law

53 In support of its action, the Federal Republic of Germany, strictly speaking, puts forward 10 pleas in law.

54 The first plea alleges infringement of Article 107(1) TFEU and rests on the assertion that the public funding of the pensions did not favour Deutsche Post; the second plea alleges infringement of the same provision, on the ground that the public financing of the pensions did not compensate Deutsche Post's costs; the third plea relates, primarily, to an infringement of Article 107(1) TFEU and, in the alternative, to an infringement of Article 107(3) TFEU, in so far as Deutsche Post's revenues from price-regulated services were taken into account; the fourth plea alleges infringement of Articles 107 and 108 TFEU and of Regulation No 659/1999 and misuse of powers and of procedure owing to the taxing of revenues received by Deutsche Post in connection with those price-regulated services; the fifth plea also alleges infringement of Articles 107 and 108 TFEU and of Regulation No 659/1999 and misuse of powers and procedure owing to the attempt to find cross-subsidisation; the sixth plea relates, primarily, to infringement of Article 107(1) TFEU and, in the alternative, to infringement of Article 107(3) TFEU, owing to incorrect calculations in the comparison of Deutsche Post's social costs with those of competing operators; the seventh plea rests, primarily, on infringement of Article 107(1) TFEU and, in the alternative, on infringement of Article 107(3) TFEU, owing to the characterisation of the funding in question as State aid incompatible with the internal market between 1995 and 2002; the eighth plea alleges infringement of Article 1(b)(1) of Regulation No 659/1999 owing to the characterisation of the funding in question as new aid; the ninth plea relates only to Article 4(1) and (4) of the contested decision, which, according to the Federal Republic of Germany, is contrary to Article 7(5) and Article 14(1) of Regulation No 659/1999; last, the 10th plea concerns the excessive length of the proceedings and the Commission's failure to act, which, it is claimed, constitute an infringement of Article 6 TFEU, Article 41 of the Charter of Fundamental Rights of the European Union, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and Article 10(1) of Regulation No 659/1999.

55 However, in so far as the Federal Republic of Germany alleges, in support of the first, second and sixth pleas, that the contested decision is vitiated by a failure to state reasons, the arguments relating to that point will be examined separately from the substantive arguments and dealt with in a separate plea (see, to that effect, judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraphs 66 and 67, and of 5 December 2013, *Commission* v *Edison*, C-446/11 P, not published, EU:C:2013:798, paragraph 20).

56 As failure to state reasons constitutes a breach of essential procedural requirements, the Court deems it appropriate to deal with the plea alleging such failure before addressing the pleas relating to the substance of the law.

The failure to state reasons in the contested decision

57 The Federal Republic of Germany submits that the contested decision is vitiated by a failure to state reasons, first, as regards the assertion that the public funding of the pensions constitutes a selective advantage in favour of Deutsche Post; second, as regards the claim that that funding corresponds to charges which are normally included in the budget of an undertaking; third, as regards the Commission's failure to explain why the case-law resulting from the judgment of 16 March 2004, *Danske Busvognmænd* v *Commission* (T-157/01, 'the "Combus" judgment', EU:T:2004:76), is not applicable in the present case; and, fourth, as regards the refusal to take into consideration the argument whereby the applicant sought to demonstrate that the reference index chosen by the Commission was incorrect.

58 The Commission disputes those assertions.

59 It must be remembered that, according to settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review (see judgment of 11 December 2013, *Cisco Systems and Messagenet* v *Commission*, T-79/12, EU:T:2013:635, paragraph 108 and the case-law cited). In that regard, when stating the reasons for the decision which it is required to take in order to ensure the application of EU law on State aid, the Commission is not required to adopt a position on all the arguments relied on by the parties concerned in support of their request. It is sufficient if it sets out the facts and legal considerations of essential importance in the scheme of the decision (see, to that effect, judgments of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 96, and of 16 December 2010, *Netherlands and NOS* v *Commission*, T-231/06 and T-237/06, EU:T:2010:525, paragraphs 141 and 142 and the case-law cited).

60 The question as to whether the statement of reasons for a measure satisfies the requirements of Article 296 TFEU must be assessed by reference not only to its wording but also to its context and to the whole body of legal rules governing the matter in question (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 63; of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 88; and of 16 September 2013, *Iliad and Others* v *Commission*, T-325/10, EU:T:2013:472, paragraph 260). Thus, the Commission does not breach its obligation to state reasons if, in its decision, it does not adopt a position on matters which in its view are manifestly irrelevant or insignificant or plainly of secondary importance (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 64; of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 89; and of 27 September 2012, *Wam Industriale* v *Commission*, T-303/10, not published, EU:T:2012:505, paragraph 87).

61 It is in the light of those principles that the Court must ascertain whether the four points of the contested decision which the Federal Republic of Germany claims to be vitiated by a failure to state reasons are in fact so vitiated.

62 As regards the assertion that the public funding of the pensions constitutes a selective advantage in favour of Deutsche Post, it is clear from the contested decision (i) that in the Commission's view the selectivity lies in the fact that 'the pension subsidy has only been granted to the Pension fund to relieve Deutsche Post from the civil servants' pension costs and therefore ultimately benefits Deutsche Post' (recital 259 of the contested decision) and (ii), as regards the actual existence of an advantage, that the Commission set out, in section VII.1.1, entitled 'Financial advantage from 1995 pension reform', the reasons why in its view such an advantage was shown to exist in this instance

(recitals 260 to 274 of the contested decision), taking care to rebut the arguments put forward by the Federal Republic of Germany. The statement of reasons in the contested decision is therefore of the requisite legal standard on that point.

63 As regards the applicant's claim that the Commission failed to state reasons for its assertion that the public funding of the pensions corresponds to charges which are normally included in the budget of an undertaking, it must be held that the Commission made a mere assertion — the merits of which do not fall to be determined at the stage of examining compliance with the obligation to state reasons — that such a contribution by the employer was part of the normal operating procedures of an undertaking in a market economy. In that regard, it is stated, in recital 263 of the contested decision, 'that the liabilities a company bears under employment legislation or collective agreements with trade unions, such as pension costs, are part of the normal costs of a business which a firm has to meet from its own resources' and that 'those costs are inherent to the economic activity of the undertaking'. It should further be noted that the Commission also referred to its practice in taking decisions and to the case-law of the General Court (footnotes 6 and 7 of the contested decision). Article 196 TFEU was therefore not infringed by the Commission in this respect either.

64 As regards the Commission's alleged failure to explain why the 'Combus' judgment of 16 March 2004 (T-157/01, EU:T:2004:76) does not apply in the present case, the argument is factually incorrect, since the Commission expressly took a position in the contested decision on that aspect of the Federal Republic of Germany's arguments. In recital 260 of the contested decision, the Commission refers to that argument and in recital 262 it rebuts it in detail. Furthermore, recital 115 of the contested decision refers to the 2011 decision, in which the Commission had also rejected that case-law as not being applicable in the present case. The contested decision therefore contains an adequate state of reasons in that regard.

65 As regards, last, the alleged absence of evidence that would justify the refusal to take into consideration the Federal Republic of Germany's arguments relating to the determination of the reference rate of contribution, it should be observed (i) that the Commission clearly set out the reasons why it had taken the total contribution rates (employer's and employee's contributions) to the retirement and unemployment insurance and also the employer's contribution to sickness and care insurance into account (recitals 301 to 306 of the contested decision) and (ii) that it analysed, and then rejected, the objections put forward by the Federal Republic of Germany (recitals 308 to 311 of the contested decision). Furthermore, it should be borne in mind that, pursuant to the case-law referred to in paragraph 59 above, the Commission is not required to comment on each of the arguments raised before it. As regards this fourth point, too, the contested decision contains an adequate statement of reasons.

66 The arguments alleging failure to state reasons in the contested decision must therefore be rejected in their entirety.

67 The Court will now examine together the fourth and fifth pleas, whereby the Federal Republic of Germany asks it to explain the precise scope of Articles 107 and 108 TFEU, and of Regulation No 659/1999, in the light of the powers conferred on the Commission to ascertain the existence of State aid.

The fourth and fifth pleas, concerning the scope of Articles 107 and 108 TFEU, and of Regulation No 659/1999, in the light of the powers conferred on the Commission to ascertain the existence of State aid, and the existence of misuse of powers and of procedure

68 In the context of its fourth plea, the Federal Republic of Germany maintains that the Commission, taking account of the recovery order in Article 4(4) of the contested decision, unlawfully taxed revenues received by Deutsche Post in connection with price-regulated services; in its fifth plea, it claims that both primary law and the relevant secondary law preclude any attempt to find cross-subsidisation.

69 The Commission objects to those assertions.

70 It must be borne in mind, first of all, that the only addressee of a decision such as the contested decision is the Member State concerned, that is to say, in this instance, the Federal Republic of Germany (see, to that effect, judgments of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraphs 16 and 18; of 25 June 1998, *British Airways and Others* v *Commission*, T-371/94 and T-394/94, EU:T:1998:140, paragraph 92; and of 11 March 2009, *TF1* v *Commission*, T-354/05, EU:T:2009:66, paragraph 31), as is explicitly stated, moreover, in Article 7 of the contested decision. It is for that Member State to adopt, against its own wishes, legally binding measures so as to comply with the obligations imposed on it by EU law (order of 21 January 2014, *France* v *Commission*, C-574/13 P(R), EU:C:2014:36, paragraph 24), namely to recover from the beneficiary or beneficiaries the amount of the aid which the Commission considers to have been unlawfully granted.

71 It is therefore incorrect to maintain, as does the Federal Republic of Germany in the context of the fourth plea, that the Commission, albeit indirectly, taxed revenues achieved by means of price-regulated services: the Member State concerned, the only addressee of the contested decision, was merely required to recover from Deutsche Post, without designating for that purpose (and, *a fortiori*, without being required to designate) a particular item in Deutsche Post's budget, the amount corresponding to a series of measures which the Commission had considered to constitute unlawful State aid. The fact that Deutsche Post might reimburse that amount by drawing on the profits achieved by means of price-regulated postal services or by other means can therefore have no impact on the lawfulness of the contested decision.

72 Nor can the Federal Republic of Germany properly rely, in the context of the fifth plea, on the prohibition, in the particular case, on attempting to find any cross-subsidisation.

73 It should be borne in mind that, so far as the principles laid down in the case-law are concerned, not only does Article 107(1) TFEU not preclude a check of the existence of such subsidies, but, on the contrary, it implies that a check of that nature is to be carried out.

74 The aim of Article 107 TFEU is to prevent trade between Member States from being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods products (judgments of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 26, and of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraph 12). The concept of aid therefore embraces not only positive benefits, such as subsidies, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect (judgments of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraph 13, and of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 58).

75 More specifically, the proper application of EU law assumes a determination of whether the revenue from a lawfully subsidised activity does not serve to finance other activities carried out by the same undertaking (see, to that effect, judgments of 10 June 2010, *Fallimento Traghetti del Mediterraneo*,

C-140/09, EU:C:2010:335, paragraph 50; of 27 February 1997, *FFSA and Others* v *Commission*, T-106/95, EU:T:1997:23, paragraphs 187 to 190; and of 1 July 2010, *M6 and TF1* v *Commission*, T-568/08 and T-573/08, EU:T:2010:272, paragraphs 118, 121, 126 and 135), as the Commission has a certain discretion in deciding on the most appropriate method for making sure that the competitive activities do not receive any cross-subsidy (judgment of 27 February 1997, *FFSA and Others* v *Commission*, T-106/95, EU:T:1997:23, paragraph 187).

76 Although the title of its fifth plea (see paragraph 54 above) does not suggest it, the Federal Republic of Germany seems, in reality, to accept that the Commission is entitled to attempt to find cross-subsidisation, but denies that the necessary conditions for an attempt to do so are satisfied in the present case. The Federal Republic of Germany thus states in the application that 'if only because there was no transfer of "State resources" within the meaning of Article 107(1) TFEU, the conditions of "cross-subsidisation" within the meaning of the legislation on aid are not satisfied'.

77 In any event, it is by no means apparent that, by having examined the compatibility of the aid supposedly resulting from Article 16 of the Law on the terms and conditions of post office employees in the light of the implementation of Article 20(2) of the Postal Law, the implementation of that provision allowed Deutsche Post to allocate a part of the revenue in respect of price-regulated services to the pension fund, the Commission attempted to find cross-subsidisation, which, by definition, is done at the stage of determining the actual existence of the aid and not at the stage of determining whether the aid is compatible with the internal market.

78 The Federal Republic of Germany maintains, moreover, that it was for the Commission to bring an action for failure to fulfil obligations, within the meaning of Article 258 TFEU, if it considered that the price regulation provided for in Article 20(2) of the Postal Law gave rise to cross-subsidisation. It thus claims that there has been a misuse of powers and of procedure.

79 That argument cannot be upheld. The Courts of the European Union have already rejected similar reasoning, pointing out, with regard to the Commission's decision to initiate proceedings for abuse of a dominant position by a German legacy telephone service provider rather than bring an action against the Member State responsible for enacting the legislation which had made such an abuse possible, that even if the Commission could have initiated proceedings against the Federal Republic of Germany for failure to fulfil obligations, such a possibility could not affect the lawfulness of the contested decision (judgment of 10 April 2008, *Deutsche Telekom* v *Commission*, T-271/03, EU:T:2008:101, paragraph 271) and, more widely, under the system laid down by Article 258 TFEU, the Commission has a discretion to bring an action for failure to fulfil obligations, which has the consequence that it is not for the Courts of the European Union to assess whether it was appropriate to do so (judgments of 26 June 2003, *Commission* v *France*, C-233/00, EU:C:2003:371, paragraph 31, and of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 47).

80 A misuse of powers and of procedure is therefore not established under the fifth plea. Nor is it established under the fourth plea, where such misuse is also claimed.

81 The Federal Republic of Germany claims that, following a complaint lodged on 22 April 2004 by UPS on the basis of Article 102 TFEU (recital 46 of the contested decision), the Commission initiated proceedings with a view to establishing that Deutsche Post had abused its dominant position by overcharging for the regulated letter services, then that it decided on 25 March 2008 to close those proceedings because in its view it was unlikely to be able to prove such abuse (recital 48 of the contested decision).

82 In the Federal Republic of Germany's submission, it was the inability to prove abuse of a dominant position that led the Commission to have recourse, in an artificial manner, to a different procedure, by initiating State aid proceedings.

83 It is sufficient here to point out that the mere fact that the Commission, in the course of evaluating the evidence before it for the purpose of imposing a sanction for an infringement of Article 102 TFEU, decides not to penalise an abuse of a dominant position which it considers it would be unable to establish to the requisite legal standard, constitutes an illustration of the principle of sound administration and actual respect for the principle of legality.

84 Furthermore, a decision is vitiated by misuse of powers or of procedure only if it appears, on the basis of objective, relevant and consistent factors, to have been taken for the purpose of achieving ends other than those stated (judgments of 12 November 1996, *United Kingdom* v *Council*, C-84/94, EU:C:1996:431, paragraph 69, and of 16 September 1998, *IECC* v *Commission*, T-133/95 and T-204/95, EU:T:1998:215, paragraph 188). In addition, where more than one aim is pursued, even if the grounds of a decision include, in addition to proper grounds, an improper one, that would not make the decision invalid for misuse of powers, provided that the decision does not cease to pursue the main aim (judgments of 21 December 1954, *Italy* v *High Authority*, 2/54, EU:C:1954:8, p. 73, 103; of 8 July 1999, *Vlaamse Televisie Maatschappij* v *Commission*, T-266/97, EU:T:1999:144, paragraph 131; and of 21 September 2005, *EDP* v *Commission*, T-87/05, EU:T:2005:333, paragraph 87).

85 In the present case, there is no evidence that the contested decision was not adopted in order to penalise State aid that was incompatible with the internal market or, in any event, that it did not include such an aim.

86 It follows from the foregoing that the fourth and fifth pleas must be rejected.

87 It is now appropriate to examine the first and second pleas and the first part of the third, sixth and seventh pleas, relating to the existence, in the present case, of State aid.

The first and second pleas and the first part of the third, sixth and seventh pleas, in so far as they relate to the existence of State aid

88 It should be borne in mind at the outset that classification as State aid within the meaning of Article 107(1) TFEU requires that four conditions are satisfied, namely that there must be an intervention by the State or through State resources, the intervention must be liable to affect trade between Member States, it must confer a selective advantage on the recipient and it must distort or threaten to distort competition (see, to that effect, judgments of 17 March 1993, *Sloman Neptun*, C-72/91 and C-73/91, EU:C:1993:97, paragraph 18; of 19 December 2013, *Association Vent de colère! and Others*, C-262/12, EU:C:2013:851, paragraph 15; and of 11 June 2009, *Italy* v *Commission*, T-222/04, EU:T:2009:194, paragraph 39).

89 The measure which the Federal Republic of Germany seeks to have annulled is the classification as State aid incompatible with the internal market as referred to in Article 1 of the contested decision, concerning the 'pension subsidy to Deutsche Post'. By that terminology the Commission refers very specifically to the public funding of the pensions of former officials of the postal services (recital 3 of the contested decision), to the exclusion, therefore, of the funding of the pensions of private employees recruited after 1 January 1995. That is therefore also the sense in which the expression 'public funding of the pensions' used in the present judgment must be interpreted. That funding is governed by Article 16 of the Law on the terms and conditions of employees of the post office, which therefore constitutes the subject matter of the contested decision. However, it should be observed that, at the stage of assessing the compatibility of the presumed aid with the internal market, the Commission emphasised that the effect of that law and that of Article 20(2) of the Postal Law combined to relieve Deutsche Post of the costs of the retirement pensions of its former officials (recitals 116 and 332 to 338 of the contested decision).

90 It is thus appropriate, when examining the various pleas put forward in that regard by the Federal Republic of Germany, to ascertain whether the public funding of the pensions could properly be classified as State aid in the light of the conditions referred to in paragraph 88 above.

The first condition: intervention by the State or through State resources

91 It must be stated that, in the present case, intervention by the State and the use of State resources are not in doubt. They are obvious in the light of the mechanism put in place by Article 16 of the Law on the terms and conditions of employees of the post office, since, as stated in paragraph 10 above, the Federal State assumed responsibility, for the years 1995 to 1999, for the difference between the total costs of the retirement pensions of former officials of Deutsche Post and an annual lump sum of 4 billion German marks (DEM) (around EUR 2 045 million) and then, from 2000, between the total costs of those former officials' pensions and 33% of the gross salaries of Deutsche Post's officials in active service.

92 The Federal Republic of Germany raises the objection, however, that those resources correspond only to revenue received by Deutsche Post in respect of price-regulated services, which cannot therefore be classified as State aid, since it corresponds to remuneration by its customers for services provided by Deutsche Post in the context of private economic relationships.

93 However, that argument does not stand up to analysis. It cannot be disputed that, owing to the intervention of the Federal State, Deutsche Post was relieved of part of the cost of the pensions payable to its retired officials, which it would have had to reflect in the unregulated prices for its services in the absence of such intervention. The Commission is therefore correct to state that the sum removed from the total amount of the costs associated with payment of those pensions corresponded to EUR 151 million in 1995 and reached EUR 3 203 million in 2010. Over the period 1995 to 2010, the total amount for which the Federal State accepted responsibility thus assumed reached an amount corresponding to more than EUR 37 billion.

94 In addition, the fact that part of the revenue from the regulated prices approved by the Federal Network under Article 20(2) of the Postal Law was intended to reduce Deutsche Post's contribution to the pension fund has the consequence that the amount for which the Federal State accepted responsibility, defined by reference to a lump sum, and then to the percentage, described in paragraph 91 above, was higher than it ought to have been. The amount of the public subsidies was therefore excessive, even if it is true that the revenues from the regulated prices are, considered intrinsically, of a private nature.

95 The first condition, relating to intervention by the State or the use of State resources, is therefore satisfied.

The second and fourth conditions, relating to an effect on trade between Member States and the distortion or threat of distortion of competition

96 The application of these two conditions in the present case is not specifically disputed by the Federal Republic of Germany. It is appropriate, in any event, to find that the Commission did not err in law or make an error of assessment when it considered, in recitals 275 to 277 of the contested decision, since the markets for parcels, newspapers and periodicals had always been open to competition in Germany and, furthermore, that since following the opening of the market for letters to competition Deutsche Post had gradually lost its exclusive rights in that sector, in which new undertakings had begun to operate, that the conditions of an effect on trade between Member States and the distortion of competition were satisfied.

The third criterion, relating to the existence of an advantage granted to an undertaking or a type of product

97 The Federal Republic of Germany maintains that this condition was not satisfied in either of its two components. It maintains, first, that, even on the assumption that there was a selective advantage in the present case, the beneficiary (or beneficiaries) is (or are) not an undertaking for the purposes of Article 107(1) TFEU and, second, that the public funding of the pensions did not give rise to such an advantage.

98 These two aspects should be examined in turn.

– The identity of the beneficiary of the alleged advantage and its capacity as an undertaking

99 The Federal Republic of Germany states, in the context of its first plea, that the beneficiary of the measure at issue is not Deutsche Post but, directly, the pension fund of the former officials of the postal services or, indirectly, the pensioners themselves, that is to say, natural persons.

100 The Commission disputes that analysis.

101 The objections put forward by the Federal Republic of Germany concerning the identity and the nature of the beneficiary of the public funding of the pensions must be rejected. It is apparent from the documents in the file that Deutsche Post, whose capacity as an undertaking cannot be disputed, would, without that funding, have had to pay, in favour of the former officials of its legal predecessors, a certain additional sum related to the salaries paid, of which it was relieved in part. It is therefore indeed the beneficiary of the measure at issue.

102 It is therefore appropriate to ascertain whether that partial acceptance of responsibility, as defined in paragraph 10 above, could properly be classified as an advantage for the purposes of Article 107(1) TFEU.

– The existence of an advantage for Deutsche Post for the purposes of Article 107(1) TFEU

103 It is appropriate, in the first place, to recall the way in which the Courts of the EU interpret the concept of advantage, before, in the second place, summarising the content of the contested decision in that regard, then, in the third place, determining, in the light of the pleas and arguments put forward by the Federal Republic of Germany, whether the Commission's reasoning permitted the conclusion, in the present case, that there was an advantage for the purposes of Article 107(1) TFEU and then, as the other conditions are satisfied, as held in paragraphs 91 to 96 above, that there was State aid.

104 In the first place, State aid, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Courts of the European Union must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU (judgments of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 111, and of 16 September 2013, *British Telecommunications and BT Pension Scheme Trustees* v *Commission*, T-226/09 and T-230/09, not published, EU:T:2013:466, paragraph 39).

105 The question is therefore whether or not a measure confers an advantage on an undertaking.

106 That advantage must be economic in nature and it must be selective.

107 The advantage must be economic in nature: that is to say, the Commission is under an obligation to make a complete analysis of all factors that are relevant to the transaction at issue and its context, including the situation of the beneficiary undertaking and of the relevant market, in order to verify whether that undertaking is receiving an economic advantage which it would not have obtained under normal market conditions (see, to that effect, judgments of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraphs 251 and 257, and of 3 March 2010, *Bundesverband deutscher Banken* v *Commission*, T-163/05, EU:T:2010:59, paragraph 98).

108 In the context of that verification, the Commission must take into account, as factors of the relevant context, all the particular features of the legal scheme of which the national measure under consideration forms part. In that regard, it should be borne in mind, first, that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects (judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 94), and, second, that a measure of intervention which does not have the effect of putting the undertakings to which it applies in a more favourable competitive position than the undertakings competing with them is not caught by Article 107(1) TFEU (see, to that effect, judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 87).

109 In that connection, it has been held that compensation which represents the consideration for the services provided by the beneficiary undertakings for discharging public service obligations does not confer an advantage for the purposes of Article 107(1) TFEU and, consequently, does not fall within the scope of that provision when, in particular, it does not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. If that condition is satisfied, the funding in question does not strengthen the competitive position of the beneficiary undertaking (judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 92).

110 Furthermore, since the sole purpose of Article 107(1) TFEU is to prohibit advantages for certain undertakings, the concept of aid covers only measures which lighten the charges which are normally included in the budget of an undertaking and which are to be regarded as an economic advantage which the beneficiary undertaking would not have obtained under the normal market conditions referred to in paragraph 107 above (see, to that effect, judgments of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 26; of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraphs 12 and 13; and of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 84 and the case-law cited). Accordingly, a measure whereby a Member State relieves an undertaking, initially required by law to continue to employ the officials of its legal predecessor and to compensate that State in consideration of the salaries and pensions which it continued to pay, of the 'structural disadvantage' represented by the 'privileged and costly status of [those] officials' by comparison with that of employees of that undertaking's private competitors does not, in principle, constitute a measure lightening the charges which are normally included in the budget of an undertaking and therefore aid (see, to that effect, the 'Combus' judgment of 16 March 2004, T-157/01, EU:T:2004:76, paragraphs 6, 7, 56 and 57). Even in that situation, however, there must be a direct relationship between the additional costs actually borne and the amount of the aid (see, to that effect, judgments of 28 November 2008, *Hôtel Cipriani and Others* v *Commission*, T-254/00, T-270/00 and T-277/00, EU:T:2008:537, paragraph 189, and of 16 September 2013, *British Telecommunications and BT Pension Scheme Trustees* v *Commission*, T-226/09 and T-230/09, not published, EU:T:2013:466, paragraph 72), which enables the net effect of the aid to be measured.

111 The advantage must also be selective. According to settled case-law, Article 107(1) TFEU prohibits State aid 'favouring certain undertakings or the production of certain goods', that is to say, selective aid (judgments of 15 December 2005, *Italy* v *Commission*, C-66/02, EU:C:2005:768, paragraph 94, and of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 52). As regards appraisal of the condition of selectivity, Article 107(1) TFEU requires an assessment of whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' by comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation (see, to that effect, judgments of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, EU:C:2001:598, paragraph 41; of 29 April 2004, *GIL Insurance and Others*, C-308/01, EU:C:2004:252, paragraph 68; and of 3 March 2005, *Heiser*, C-172/03, EU:C:2005:130, paragraph 40). In order to determine whether a measure is selective, it is therefore appropriate to examine whether, within the context of a particular legal regime, that measure constitutes an advantage for certain undertakings by comparison with others which are in a comparable legal and factual situation (judgments of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 56; and of 28 July 2011, *Mediaset* v *Commission*, C-403/10 P, not published, EU:C:2011:533, paragraph 36).

112 It is therefore solely by comparison with the competitors of the undertaking in question that the advantage must be assessed (see, to that effect, judgment of 27 September 2012, *Italy* v *Commission*, T-257/10, not published, EU:T:2012:504, paragraph 70). Furthermore, the logic behind the recovery of unlawful aid is that the beneficiary loses the advantage which it had enjoyed on the market by comparison with its competitors and that the situation existing before the grant of the aid is restored (see judgment of 29 April 2004, *Italy* v *Commission*, C-372/97, EU:C:2004:234, paragraphs 103 and 104 and the case-law cited; judgment of 27 September 2012, *Italy* v *Commission*, T-257/10, not published, EU:T:2012:504, paragraph 147).

113 In the second place, as stated in the context of the examination of the statement of reasons on which the contested decision is based, the Commission devoted recitals 260 to 274 of that decision, under the heading 'Financial advantage from 1995 pension reform', to showing how in its view Deutsche Post had benefited from an advantage.

114 The Commission began by observing, in recital 261 of the contested decision, that it was necessary to determine whether the public funding of the pensions had allowed Deutsche Post to avoid costs that would normally have had to be borne by the company and had thus prevented market forces from producing their normal effect.

115 In recital 262 of the contested decision, the Commission rejected the arguments whereby the Federal Republic of Germany claimed that the principle identified in the 'Combus' judgment of 16 March 2004 (T-157/01, EU:T:2004:76) is applicable in the present case.

116 In recital 263 of that decision, the Commission asserted, as the main premiss of its syllogism, that the costs resulting from the application of employment legislation or collective agreements are part of the normal costs which an undertaking has to meet from its own resources and, as the minor premiss, that pension costs, determined according to the employment legislation or collective agreements, are part of those costs. It concluded that Deutsche Post was facing, so far as the pensions of its former officials was concerned, a cost inherent in the economic activity of the undertaking, within the meaning of Article 107(1) TFEU.

117 Recitals 264 to 266 of the contested decision are devoted to the way in which the status of the German postal service developed between 1950 and 1995 (see, in that regard, paragraphs 1 to 12 above). The Commission inferred from those developments that Deutsche Bundespost, and then Postdienst, assumed in full a burden which Deutsche Post bears only in part, which gives rise to an advantage for Deutsche Post.

118 In recital 267 of the contested decision, the Commission stated that the arguments as to whether Deutsche Post supported higher pension costs than its private competitors 'were irrelevant for the purpose of finding whether the pension subsidy constitute[d] a State aid', but that, on the contrary, they would be examined 'in the context of the analysis of the compatibility of [the aid]'. That idea is also expressed in recital 268 of the contested decision.

119 Last, in recitals 269 to 273 of the contested decision the Commission rejects various arguments put forward by the Federal Republic of Germany during the administrative procedure.

120 In the third place, it must be determined, in the light of the pleas and arguments put forward in that regard by the Federal Republic of Germany, whether the Commission was correct to conclude that that Member State had conferred an advantage on Deutsche Post.

121 As stated in paragraph 87 above, the Federal Republic of Germany devoted a number of pleas to disputing the existence of State aid in the present case. In the context of each of those pleas, it denied that Deutsche Post had the benefit of an advantage within the meaning of Article 107(1) TFEU.

122 It is appropriate to examine, first of all, the arguments whereby the Federal Republic of Germany seeks, in its first plea, to prove that the third condition, relating to the existence of a selective economic advantage, was not satisfied.

123 The Commission asks the Court to reject those arguments.

124 First of all, the Federal Republic of Germany claims that the public funding of the pensions does not constitute an advantage for Deutsche Post because the amount that it is required to pay 'to the pension fund is determined by law'. However, such an argument must be rejected as inoperative, since the Commission was specifically required to determine, at that stage, whether, on account of Article 16 of the Law on the terms and conditions of employees of the postal service, Deutsche Post received an economic advantage by comparison with its competitors which it did not previously enjoy. It is quite immaterial, in that regard, that the advantage, if it is established, is the consequence of a legal obligation or State intervention in a different form, since both are subject to the provisions of Article 107(1) TFEU.

125 Next, the Federal Republic of Germany maintains that, in order to assess the existence of State aid, the Commission took into account factors relating to the German legal framework of social security and employment relationships. However, it should be observed that that argument is factually incorrect, since it was only at the stage of assessing the compatibility of the alleged aid with the internal market that considerations of that nature were put forward by the Commission in the contested decision.

126 Last, the Federal Republic of Germany relies on the Commission's previous practice in adopting decisions, referring to Commission Decision 2009/945/EC of 13 July 2009 concerning the reform of the method by which the RATP pension scheme is financed (State aid C 42/07 (ex N 428/06) which France is planning to implement in respect of RATP (OJ 2009 L 327, p. 21). That argument must also be rejected. In fact, it must be borne in mind, without there being any need to consider whether the practice relied on is proved to exist, that it cannot affect the validity of the contested decision, which can be assessed only in the light of the objective rules of the Treaty (see, to that effect, judgments of 20 May 2010, *Todaro Nunziatina & C.*, C-138/09, EU:C:2010:291, paragraph 21, and of 27 September 2012, *Wam Industriale* v *Commission*, T-303/10, not published, EU:T:2012:505, paragraph 82). Accordingly, it cannot depend on a subjective assessment by the Commission and must be determined independently of its previous practice (judgments of 27 September 2012, *Wam Industriale* v *Commission*, T-303/10, not published, EU:T:2012:505, paragraph 82, and of 5 February 2015, *Ryanair* v *Commission*, T-500/12, not published, EU:T:2015:73, paragraph 39).

127 The arguments in the Federal Republic of Germany's first plea must therefore be rejected in that they relate to the actual existence of an advantage.

128 Since the part of the first plea relating to failure to state reasons in the contested decision has been rejected (see paragraphs 55 and 66 above) and since the objections in the same plea relating to the identity of the beneficiary of the alleged aid and disputing that the beneficiary was an undertaking have been rejected (see paragraph 101 above), the first plea must be rejected in its entirety.

129 In the context of its second plea, which is based on the fact that the public funding of the pensions did not compensate for the costs supported by Deutsche Post, the Federal Republic of Germany submits an argument consisting of three parts, the first two of which seek to contradict the assertion that the costs compensated for by the aid to the public funding of the pensions are normally included in the budget of an undertaking, while the third relates to the question of compensation for a structural disadvantage.

130 It should again be pointed out, by way of preliminary observation (see paragraph 110 above), that in the 'Combus' judgment of 16 March 2004 (T-157/01, EU:T:2004:76, paragraphs 6, 7, 56 and 57), this Court held that a measure whereby a Member State relieves an undertaking, initially required by law to continue to employ the officials of its legal predecessor and to compensate that State in respect of the salaries and pensions which the latter continued to pay, of the 'structural disadvantage' represented by the 'privileged and costly status of [those] officials' by comparison with that of employees of that undertaking's private competitors did not in principle constitute a measure lightening the charges which are normally included in the budget of an undertaking and therefore aid. It cannot be maintained that the cost of a retirement scheme not covered by the general law and imposed by the legislation of a Member State forms part of the normal charges of an undertaking, whether, as in the case that gave rise to the 'Combus' judgment of 16 March 2004 (T-157/01, EU:T:2004:76), the legislation in question is applicable to Danish officials or, as in the present case, the legislation governs the pensions of officials who were historically recruited by Deutsche Bundespost to provide the postal public service, and are thus treated as officials of the German State.

131 It should be emphasised that, having reached that decision, the Court did not intend to take into consideration only the intention of the national legislature (namely to relieve the operator concerned of a structural disadvantage), independently of its effects. The Court thus expressly stated that the Danish State 'could have obtained the same result', that is to say, the same effect, 'by reassigning those officials within the public administration, without paying any particular bonus' (the 'Combus' judgment of 16 March 2004, T-157/01, EU:T:2004:76, paragraph 57). The principle that emerges from that judgment therefore does not contradict the principle, referred to in paragraph 108 above, stating that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effect (see, to that effect, judgments of 3 March 2005, *Heiser*, C-172/03, EU:C:2005:130, paragraph 46; of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraphs 94 and 95; and of 16 September 2013, *British Telecommunications and BT Pension Scheme Trustees* v *Commission*, T-226/09 and T-230/09, not published, EU:T:2013:466, paragraph 74).

132 Subsequently, following the same logic as that governing the case-law summarised in paragraphs 108 and 109 above, in order to determine whether the measure at issue confers an advantage within the meaning of Article 107(1) TFEU on Deutsche Post, it is appropriate to consider whether the measure has the effect of strengthening Deutsche Post's position by comparison with undertakings competing with it. In that context, it will be appropriate to take into account any obligations imposed on Deutsche Post under the national legislation on the funding of pensions which are not imposed on its competitors. Just as the imposition of a public service obligation precludes payment of compensation not exceeding what is necessary to cover the costs entailed in implementing it being considered to confer an advantage for the purposes of Article 107(1) TFEU, the imposition, by an act of a public authority, of an obligation to bear the full cost of the pensions of the staff having the status of official

instead of contributing to retirement insurance precludes the funding of that cost being classified as an advantage, on condition that that funding does not exceed what is necessary to place Deutsche Post's obligations on an equal footing with the obligations of the undertakings competing with it. The existence of an advantage can therefore be accepted only if the funding in question exceeds that threshold.

133 As may be seen from the application and the reply, the Federal Republic of Germany maintains that the Commission did not carry out any specific examination in order to determine whether the costs assumed by the public funding of the pensions were among those which are normally included in the budget of an undertaking and it is only in the context of the examination of the compatibility of the measure at issue with the internal market that the Commission made the slightest comparison with the costs which an undertaking is normally required to discharge.

134 The Federal Republic of Germany further claims that the mere assertion that the costs linked with pensions constitute an undertaking's normal operating costs cannot suffice in the case of the public funding of the pensions of former officials and that the Commission was required to make clear whether the comparison should be with an undertaking employing only private employees or whether it supposed that the undertaking included officials among its current or retired employees.

135 In that Member State's submission, that omission constitutes an error of assessment that is in itself a ground for annulment of the contested decision: had a specific examination been carried out it would have been possible to establish that the social charges relating to officials of Deutsche Post were not part of the costs which are normally included in the budget of an undertaking.

136 The Federal Republic of Germany maintains that those costs correspond to a structural disadvantage within the meaning of the 'Combus' judgment of 16 March 2004 (T-157/01, EU:T:2004:76), which the Commission failed to take into consideration.

137 The Federal Republic of Germany submits, last, that the subsidies relating to pensions did not relieve Deutsche Post of payment, first of all of the annual lump sum of an amount equivalent to EUR 2 045 million, then of an annual amount that representing 33% of the total gross salaries of Deutsche Post officials in active service, since Deutsche Post was never under such an obligation, which was borne solely by Deutsche Bundespost.

138 The Commission claimed, including at the hearing, that it did indeed carry out a specific examination of whether the costs of which Deutsche Post had been relieved by Article 16 of the Law on the terms and conditions of employees of the postal service were costs normally borne by an undertaking. It observed that, according to the case-law, the cost of employment was among an undertaking's normal costs, which also included payment of the retirement pensions.

139 In the Commission's submission, the fact that recruitments that took place during the years before 1995 were subject to different conditions from those applied after that date to new employees of Deutsche Post has no impact on Deutsche Post's obligation to meet, for the staff members concerned, that is to say, the officials, the conditions which had been granted to them. For the same reasons, the form taken by the cost of the retirement pensions is immaterial in the present case, since the only issue to be determined is whether that cost forms part of the costs that an undertaking must normally assume.

140 The Commission contends that the methods proposed by the Federal Republic of Germany in order to determine the costs in question are not consistent with the case-law, and claims that the 'Combus' judgment of 16 March 2004 (T-157/01, EU:T:2004:76) has not been confirmed either by the case-law or by the Commission's practice in taking decisions.

141 The Commission concludes by recalling that, according to settled case-law, the existence of aid is to be assessed by reference to the effects of the State measures and not to their causes or objectives.

142 In that regard, it should be observed that, as the Commission confirmed in the defence and also in its answers to the questions put to it at the hearing, it merely considered, in recitals 262 and 263 of the contested decision, that an advantage existed solely because the Federal German State accepted responsibility for part of the cost of the former officials' pensions, when, according to the Commission, responsibility for that cost had not been accepted in the past. However, even on the assumption that that assertion was correct, which is open to doubt, since, if there were no direct subsidies on the part of the Federal German State, there were nonetheless indirect compensations, that is to say, compensations from Postbank and Telekom of which Postdienst, Deutsche Post's legal predecessor, was the recipient, in order to cover its losses, which again was established at the hearing, that assertion could not suffice to establish that Deutsche Post was placed at an advantage by comparison with its competitors.

143 It is perfectly possible, in fact, to infer from that development that, following the application of the measure at issue, Deutsche Post is less disadvantaged than before the measure was adopted, but that it continues to be disadvantaged by comparison with its competitors, or rather that it is on a par with them, without thus being the beneficiary of an advantage. In fact, as the Commission states in recitals 294 and 297 of the contested decision, the burden entailed by the full cost of the pensions imposed on Deutsche Post before 1995, in fact in a monopolistic environment, is such that the undertaking in question would have been unable to compete on its merits with its competitors and would therefore have had to leave the market in the absence of measures relieving it in part from that burden.

144 In that context, it follows from what is set out in paragraphs 108, 109 and 132 above that the concept of 'charges which are normally included in the budget of an undertaking' does not include the charges imposed on just one undertaking under legislative provisions which derogate from the rules generally applicable to competing undertakings and which have the effect on imposing on that undertaking obligations which are not imposed on those competing undertakings. On the contrary, 'charges which are normally included in the budget of an undertaking' are those which result from the general regime.

145 The position set out in recital 263 of the contested decision, that the only decisive element for the purpose of assessing the existence of an advantage is that 'in one way or another, undertakings bear the full costs for pensions' and that, in that regard, the burden borne by Deutsche Post was alleviated, is therefore vitiated by an error of law. In addition, if, as the Commission claims, the concept of 'charges which are normally included in the budget of an undertaking' must be defined by reference to the particular rules applicable to the undertaking that is the alleged beneficiary, there is nothing to prevent the view that the measure at issue which alleviates Deutsche Post's burdens is part of those rules, which precludes the existence of an advantage.

146 The same applies, consequently, to the position explained in recitals 267 and 268 of the contested decision, namely that the fact that Deutsche Post was subject to more onerous legal obligations in relation to the funding of the pensions of its staff than those borne by its competitors is irrelevant from the aspect of the existence of an advantage, but would be relevant only in the context of the assessment of the compatibility of the measure with the internal market.

147 The Commission ought therefore, when assessing the concept of advantage, to have ascertained whether, by assuming responsibility for the difference between the lump sum fixed between 1995 and 1999 and the total amount of the costs of the pensions of former officials of Deutsche Post, and the difference between the sum representing 33% of the gross salaries of Deutsche Post's officials in active service and that same total amount, the Federal State had conferred an economic advantage on Deutsche Post by comparison with its competitors.

148 It follows from the case-law, in accordance with what is set out in paragraphs 108, 109 and 132 above, that it is indeed at the stage of the application of Article 107(1) TFEU, namely at the stage of proving the existence of an advantage, that the Commission must demonstrate, for example, that the partial exemption from the obligation to contribute to the pension protection fund constitutes a selective advantage for a former legacy operator (see, to that effect, judgment of 16 September 2013, *British Telecommunications and BT Pension Scheme Trustees* v *Commission*, T-226/09 and T-230/09, not published, EU:T:2013:466, paragraph 46).

149 In the event of a succession of measures intended to compensate for the burdens imposed on a single undertaking under legislative provisions which derogate from the rules generally applicable to competing undertakings and which have the effect of imposing on that undertaking obligations which not imposed on its competitors, the Commission is clearly required, when examining one of those measures from the aspect of the law on State aid, to take into account the effects produced by the previous measures, in order to determine whether the last measure which it is required to examine, in the light of those which it had already analysed, constitutes overcompensation or not, which, consequently, allows that overcompensation, if it is established, to be regarded as constituting an economic advantage, bearing in mind that it is always open to the Member State, when a new measure is being examined, to demonstrate that that measure does not cross the threshold beyond which the undertaking that benefits from the measure is placed at an advantage by comparison with competing undertakings. It should be borne in mind, however, that the hypothesis of a succession of provisions, examined by the Commission as and when they are notified by the Member States concerned, does not correspond to the present case, as in this case the Commission analysed the public funding of the pensions only after receiving complaints from competing undertakings.

150 In the present case, although the Commission sought to establish the actual existence of a selective economic advantage, and not to accept it by mere supposition, it did so, as it itself acknowledges in the defence and as it confirmed at the hearing, only at the stage of examining the compatibility of the aid with the internal market, in recitals 288 to 410 of the contested decision. However, it is apparent from the foregoing that only the amounts in excess of what is necessary in order to align the cost of the pensions imposed on Deutsche Post before 1995 with the cost borne by its competitors were of such a kind to confer such an advantage on Deutsche Post and therefore to constitute State aid within the meaning of Article 107(1) TFEU.

151 As stated in paragraph 133 above, the Federal Republic of Germany, in emphasising that the Commission did not make 'the slightest comparison with the burdens which an undertaking must "normally" pay with regard to private employees in accordance with German social law except in the context of the examination relating to the compatibility of the measure with the internal market', therefore demonstrated to the requisite legal standard that the Commission had failed to have regard to the case-law cited in paragraph 148 above. It should be observed that that case-law, far from merely referring to a formal requirement, highlights the two stages which the analysis of a measure in the light of the provisions of Article 107 TFEU must entail, and to which highly significant consequences are attached.

152 In the first stage, as pointed out in paragraph 104 above, the Courts of the European Union carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU (judgments of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 111, and of 16 September 2013, *British Telecommunications and BT Pension Scheme Trustees* v *Commission*, T-226/09 and T-230/09, not published, EU:T:2013:466, paragraph 39). It follows that it is for the Courts of the European Union to check whether the facts relied on by the Commission are substantively accurate and whether they establish that all the conditions justifying the classification of 'aid' within the meaning of Article 107(1) TFEU are fulfilled (judgment of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 142). It has repeatedly been held, moreover, that Article 107(3)(c) TFEU conferred on the Commission a discretion the exercise of which entails assessments of an economic and social nature

(judgments of 20 September 2007, *Fachvereinigung Mineralfaserindustrie* v *Commission*, T-375/03, not published, EU:T:2007:293, paragraph 138, and of 27 September 2012, *Italy* v *Commission*, T-257/10, not published, EU:T:2012:504, paragraph 133), from which it follows that the review of such assessments involves ascertaining that the rules of procedure have been complied with, that the reasoning is sufficient, that the facts are correct and that there is no manifest error of assessment or misuse of power (judgment of 13 September 1995, *TWD* v *Commission*, T-244/93 and T-486/93, EU:T:1995:160, paragraph 82).

153 In the second stage, the grant of unlawful aid may entail, in addition to the obligation for the beneficiary to reimburse the aid, the obligation to pay interest in respect of the period of unlawfulness or to pay compensation to its competitors (see, by analogy, judgment of 12 February 2008, *CELF and Ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraph 55).

154 It follows from all of the foregoing that the Federal Republic of Germany is correct to maintain that the mere assertion that the pension costs are part of the costs which are normally included in the budget of an undertaking was not sufficient to establish, in the present case, the existence of a real economic advantage in favour of Deutsche Post. The Commission, which bore the obligation to prove that advantage, did not discharge that obligation and thus erred in law.

155 The second plea must therefore be upheld, apart from the arguments which it contains in relation to compliance with the obligation to state reasons (see paragraph 66 above).

156 That finding alone is sufficient for Article 1 and Articles 4 to 6 of the contested decision to be annulled and the Federal Republic of Germany's action to be upheld, without there being any need to adjudicate on the eighth to 10th pleas or the remainder of the third, sixth and seventh pleas.

Costs

157 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In the present case, as the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Federal Republic of Germany.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Annuls Articles 1 and 4 to 6 of Commission Decision 2012/636/EU Measures C 36/07 (ex NN 25/07) implemented by Germany for Deutsche Post AG;**

2. **Orders the European Commission to pay the costs.**

Gratsias Kancheva Wetter

Delivered in open court in Luxembourg on 14 July 2016.

[Signatures]