OPINION OF ADVOCATE GENERAL JÄÄSKINEN
delivered on 24 March 2010[1]

1. By its appeal, the Commission of the European Communities asks the Court of Justice to set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') in Case T-266/02 *Deutsche Post* v *Commission* [2008] ECR II-1233 ('the judgment under appeal'), by which it annulled Commission Decision 2002/753/EC of 19 June 2002 on measures implemented by the Federal Republic of Germany for Deutsche Post AG.[2]

2. In the contested decision, the Commission found that, in the context of the restructuring of the former German post and telecommunications administration, Deutsche Post AG had received substantial compensation payments from State resources. Given, first, its policy of selling below cost in the postal packets market sector, penalised by the Commission in its decision of 20 March 2001,[3] in which it found that Deutsche Post AG had abused its dominant position, and, second, the losses recorded by Deutsche Post AG during the period under consideration, the Commission found that that aggressive price policy could only have been financed by the resources which Deutsche Post AG had received as compensation for the provision of services of general economic interest. Consequently, the Commission concluded that unlawful State aid had been granted.

3. The General Court held that the Commission had infringed Article 87(1) EC[4] in finding that the transfers by the State had conferred an advantage on Deutsche Post AG.

4. The central issue in the present appeal is thus which method should be applied to determine whether an undertaking entrusted with the provision of a service of general economic interest has received compensation exceeding the additional costs generated by the provision of that service, capable of constituting an advantage for the purposes of Article 87(1) EC. This issue is part of a broader debate on the legal nature of compensation

1 — Original language: French.

2 — OJ 2002 L 247, p. 27 ('the contested decision').

3 — Commission Decision 2001/354/EC of 20 March 2001 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/35.141 – Deutsche Post AG) (OJ 2001 L 125, p. 27).

4 — Since the judgment under appeal was delivered on 1 July 2008, references to the provisions of the EC Treaty follow the numbering applicable before the entry into force of the Treaty on the Functioning of the European Union.

for the costs arising from the provision of a service of general economic interest.

I — Facts, procedure and the judgment under appeal

5. Deutsche Post AG is a large undertaking that operates both in the mail delivery sector, in which it enjoys a monopoly, and in two other postal sectors, namely parcel delivery and delivery of newspapers and periodicals, both of which sectors are open to competition.

6. In the parcel delivery sector, Deutsche Post AG provides, first, services relating to the delivery of parcels handed in directly at post office counters and, second, services relating to the delivery of larger quantities of parcels not handled directly at post office counters ('the door-to-door parcel delivery sector').

7. In so far as concerns the door-to-door parcel delivery sector, Deutsche Post AG provides two main services, namely, first, door-to-door parcel delivery services for business customers who do their own presorting or post a minimum quantity of parcels ('business-to-business segment') and, second, parcel delivery services for mail-order companies which dispatch goods ordered by catalogue or electronically ('business-to-customer segment').

8. In the context of the liberalisation and restructuring of the postal administration, pursuant to the Postal Organisation Act (Postverfassungsgesetz), Deutsche Post AG received transfer payments from Deutsche Bundespost Telekom ('DB-Telekom') to compensate it for the losses it incurred from 1990 to 1995 ('transfer payments made by DB-Telekom').

9. On 20 March 2001, the Commission adopted Decision 2001/354, in which it concluded, in essence, that Deutsche Post AG had infringed Article 82 EC in so far as it had abused its dominant position only in the business-to-customer segment, in particular by pursuing a policy of selling below cost by offering prices below the additional costs of providing those services.

10. Since that decision has not been the subject of any legal challenge, it has become definitive. However, the fact of having charged

predatory prices and the question of receiving unlawful State aid are two separate issues.

11. On 19 June 2002, the Commission adopted the contested decision in which it examined, among other matters, the financial assistance which the State had provided to Deutsche Post AG. The Commission decided that the State aid totalling EUR 572 million (DEM 1 118,7 million) granted to Deutsche Post AG was incompatible with the common market. Consequently, it ordered the recovery of the unlawfully granted aid.

12. Following an action for annulment brought by Deutsche Post AG, the General Court upheld the applicant's complaint that the Commission had failed to establish that Deutsche Post AG had benefited from an advantage by means of the transfer payments made by DB-Telekom. Furthermore, after finding that the Commission had infringed Article 87(1) EC, the General Court gave its findings, for the sake of completeness, on the complaint that the Commission was, in any event, wrong to conclude that the transfer payments made by DB-Telekom had enabled Deutsche Post AG to cover the net additional costs generated by its policy of selling below cost. After analysing the facts and figures relating to those net additional costs, the General Court upheld that complaint also.

II — The appeal

13. In support of its appeal, the Commission relies upon the following grounds.

14. The Commission complains that the judgment under appeal infringed Articles 87(1) EC and 86(2) EC. It argues that those provisions were incorrectly interpreted by the General Court in that it was held that they excluded a method, not otherwise criticised in the judgment, which made it possible to conclude, on the basis of logical and relevant reasoning, that State aid had been granted. The Commission further relies on the lack of jurisdiction of the General Court and infringement of Article 230 EC, since the Court exceeded the limits of its jurisdiction and power of review under Article 230 EC. It also relies upon infringement of Article 36 of the Statute of the Court of Justice, on the ground that the General Court failed to state reasons for its decision that the method used in the contested decision was improper.

15. Moreover, by letter received by the Court of Justice on 9 December 2008, Bundesverband Internationaler Express- und Kurierdienste eV ('BIEK') lodged a response in support of the appellant. By letter dated 4 December 2008, UPS Deutschland Inc. and UPS Europe NV ('UPS') lodged a joint response and a cross-appeal.

16. Having regard to the central issue, namely the method which the Commission was entitled to use in the present case, it suggests that the Court examine all the grounds of appeal together.

17. However, it seems to me appropriate to deal with the grounds of appeal separately, according to whether they address the main reasoning in the judgment under appeal or the reasons given therein for the sake of completeness.

III — Preliminary observations on the scope of judicial review of the Commission's acts in matters of State aid

18. First of all, it must be recalled that the concept of State aid, as defined in the Treaty, must be interpreted on the basis of objective factors. For that reason, the Community Courts 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 87(1) EC. [5]

19. As Advocate General Cosmas emphasised in his Opinion in the case which gave rise to the judgment in *France* v *Ladbroke Racing and Commission*, [6] when the Court of Justice, the General Court and national courts are called on to consider whether or not it is correct to classify a national measure as State aid for the purpose of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC), they must carry out – as a matter of principle and to the fullest possible extent – a comprehensive review of the substance. That rule is reversed only where the Court establishes that there are particular circumstances which prevent an extensive judicial review from being carried out. In Advocate General Cosmas's view, it cannot be maintained that such special circumstances, restricting the opportunity for judicial intervention in the substance of the case, are automatically present whenever the interpretation and application of Article 92(1) of the EC Treaty are at issue.

20. It follows that, in the context of the judicial review of measures pursuant to Article 87(1) EC, comprehensive review is the rule and limited review is the exception. [7]

5 — See, to that effect, Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25, and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777 ('*Chronopost II*'), paragraph 141.

6 — See point 15 of the Opinion.

7 — The situation is different from that which applies to the application of Article 87(3) EC, that is to say, where the Commission is called upon to rule on the compatibility of a measure constituting State aid. See Joined Cases C-75/05 P and C-80/05 P *Germany* v *Kronofrance* [2008] ECR I-6619, paragraph 59 and the case-law cited.

21. Second, since a complex economic appraisal is involved, it follows from the case-law that, in reviewing an act of the Commission which has necessitated such an appraisal, the Court must confine itself to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment or misuse of powers. [8]

22. Nevertheless, it is important to bear in mind that, whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. [9]

23. Indeed, according to the case-law of the Court, not only must the Community judicature establish whether the evidence relied on is factually accurate, reliable and consistent, but also review whether that evidence contains all the information which must be taken into account in order to appraise a complex situation and whether it is capable of substantiating the conclusions drawn from it. [10] In my opinion, that evidence also includes the methods applied.

24. Nevertheless, it is settled case-law that, in the context of such a review, the Community Courts must not substitute their own economic assessment for that of the Commission. [11]

25. It is therefore in the light of those principles that the grounds raised in the present appeal must be considered.

8 — See *Chronopost II*, paragraph 143.

9 — In the area of concentrations, see Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 39, and Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraph 56. See von Danwitz, T., *Europäisches Verwaltungsrecht*, Springer, Berlin, 2008, p. 361. According to that author, unlike German law, European Union law makes no distinction, as a rule, between, on the one hand, discretion regarding the assessment of the facts ('Beurteilungsspielraum auf Tatbestandsseite') and, on the other, discretion regarding their legal consequences ('Ermessen auf Rechtsfolgenseite').

10 — See, to that effect, Case 98/78 *Racke* [1979] ECR 69, paragraph 5; Case C-16/90 *Nölle* [1991] ECR I-5163, paragraph 12; *Commission* v *Tetra Laval*, paragraph 39; and Case C-326/05 P *Industrias Químicas del Vallés* v *Commission* [2007] ECR I-6557, paragraph 76.

11 — Order in Case C-323/00 P *DSG* v *Commission* [2002] ECR I-3919, paragraph 43, and *Spain* v *Lenzing*, paragraph 57.

IV — The first ground of appeal in the main appeal

A — *The first limb of the first ground of appeal*

1. Arguments of the parties

26. By the first limb of its first ground of appeal, the Commission, supported by BIEK and UPS, argues that the General Court erred in law in that the judgment under appeal fails to point to any deficiency in the method used in the contested decision.

27. According to the Commission, the contested decision was not based on any mere 'belief'. On the contrary, it was a well-founded conclusion, that is to say that the conclusion drawn in the contested decision was based on facts ascertained by logical reasoning. It was, the Commission submits, a process of deduction, enabling it to draw from facts A and B a conclusion C, such as forms an integral part of every decision of this type that it adopts. To illustrate its reasoning the Commission puts forward an example: if it can be proven that a train has left station A on a single track and arrives, as expected, at station B, then it can be deduced that it has passed through station C which lies on that single track between station A and station B.

28. The Commission complains that the General Court regarded that deduction as a 'belief' and that it annulled the contested decision without mentioning any possible errors in the act in question. The Commission's factual deduction, however, rests on the premiss that 'money must after all come from somewhere'.

29. In this connection, the Commission emphasises that, since it is established, first, that the parcel service was a loss-making operation and, second, that the undertaking providing that parcel delivery service was not making any other profits which it might have imputed to the parcel service, the only conclusion that can be drawn is that the predatory pricing policy practised by Deutsche Post AG was financed by the State aid that it received.

30. In response to the Commission's arguments, Deutsche Post AG contends that the General Court was not obliged to state the reasons for which the method chosen by the Commission was wrong, since the concept of State aid is an objective one. Indeed, Deutsche Post AG maintains that, in the context of the application of Article 87(1) EC, the Commission has no discretion in

determining whether or not a measure constitutes State aid.

2. Legal assessment

31. According to the German Government, which has intervened in support of Deutsche Post AG, this is not simply a dispute about which method should be used to reach the same result. The method used by the Commission differs in terms of its result from the alternative method, which allows a direct assessment, that is to say, without any supposedly necessary deduction, of whether or not there is an advantage for the purposes of Article 87(1) EC.

(a) The treatment of financial compensation in the context of a service of general economic interest

34. In so far as concerns establishing the legal nature of financial compensation, two views have vied for a number of years in the case-law: the 'State aid' approach and the 'compensatory' approach. [13]

32. Referring to the judgment in *Altmark Trans and Regierungspräsidium Magdeburg* [12] ('*Altmark*'), the German Government points out that, first, the net additional costs generated by the public interest obligations imposed on the postal services must be calculated in the light of certain parameters and that, second, they must be compared to the resources transferred by way of compensation.

35. According to the State aid approach, any public funding of a public service obligation constitutes State aid for the purposes of Article 87(1) EC.

33. Lastly, according to the German Government, this is not a case involving the assessment of complex economic relations.

12 — Case C-280/00 [2003] ECR I-7747.

13 — Nettesheim, M., 'Europäische Beihilfeaufsicht und mitgliedstaatliche Daseinsvorsorge', *Europäisches Wirtschafts- und Steuerrecht*, 2002, Vol. 6, p. 253. The author distinguishes between a method used for the examination of the elements which comprise the concept of State aid ('Tatbestandslösung') in the context of which compensation is not regarded as State aid for the purposes of Article 87(1) EC and two other methods, in the context of which any compensation from the State is, conceptually speaking, regarded as aid, whose compatibility may be founded on Article 86 EC ('Spezialitätslösung') or Article 87 EC ('Rechtfertigungslösung'). See also Quigley, C., *European State Aid Law and Policy*, Hart, Oxford, 2009, p. 158 et seq. See also the Opinion of Advocate General Jacobs in Case C-126/01 *GEMO* [2003] ECR I-13769, points 94 and 95.

36. Such funding may, nevertheless, be held compatible with the common market, once it has been examined by the Commission, which may rely on both Article 87(2) and(3) EC and on the provision in Article 86(2) EC. This approach is illustrated, inter alia, by the judgments of the General Court in *FFSA and Others* v *Commission* [14] and *SIC* v *Commission*. [15] After finding that financial compensation in the form of a tax concession constituted State aid, the General Court held, in *FFSA and Others* v *Commission*, that the grant of State aid may, under Article 86(2) EC, escape the prohibition laid down in Article 87 EC provided that the sole purpose of the aid in question is to offset the additional costs incurred in performing the particular task assigned to the undertaking entrusted with the operation of a service of general economic interest and that the grant of the aid is necessary in order for that undertaking to be able to perform its public service obligations under conditions of economic equilibrium. [16]

37. According to the compensatory approach, which originated in the judgments in *ADBHU* [17] and especially *Ferring*, [18] compensation for public service obligations does not constitute State aid.

38. Only where the compensation exceeds the additional costs generated by the public service mission does it constitute State aid. In *ADBHU*, Advocate General Lenz took the view that, since the indemnities did not exceed annual uncovered costs actually recorded by the undertakings, taking into account a reasonable profit, there could be no question of an advantage for the purposes of the Treaty. [19] The Court followed the Advocate General, emphasising that 'the indemnities do not constitute aid within the meaning of Article 92 … of the [EC] Treaty [now, after amendment, Article 87 EC], but rather consideration for the services performed by the collection or disposal undertakings'. [20]

39. As Advocate General Tizzano observed in *Ferring*, if the State imposes certain public service obligations on an undertaking, then covering the additional costs arising from the performance of those obligations confers no advantage on the undertaking in question, but serves to ensure that it is not unjustly disadvantaged vis-à-vis its competitors. [21]

40. Accordingly, normal conditions of competition will only be altered, according to Advocate General Tizzano, where any compensation exceeds the additional net costs attributable to the performance of public

14 — Case T-106/95 [1997] ECR II-229.

15 — Case T-46/97 [2000] ECR II-2125, paragraph 82. The judgment of the Court of Justice in Case C-387/92 *Banco Exterior de España* [1994] ECR I-877 also follows this approach. See the Opinion of Advocate General Jacobs in *GEMO*, point 99.

16 — Paragraph 178.

17 — Case 240/83 [1985] ECR 531.

18 — Case C-53/00 [2001] ECR I-9067.

19 — See the Opinion of 22 November 1984.

20 — *ADBHU*, paragraph 18.

21 — See point 61 of the Opinion.

service obligations. [22] Where State funding is limited to compensating for an objective disadvantage imposed by the State on the recipient, there is no economic advantage capable of distorting competition. [23]

41. The compensatory approach followed by the Court in its judgment in *Ferring* was criticised by Advocate General Léger in his Opinion in *Altmark*. [24] According to the Advocate General, the compensatory approach tends to overturn the derogating provisions on State aid, in that it amounts to examining the compatibility of the aid within the framework of Article 87(1) EC. [25]

42. Nevertheless, the Court held in its judgment in *Altmark* that, where public subsidies granted to undertakings expressly required to discharge public service obligations in order to compensate for the costs incurred in discharging those obligations comply with the four conditions set out in the judgment, those subsidies are not caught by Article 87(1) EC. According to the Court, compensation for performing public service obligations does not constitute an advantage provided that it does not 'have the effect of putting [the undertakings in question] in a more favourable competitive position than the undertakings competing with them'. Conversely, State measures which fail to satisfy one or more of the said conditions must be regarded as State aid for the purposes of that provision. [26]

43. Lastly, in his Opinion in *GEMO*, Advocate General Jacobs proposed the application of an analysis of State financing of services of general interest based, first, on the nature of the link between the financing granted and the

22 — *Ibidem*, point 62.

23 — *Ibidem*, point 63. In its judgment in *Ferring*, the Court of Justice rejected the General Court's analysis of the concept of 'advantage' in its judgment in *FFSA and Others* v *Commission*.

24 — In his second Opinion, of 14 January 2003, in *Altmark*, Advocate General Léger maintained that the concept of 'advantage' arising from the Treaty is based on a 'gross' theory of aid or the 'apparent' advantage theory. Using that approach, the advantages conferred by the public authorities and what the recipient has to contribute in return must be examined separately. The existence of the contribution is of no relevance for determining whether the State measure constitutes aid for the purposes of Article 87(1) EC. It comes into consideration only at a later stage of the analysis, for assessing whether the aid is compatible with the common market (see points 33 and 34).

25 — The second Opinion in *Altmark*, point 46.

26 — *Altmark*, paragraphs 87 and 94. It might be helpful to recall the criteria laid down in *Altmark*, which are that: (1) the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined; (2) the parameters on the basis of which the compensation is to be calculated must be established in advance in an objective and transparent manner; (3) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations; and (4) where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the means necessary to be able to meet the necessary public service requirements, would have borne in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

general interest duties imposed and, second, on how clearly those duties are defined. [27] Most importantly, he emphasised that the choice between the 'State aid' approach and the compensatory approach is not merely a theoretical matter, but one that has practical consequences as well as important procedural implications. [28]

44. Clearly, for the purposes of the present case, the crucial question remains whether or not the method chosen by the Commission is appropriate to identify a situation where the compensation exceeds what is necessary to offset appropriately the additional costs arising from public interest obligations and thus confers a possible advantage on the recipient undertaking.

45. Notwithstanding, the choice of method is, I think, inextricably linked to the Court's decision as to what constitutes compensation for performing a public service. In my view, the necessity of identifying net additional costs stands in contradiction to the approach advocated by the Commission according to which concrete calculations may be dispensed with and reliance placed on a presumption. The following observations illustrate this.

(b) The difficulties of identifying the costs of a service of general economic interest

46. I would recall that in *SFEI and Others*, the Court of Justice held, in relation to the provision of services of general economic interest, that a finding of the existence of an economic advantage called for the determination of what is normal remuneration for the services in question. Such a determination presupposes an economic analysis taking into account all the factors which an undertaking, acting under normal market conditions, should have taken into consideration when fixing the remuneration for the services provided. There is an advantage where the undertaking receives a benefit under a State measure which it would not have obtained under normal market conditions. [29]

47. The difficulty of identifying the costs was remarked upon by the General Court in its judgment in *FFSA and Others* v *Commission*,

27 — Point 118. See also the Opinion in Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243, in which Advocate General Stix-Hackl expressed doubts as to whether the solution in *Ferring* could be applied where the public service obligations were not clearly defined.

28 — The Opinion in *GEMO*, points 110 to 114.

29 — Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraphs 60 and 61.

where it mentioned the need to introduce an analytical accounts system for undertakings which, whilst entrusted with public service tasks, engage in activities in competitive sectors. [30]

48. In *FFSA and Others* v *Commission*, the possibility of a cross-subsidy taking place was excluded to the extent to which the aid in question remained lower than the additional costs generated by performance of the task to provide a service of general economic interest. Consequently, the method used by the Commission was considered appropriate to satisfy itself, to the requisite legal standard, that the grant of the State aid in question would involve no cross-subsidy contrary to Community law. [31]

49. I note that, in *Chronopost and Others* v *UFEX and Others*, the Court went on to mention the analysis of the available objective and verifiable elements, [32] and held that there could be 'no question of State aid to SFMI-Chronopost if, first, it is established that the price charged properly covers all the additional, variable costs incurred in providing the logistical and commercial assistance, an appropriate contribution to the fixed costs arising from use of the postal network and an adequate return on the capital investment in so far as it is used for SFMI-Chronopost's competitive activity and if, second, there is nothing to suggest that those elements have been underestimated or fixed in an arbitrary fashion.' [33]

50. Moreover, both the compensatory approach adopted in *Ferring* [34] and the requirements relating to compensation set out in the third and fourth conditions stipulated in the judgment in *Altmark* militate in favour of a precise calculation of the costs and a review of their allocation. [35] The case-law subsequent to *Altmark* offers some clarification of the conditions just mentioned. [36]

30 — Paragraph 186. I would observe, in this connection, that the act which applied in that case was Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35).

31 — Order in Case C-174/97 P *FFSA and Others* v *Commission* [1998] ECR I-1303, paragraphs 188 and 189.

32 — Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost and Others* v *UFEX and Others* ('*Chronopost I*') [2003] ECR I-6993. In paragraph 38 of the judgment, the Court held that 'in the absence of any possibility of comparing the situation of La Poste with that of a private group of undertakings not operating in a reserved sector, "normal market conditions", which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements which are available'.

33 — *Ibidem*, paragraph 40.

34 — Paragraph 33.

35 — For the conditions in *Altmark*, see footnote 26.

36 — See *Enirisorse* and Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraph 160, in which the General Court, referring to the spirit and purpose of the conditions stipulated in *Altmark*, held that a flexible approach should be adopted to their application.

51. I would point out that, in its Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, [37] the Commission stated that the amount of compensation must not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit on any own capital necessary for discharging those obligations. The compensation must, it said, be actually used for the operation of the service of general economic interest concerned, without prejudice to the undertaking's ability to enjoy a reasonable profit. [38] It also follows from that decision that the costs to be taken into consideration must comprise all the costs incurred in the operation of the service of general economic interest. [39]

52. In so far as concerns the calculation method to be applied in the present case, it is clear from paragraph 69 of the contested decision that the German Government proposed that the specific burden associated with the discharging of public service obligations should be defined and calculated as the difference between the cost of providing parcel services under normal market conditions and the special cost of providing these services that only Deutsche Post AG incurs on account of its status as a former State administrative body. That proposal refers to an *in concreto* calculation and seems acceptable.

53. Nevertheless, according to certain authors, such an approach could lead to an abuse of the concept of 'net additional costs' within the meaning of the *Ferring* judgment, in that the costs arising from inefficiency on the part of the undertaking concerned might be borne by the Member State. [40]

54. I would point out in this connection that the question of inefficiency, thus posed, forms part of a broader debate on price regulation systems based on the principle of compensation for costs. Indeed, a certain degree of inefficiency is inherent in any system of this type since undertakings will be less motivated to

37 — OJ 2005 L 312, p. 67.

38 — 'The amount of compensation shall include all the advantages granted by the State or through State resources in any form whatsoever. The reasonable profit shall take account of all or some of the productivity gains achieved by the undertakings concerned during an agreed limited period without reducing the level of quality of the services entrusted to the undertaking by the State.' (Article 5 of the decision)

39 — The calculation proposed on the basis of cost accounting principles is set out in the said decision.

40 — See Nettesheim, M., op. cit.; Bartosch, A., 'The "Net Additional Costs" of Discharging Public Service Obligations: The Commission's Deutsche Post Decision of 19 June 2002', *European State Aid Law Quarterly*, Vol. 1, 2002, No 2, p. 189.

minimise costs in respect of which they anticipate compensation. [41]

55. A solution might be found in the introduction of the objective of increased efficiency in the framework of compensation for the costs of services of general economic interest. I note that the interpretation of the fourth condition stipulated in *Altmark* calls for the criterion of efficiency and the optimisation of costs to be taken into account. In my view, that criterion is a logical consequence of maintaining healthy competition in the European Union's market.

(c) The Commission's calculation in the present case

56. It must be observed at the outset that, in the contested decision, the Commission did not actually calculate the costs. Moreover, it justifies its approach on the ground of rationalising the procedure. According to the Commission, where sound internal administrative practice advocates a method which enables it to deal rapidly and efficiently with the objections put forward by complainants, it is not for the General Court to usurp its choice of the method to be applied.

57. In short, the Commission made a finding that State aid was present after taking note of the transfers from DB-Telekom and of the net additional costs generated in the open-to-competition sector of door-to-door parcel delivery services, together with the losses recorded by Deutsche Post AG. Thus, the Commission did not attempt to establish the difference between the sums which Deutsche Post AG received and the costs it actually bore in providing a service of general economic interest in order to identify the net additional costs which would thus constitute an advantage.

58. As regards the detail of the Commission's calculation, I am of the view that the General Court was right to hold that the link between the predatory pricing policy and the transfers from the State was dubious.

59. Indeed, the Commission has in no way proven that the sums in question were allocated to the sector in which losses were made. Whilst it appears from the documents at the Commission's disposal that the former Bundespost feared that the volume of its deliveries would stagnate and that it would lose market share, and felt that its position as market leader was under threat, those

41 — Economic theory speaks of 'allocative efficiency'. See, Netz, J.S., *Price Regulation, a Non Technical Overview*, 1999; see also, Spulber, D.F., *Regulation and Markets*, MIT, 1989, p. 134.

circumstances, in themselves, signally fail to prove that the transfers in issue were utilised to finance the predatory pricing policy.

60. In my view, it cannot be ruled out that Deutsche Post AG could have had recourse to profits in the sectors not open to competition, such as its monopoly in mail delivery, in order to finance that discount policy, which, moreover, was penalised by the Commission. Nor is there anything to show that it was unable to increase its debt.

61. Moreover, Deutsche Post AG argues in its written submissions that it was entitled to the reimbursement of the net costs of a service of general economic interest over the period from 1990 to 1994, regardless of whether it made profits or losses in the years subsequent to 1994. It also indicates that it had already used up the resources made available to it by transfers from the State by 1 January 1995, so that it was completely unable to cover the losses which it sustained from 1995 to 1998 using that compensation.

62. In this respect, the deficiencies of the method which the Commission applied are particularly striking. It should, in fact, have given a timescale to its calculation, by defining the period in respect of which it analysed the allocation of the compensation. Ideally, it would have been appropriate to make a distinct calculation relating to the profitability of a given aspect of the activities reported in the undertaking's balance sheet.

63. The method chosen by the Commission fails to explain, against the background of Deutsche Post AG's situation, which was characterised by the twin aspects of, on the one hand, net additional costs generated by a service of general economic interest and, on the other, a deficit arising from a predatory pricing policy, the reasons for presuming that the State resources in question financed that deficit, despite the fact that their being classed as aid is dependent on their being allocated to the said service of general economic interest and their correlation with the costs of that service.

64. Moreover, despite Deutsche Post AG's overall losses which the Commission ascribes to the years covered by its method of calculation, Deutsche Post AG undeniably generated income, albeit that it was less than its expenditure.

65. As the German Government emphasises, expenditure includes both the net additional costs justified by the public interest obligations imposed on the postal services and, as such, eligible for compensation by the State, and other costs ineligible for compensation.

66. So, applied to other costs incurred by Deutsche Post AG, the Commission's theory that the predatory pricing policy was necessarily financed by transfers from the State is paradoxical. As the German Government has pointed out, following that reasoning, no expenditure could be covered by Deutsche Post AG's own income, given that it suffered losses during the period in question. Thus all expenditure would have had to be financed by public resources.

67. Moreover, as Deutsche Post AG argues in its written submissions, the Commission has failed to take into account the fact that economic realities are such that, where losses in a given year cannot be offset by own resources, they are recorded as losses carried forward to the following year's balance sheet. Consequently, the Commission was not entitled to find that the losses from the door-to-door parcel delivery service were 'inevitably' financed by the transfers from DB-Telekom. [42]

68. Similarly, I share the General Court's view that the Commission's approach as regards Deutsche Post AG's burdens of the past is wanting. Given the breadth of Deutsche Post AG's activities, and in particular its role as an undertaking entrusted with the performance of a service of general economic interest, the impact of those burdens of the past cannot automatically be dismissed. Yet, as is clear from paragraph 84 of the judgment under appeal, despite the information provided by the German Government, the Commission failed to draw any conclusions in this regard.

69. Lastly, in so far as concerns the indisputable difficulties by which the Commission may be confronted in reviewing the financing of a service of general economic interest, I would observe that there is a difference between difficulties relating to economic data and its assessment, on the one hand, and difficulties of an administrative nature, on the other.

70. Regarding difficulties relating to economic data, it is conceivable that, in certain circumstances, the Member State concerned cannot provide the Commission with precise information concerning, for example, the internal allocation of general costs or the appropriate rate of return on capital investment where capital is allocated to various different activities. Where this is so, I take the view that a presumption based on experience or common sense is permissible.

42 — Thus, in my view, the Commission's example of a single-track railway is irrelevant, in that the system of financing of an undertaking is not a closed system but an open one fed by various sources of financing, including debt.

71. Regarding difficulties of an administrative nature, as the General Court held in paragraph 75 of the judgment under appeal, the Commission has power to order the Member State to provide it with all the documentation, information and data necessary for the purpose of assessing the compatibility of aid with the common market. [43] It is only if the Member State, notwithstanding the Commission's order, fails to provide the information requested that the Commission is empowered to terminate the procedure and make its decision, on the basis of the information available to it, on the question whether or not the aid is compatible with the common market. [44]

72. Consequently, in the absence of such an order, the Commission is not entitled to terminate the procedure and adopt its decision on the basis of the information available to it.

(d) The reasoning of the General Court

73. In response to the complaint that the Commission did not establish that Deutsche Post AG enjoyed an advantage, the General Court recalled, in paragraph 78 of the judgment under appeal, the various stages of the Commission's reasoning, as set out in the contested decision. The General Court also recalled, in that same paragraph, the position expressed by the Commission at the hearing. [45]

74. Contrary to the Commission's submissions in its appeal, I am of the view that, as regards the reasoning which led the General Court to find, in paragraph 88 of the judgment under appeal, that the Commission had not shown the existence of an advantage, the General Court did not substitute its own method of calculation. Rather, it pointed out deficiencies relating to the question of the extent of the burden of proof borne by the Commission in its examination of State aid.

75. The General Court looked into how the Commission proceeded in this case and found that it had abstained from checking whether the amount of the transfers from DB-Telekom exceeded the amount of the additional net costs incurred by Deutsche Post AG.

43 — Case C-301/87 *France* v *Commission* [1990] ECR I-307 ('*Boussac*'), paragraphs 19 and 20. As the General Court stated in paragraph 75 of the judgment under appeal, these criteria have been incorporated into Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

44 — See *Boussac*, paragraph 22, and Case T-366/00 *Scott* v *Commission* [2007] ECR II-797, paragraph 144.

45 — Its position was that, since the applicant had not provided evidence to show that it covered the alleged net additional costs generated by its policy of selling below cost through resources other than the transfer payments made by DB-Telekom, it was entitled to assume that Deutsche Post AG had received State aid amounting to DEM 1 118,7 million.

76. In accordance with Article 36 of the Statute of the Court of Justice, [46] the General Court therefore set out the reasons for which it found that the Commission's decision was vitiated by inadequacies and inaccuracies.

77. Moreover, in so far as concerns the extent of the General Court's review, it is important to state, in the light of the case-law mentioned in points 18 to 24 of the present Opinion, that the General Court was right to recall, in paragraph 90 of the judgment under appeal, that characterising a measure as State aid cannot, in principle and save for particular circumstances owing to the complex nature of the State intervention in question, justify the attribution to the Commission of a broad discretion.

78. In paragraph 91 of the judgment under appeal, the General Court thus rightly found that, whilst the case-law allows the Commission a certain discretion in deciding on the most appropriate method for making sure that competitive activities do not receive any cross-subsidy, the fact remains that, according to the *Altmark* judgment, the Commission was not entitled to classify as State aid State resources granted as compensation for additional costs associated with the provision of a service of general economic interest.

79. It is thus clear from the first sentence of paragraph 91 of the judgment under appeal that the General Court's criticism relates to the Commission's legal classification of the measure, not to its analysis of the facts.

80. There was thus no need for the General Court to make a finding on the extent of the Commission's discretion and, consequently, the scope of the European Union Court's review of the factual findings in question. On the other hand, without expressly ruling on the question whether or not there were, in the present case, complex economic assessments, it criticised the Commission, in the second sentence of paragraph 91 of the judgment under appeal, for having relied upon a presumption when it came to establishing the existence of an advantage for the purposes of Article 87(1) EC.

81. The General Court's reasoning thus remained within the limits of its powers of judicial review when reviewing legality.

82. Consequently, having regard to all the foregoing points, I consider that the General Court in no way infringed the provisions of Articles 87(1) EC, 86(2) EC and 230 EC. The

46 — The statute applies to the General Court pursuant to Article 53 of the Statute of the Court of Justice of the European Union.

question of infringement of Article 36 of the Statute of the Court of Justice no longer arises. I therefore propose that the Court reject that ground of appeal as unfounded.

B — *The second limb of the first ground of appeal*

1. Arguments of the parties

83. In the context of the second limb of the first ground of appeal, the Commission, supported by UPS, argues that the General Court was wrong to complain that the Commission had not examined all the evidence. It thus takes issue with paragraphs 78, 85, 86, 87 and 88 of the judgment under appeal.

84. The Commission addresses, in this context, the question of the burden of proof. It argues that it was for the applicant at first instance, in the proceedings before the General Court, to prove the unlawfulness of the method which it had used and that it was not itself obliged to establish that the method accepted by the Court was 'impossible'.

2. Legal assessment

85. By this limb of the first ground of appeal, the Commission merely reiterates its argument relating to the validity of the method which it applied in order to reach its finding that the aid was unlawful.

86. Consequently, having regard to the answer proposed to the first limb of the first ground of appeal, I consider that the Commission's argument can be rejected at the outset.

87. Nevertheless, the claims which the Commission formulates in the context of the second limb of its first ground of appeal call for the following observations on my part.

88. First of all, I would recall that, according to a general legal principle, it is for a person seeking to assert a right in legal proceedings to prove the facts on which he bases his claim, a rule often expressed by the well-known Latin adage '*ei incumbit probatio qui dicit, non qui negat*'. [47]

47 — Opinion of Advocate General Tizzano in Case C-526/04 *Laboratoires Boiron* [2006] ECR I-7529, point 68. For express recognition of the validity of this principle also in the context of Community litigation, see Case T-117/89 *Sens* v *Commission* [1990] ECR II-185, paragraph 20. See also Case 3/86 *Commission* v *Italy* [1988] ECR 3369, paragraph 13, and Case 290/87 *Commission* v *Netherlands* [1989] ECR 3083, paragraphs 11 and 20.

89. Consequently, the General Court correctly applied the rules governing the burden of proof by finding that it was for the Commission to prove that the measures in question constituted unlawful State aid.

C — *The third limb of the first ground of appeal*

1. Arguments of the parties

90. Besides, I would point out that the General Court found, in the light of the content of the Court file, that the Commission had abstained from checking whether the total amount of the transfer payments from DB-Telekom was less than the total amount of the net additional costs generated by a service of general economic interest.

91. In so doing, it undertook an assessment of the facts which led it to find that the existence of unlawful State aid remained unproven. Such an assessment does not, unless it distorted the clear sense of the evidence submitted to it, constitute a question of law which is subject, as such, to review by the Court of Justice. [48]

92. Given that the Commission has not pleaded any distortion of the evidence, I propose that the Court reject the second limb of the first ground of appeal as unfounded.

93. After submitting that the General Court's reasoning in the judgment under appeal was wrong in that it failed to explain in what way the contested decision was defective, the Commission goes on to allege that the reasoning was based neither on the complaints put forward nor on the contested decision. The General Court's examination was, it says, vitiated by methodological error, as is illustrated by the fact that it based its reasoning on an assertion made by the Commission's agent at the hearing. It argues that the use of the word 'consequently' at the beginning of paragraph 79 of the judgment under appeal demonstrates that the General Court attached decisive importance to that assertion.

94. Moreover, the Commission, supported by BIEK and UPS, submits, first, that the General Court made findings that were inconsistent with the content of the file. According to the Commission, 'contrary to the statement made by the General Court in paragraph 82 of the judgment under appeal, the Decision clearly stated that "the information made available to it by the Federal Republic of Germany, according to which the door-to-door parcel delivery sector constituted a service of general economic interest, was not valid"'. The Commission emphasises that it had noted, in paragraph 76 of the contested decision,

48 — See, in particular, Joined Cases C-186/02 P and C-188/02 P *Ramondín and Others* v *Commission* [2004] ECR I-10653, paragraph 46.

that the door-to-door parcel delivery services were not covered by a duty to deliver or, consequently, by the public service mission.

95. The Commission submits, second, that the reasoning followed by the General Court in the second part of paragraph 82 of the judgment under appeal is wrong, in that it held that the Commission had acknowledged, at least implicitly, that Deutsche Post AG had also recorded, apart from the net additional costs generated by its policy of selling below cost, net additional costs that were associated with the provision of a service of general economic interest.

2. Legal assessment

96. In so far as concerns the Commission's first allegation, that, at the end of paragraph 78 of the judgment under appeal, the General Court attached decisive importance to the position maintained at the hearing by an agent of the Commission, it is sufficient to state that that position was identified by the General Court in order to confirm the statement of reasons given in the contested decision, which was set out at the beginning of that same paragraph of the judgment under appeal. In any event, the Commission has not claimed that that assertion was wrong.

97. By the third limb of the first ground of appeal, the Commission complains, in particular, that the General Court distorted the clear sense of the evidence in the Court file in the action for annulment, which constitutes a question of law which is subject, as such, to review by the Court of Justice. It is therefore necessary to consider that question.

98. First of all, to be able to give a ruling on the question whether the General Court distorted the information in the Court file, it is appropriate to compare the text of paragraph 82 of the judgment under appeal with the relevant passage in the contested decision.

99. First, it is clear from the content of the Court file that the door-to-door parcel delivery sector comprised two segments, namely the segment for business customers who do their own pre-sorting or post a minimum quantity of parcels, and the business-to-customer segment.

100. In paragraph 76 of the contested decision, the Commission explains that Article 2(2)(3) of the Postdienst Mandatory Services Ordinance (Postdienst-Pflichtleistungsverordnung) excludes from the universal acceptance obligation parcels in respect of

which special rules are adopted under separate contracts with customers who do their own pre-sorting or customers with cooperation contracts. [49]

101. Whilst it may well be admitted that the Commission thus noted the exclusion from the scope of a service of general economic interest certain services falling within the first segment of the door-to-door parcel delivery sector, I consider that the General Court did no more than observe, in the first part of paragraph 82 of the judgment under appeal, that the Commission made no criticism of the information made available by the German Government. [50]

102. Consequently, contrary to the Commission's submission, the General Court in no way misrepresented the position expressed by the Commission in the contested decision.

103. Second, in so far as concerns the second part of paragraph 82 of the judgment under appeal, the form of words employed by the General Court may admittedly appear imprecise.

104. Notwithstanding, it is obvious from the General Court's reasoning that the finding with which the Commission takes issue is connected with the reference to paragraph 73 of the contested decision, [51] in which the Commission noted that there was a minimum amount of Deutsche Post AG's net additional costs which was in no way linked to the discharge of public service obligations.

105. The General Court was consequently entitled to infer that the Commission had not ruled out the fact that Deutsche Post AG bore net additional costs linked to the provision of a service of general economic interest. In the light of the foregoing considerations, I propose that the Court also reject this limb of the first ground of appeal as unfounded.

49 — Paragraph 76 states: 'According to the official explanatory memorandum to the Postdienst Mandatory Services Ordinance, Article 2(2)(3) effectively excludes from the universal acceptance obligation parcels in respect of which special rules are adopted under separate contracts with specific customers, e.g."self-labellers" or customers with cooperation contracts. According to the explanatory memorandum, such business customers may be excluded from the acceptance obligation because there is effective competition in this sector which renders the acceptance obligation superfluous.'

50 — Paragraph 82 reads: 'Therefore, it must be held, as the Commission moreover confirmed in one of its submissions, that, on the one hand, the Commission did not state in the contested decision that the information made available to it by the Federal Republic of Germany, according to which the door-to-door parcel delivery sector constituted a service of general economic interest, was not valid and that, on the other hand, it acknowledged, at least implicitly, that [Deustche Post AG] had also recorded, apart from the net additional costs generated by its policy of selling below cost, net additional costs that … were associated with the provision of a service of general economic interest ("the uncontested net additional costs").'

51 — The reference appears in paragraph 81 of the judgment under appeal.

V — The second ground of appeal raised by the Commission

1. Arguments of the parties

106. By this ground of appeal, the Commission, supported by BIEK and UPS, complains, in essence, that the General Court substituted its own assessment for that of the Commission by examining matters which the latter had at no time examined itself. According to the Commission, in paragraphs 97 to 109 of the judgment under appeal, the General Court considered information which had not been considered at all in the contested decision and whose accuracy was unconfirmed.

107. The Commission, joined on this point in particular by BIEK, complains that the General Court compared accounting results with the public compensation payments and the repayments. That Court concluded that the predatory prices could not have been financed from public resources, given that the financial compensation in the sum of DEM 11 081 million was less than the sum of the accounting losses, which stood at DEM 4 945 million, and the repayments of DEM 10 104 million.

108. According to the Commission, that reasoning is faulty for a number of reasons.

109. First of all, it submits that the General Court failed to establish that Deutsche Post AG could have survived financially without financial compensation. However, to reach a finding that Deutsche Post AG had been in a position to finance the cost of its predatory prices from its own resources without injections of public funds such proof would have been indispensable.

110. Next, the General Court's analysis of the financial accounting was not such as to enable it to answer that question. Indeed, according to the Commission, in order to establish how the predatory prices were financed, it would be necessary to examine, first of all, the level of available resources. The question is not, therefore, whether the compensation payments were greater or less than the accounting losses, but whether the compensation payments provided Deutsche Post AG with sufficient liquid assets to generate a cash flow that would enable it to finance its predatory pricing policy.

111. Moreover, after stating that the cash-flow analysis ought to have extended beyond 1995, the Commission argues that the General Court appears to have added the repayments to the costs, which increased the accounting losses. However, those repayments, it submits, cannot be considered as ordinary costs

since they served a double purpose by replacing both taxes and dividends. [52]

112. Lastly, the Commission points to the necessity of recording income and expenditure on a same year basis so as to be able to compare profits and cash flow over a number of years.

2. Legal assessment

113. In the context of the second ground of appeal, which, given its subject-matter, must be treated as a separate ground, the Commission criticises the reasoning which the General Court set out for the sake of completeness, in so far as it examined the question whether the transfer payments made by DB-Telekom had allowed Deutsche Post AG, in view of the losses which it had recorded in the years 1990 to 1995, to cover the alleged additional costs generated by its policy of selling below cost between 1994 and 1999.

114. I would point out in this connection that a ground of appeal directed against a ground stated in a judgment merely for the sake of completeness must be regarded as nugatory since it cannot lead to the quashing of the judgment. [53] Grounds of appeal challenging supplementary grounds in a judgment that are not the essential basis of the decision must also be rejected. [54]

115. Nevertheless, in the event that the Court of Justice finds that it is not beyond doubt that this part of the grounds of the General Court's judgment was stated merely for the sake of completeness, notwithstanding the statement to that effect in paragraph 97 of the judgment under appeal, I would set out the following alternative reasoning.

116. The General Court, in this case, overstepped the bounds of its review of the contested decision by employing information of an economic nature contained in the Court file in order to present a calculation of its own.

117. In my view, this type of exercise is not, as a rule, the duty of the Courts of the European Union in the context of disputes as to the legality of a measure. It seems to me that it would create a particularly grave risk if the General Court were to substitute its own assessment for that of the Commission and,

52 — I would observe, in this connection, that the Commission relied upon the alleged existence of a constant deficit during the period in question. However, both taxes due and dividends are normally paid from current year profits.

53 — Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 148, and Case C-443/05 P *Common Market Fertilizers* v *Commission* [2007] ECR I-7209, paragraph 137. See also, as regards the sufficiency of any of the grounds to sustain the operative part of a judgment under appeal, Case C-164/01 P *van den Berg* v *Council and Commission* [2004] ECR I-10225, paragraph 60; the order in Case C-552/03 P *Unilever Bestfoods* v *Commission* [2006] ECR I-9091, paragraph 148; and the order of 13 March 2007 in Case C-150/06 P *Arizona Chemical and Others* v *Commission*, paragraph 47.

54 — Case C-326/91 P *de Compte* v *Parliament* [1994] ECR I-2091, paragraphs 107 and 123.

accordingly, wrongly encroached on the discretion enjoyed by the Commission. [55]

118. Consequently, by analysing, in paragraphs 103 to 108 of the judgment under appeal, the financial information relating to the possibility of the transfer payments from DB-Telekom covering the additional costs generated by Deutsche Post AG's policy of selling below cost between 1994 and 1999, the General Court erred in law by substituting its own assessment for that of the Commission.

119. Nevertheless, I consider that the grounds stated up to paragraph 97 of the judgment under appeal constitute an independent, decisive legal basis on which the annulment of the contested decision quite rightly rests.

120. Thus, even if the second ground of appeal is well founded, it is nevertheless incapable of calling into question the judgment under appeal in so far as it annulled the contested decision, since the ground for that annulment was the finding that the Commission had not shown, to the requisite legal standard, that the transfer payments made by DB-Telekom had conferred an advantage, for the purposes of Article 87(1) EC, on Deutsche Post AG. [56]

VI — The grounds of appeal raised by the other parties to the proceedings

A — *The pleadings of the interveners in support of the Commission*

121. In addition to supporting the Commission, both BIEK and UPS submit their own arguments, albeit that they coincide for the most part with the grounds of appeal put forward by the Commission.

122. Those arguments relate essentially to the General Court's alleged infringement of the principles deriving from the judgment in *Altmark*, in that it failed to find that none of the criteria laid down in that case, which would have enabled the compensation

55 — See, on this point, points 89 and 90 of the Opinion of Advocate General Kokott of 17 September 2009 in Case C-441/07 P *Commission* v *Alrosa* (pending before the Court).

56 — See, to that effect, *Commission* v *Tetra-Laval*, paragraph 89.

received on account of the performance of a service of general economic interest to escape the rules on State aid, had been fulfilled. BIEK also complains that the General Court misconstrued the conditions laid down in the judgment in *BUPA and Others* v *Commission*.

123. More particularly, BIEK maintains that the General Court failed to apply the rules governing the burden of proof when, in paragraph 86 of the judgment under appeal, it found that the Commission had failed to check that the amount of the transfer payments made did not exceed the net additional costs arising from the performance of a service of general economic interest.

124. For its part, UPS maintains that the General Court erred in law in holding that the support granted to Deutsche Post AG constituted 'compensation' for a service of general economic interest (paragraph 73 of the judgment under appeal), without, however, checking whether the performance of the service was indeed the performance of a service of general economic interest. UPS also observes that the General Court failed to apply the criteria in *Altmark* when it held that the Commission had failed to show, to the requisite legal standard, that the transfer payments made by DB-Telekom had conferred an advantage on Deutsche Post AG (paragraph 88 of the judgment under appeal).

B — *Legal assessment*

125. First of all, as regards the alleged misapplication of the *Altmark* case-law, I would observe that, in paragraphs 68 to 74 of the judgment under appeal, the General Court correctly noted the applicable case-law relating to the classification as State aid and the case-law relating to the question of compensation designed to finance public service obligations. In particular, it cited the conditions laid down in the judgment in *Altmark*.

126. However, it is important to note that the General Court's analysis related to the legality of the contested decision.

127. It in fact pointed out, in paragraph 94 of the judgment under appeal, that the Commission had confined itself to findings, in the contested decision, that the net additional costs generated by Deutsche Post AG's

policy of selling below cost could not be the subject of compensation. On the other hand, the Commission had not checked or established that Deutsche Post AG had recorded other net additional costs associated with the provision of a service of general economic interest for which, in the conditions laid down in *Altmark*, the company had the right to claim compensation by means of the total amount of the transfer payments made by DB-Telekom.

128. Consequently, the General Court rightly held, in paragraph 95 of the judgment under appeal, that, in so far as the Commission had carried out no examination or assessment in that respect, it was not for the European Union Court to replace the Commission by carrying out in its stead an examination which the Commission never carried out and substituting the conclusions at which the Commission would then have arrived.

129. Lastly, in so far as concerns the issue of infringement of the rules governing the burden of proof and the General Court's failure to determine the nature of the services provided by Deutsche Post AG, those grounds of appeal are covered by the second and third limbs of the first ground of appeal put forward by the Commission. There is thus no further need to examine them.

VII — Final remarks

130. In my view, the application of the compensatory approach in the context of the financing of a public service of general interest, as adopted in the case-law of the Court of Justice, excludes the use of any method which dispenses with a calculation enabling the identification of the costs of that service and their comparison with the sums paid by way of compensation. However, should the Court opt for one or other variant of the so-called 'State aid' approach, it cannot be ruled out that the aid in question might be found to be incompatible with the internal market, having regard to the anti-competitive conduct of the recipient undertaking. Nevertheless, I consider that the compensatory approach is now well established in the case-law and that, following the judgment in *Altmark*, it is more justified than those alternatives.

131. Having regard to the foregoing, I propose that the Court dismiss the Commission's appeal and the cross-appeal in its entirety, and order the Commission to pay the costs.

VIII — Conclusion

132. In conclusion, I propose that the Court should:

— dismiss the appeal of the European Commission and the cross-appeal in its entirety;

— order the European Commission to pay the costs.