

JUDGMENT OF THE COURT (First Chamber)

2 September 2010*

In Case C-399/08 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 15 September 2008,

European Commission, represented by V. Kreuschitz, J. Flett and B. Martenczuk, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

Deutsche Post AG, established in Bonn (Germany), represented by J. Sedemund, Rechtsanwalt,

applicant at first instance,

* Language of the case: German.

Bundesverband Internationaler Express- und Kurierdienste eV, established in Frankfurt am Main (Germany), represented by R. Wojtek, Rechtsanwalt,

UPS Europe SA, established in Brussels (Belgium), represented by E. Henny, advocaat,

Federal Republic of Germany, represented by M. Lumma and B. Klein, acting as Agents, with an address for service in Luxembourg,

interveners at first instance,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet, M. Ilešič, M. Safjan and M. Berger, Judges,

Advocate General: N. Jääskinen,
Registrar: R. Grass,

after hearing the Opinion of the Advocate General at the sitting on 24 March 2010,

gives the following

Judgment

- 1 By its appeal, the Commission of the European Communities seeks to have 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 (OJ 2002 L 247, p. 27; ‘the contested decision’).

Legal context

- 2 As is apparent from the national legal framework as described in the judgment under appeal, by virtue of Article 1(2) of the Postverfassungsgesetz (Postal Organisation Act) of 8 June 1989 (BGBl. 1989 I, p. 1026; ‘the PostVerfG’) the Deutsche Bundes-

post (German postal administration) was divided into three distinct legal entities, namely Deutsche Bundespost Postdienst ('DB Postdienst'), Deutsche Bundespost Telekom ('DB Telekom') and Deutsche Bundespost Postbank. Since Article 65(2) of the PostVerfG provided that those entities were to maintain the services that the Deutsche Bundespost was supplying, DB Postdienst took over the activities of the Deutsche Bundespost in the postal sector.

- 3 In accordance with Article 37(3) of the PostVerfG, those three legal entities had to pay financial compensation to each other where one of them was unable to cover its expenditure out of its own revenue. Further, under Article 63(1) of the PostVerfG, the Deutsche Bundespost, notwithstanding its break-up, remained liable, until 1995, to transfer a percentage of its operating income back to the State.

- 4 Under Article 1(1) of the Postdienst-Pflichtleistungsverordnung (Postdienst Mandatory Services Ordinance) of 12 January 1994 (BGBl. 1994 I, p. 86; 'the PPfLV'), DB Postdienst had to provide its 'mandatory services' throughout Germany in accordance with the principle of tariff uniformity. As regards, more specifically, the conveyance of parcels, Article 2(1) of the PPfLV provided that DB Postdienst had to guarantee the collection, transport and delivery throughout Germany of parcels weighing up to 20 kilograms and not exceeding certain maximum dimensions. In addition, Article 2(2)(3) of the PPfLV authorised DB Postdienst to set a tariff below the uniform tariff for customers who carried out certain sorting operations themselves or posted a minimum quantity of parcels.

- 5 In accordance with Articles 1 and 2 of the Postumwandlungsgesetz (Postal Reorganisation Act) of 14 September 1994 (BGBl. 1994 I, p. 2339), the three legal entities resulting from the break-up of the Deutsche Bundespost were, as from 1 January

1995, converted into public limited companies ('Aktiengesellschaft' (AG)), namely Deutsche Post AG ('DPAG'), Deutsche Telekom AG and Deutsche Postbank AG.

- 6 Finally, under Article 4(1) of the Postgesetz (Postal Law) of 22 December 1997 (BGBl. 1997 I, p. 3294), the conveyance of parcels weighing up to 20 kilograms constituted a universal service.

Background to the dispute and the contested decision

- 7 DPAG operates both in the mail delivery sector, in which, at the time of the facts, it enjoyed a monopoly, and in two other postal sectors, namely parcel delivery and delivery of newspapers and periodicals, both of which sectors being, by contrast, open to competition.
- 8 In the parcel delivery sector, DPAG provides, among others, services relating to the delivery of large quantities of parcels not handled directly at post office counters ('the door-to-door parcel delivery sector'). That sector can itself be subdivided into two main segments, namely, first, door-to-door parcel deliveries for business customers who do their own pre-sorting or post a minimum quantity of parcels and, second, parcel deliveries for mail-order businesses for goods ordered by catalogue or electronically.

- 9 In 1994, the private parcel delivery undertaking, UPS Europe SA ('UPS'), and Bundesverband Internationaler Express- und Kurierdienste eV ('BIEK') lodged a complaint before the Commission. In essence, UPS and BIEK accused DB Postdienst, first, of applying a policy of selling below cost in the door-to-door parcel delivery sector, which constituted an abuse of a dominant position within the meaning of Article 82 EC, and, second, of covering its losses in that sector either through income generated in the reserved sector or through public resources granted to it in breach of Article 87 EC.
- 10 On 20 March 2001, the Commission adopted Decision 2001/354/EC relating to a proceeding under Article 82 of the EC Treaty (Case COMP/35.141 – Deutsche Post AG) (OJ 2001 L 125, p. 27), by which it decided, in essence, that DB Postdienst, and later DPAG, had infringed Article 82 EC since it had abused its dominant position only in the market segment of parcel deliveries for mail-order businesses for goods ordered by catalogue or electronically, in particular by practising, from 1990 to 1995, a policy of selling below cost at prices lower than the actual costs connected to the type of service concerned.
- 11 On 19 June 2002, the Commission adopted the contested decision, by which it decided that the amount of the transfers made – pursuant to Article 37(3) of the PostVerfG – by DB Telekom then by Deutsche Telekom AG in favour of DB Postdienst then of DPAG as compensation for the provision of services of general economic interest ('SGEI') was greater than that necessary to compensate for the net additional costs caused to the latter two undertakings by their provision of those services. The Commission inferred therefrom that the amount corresponding to such overcompensation had been used to make good losses in the segments of the door-to-door parcel delivery sector open to competition. According to the contested decision, those losses amounted to a total of DEM 1 118,7 million and were the result of DB Postdienst's policy of selling below cost, then that of DPAG during the period from 1994 to 1999, as established by Decision 2001/354.

- ¹² The Commission therefore concluded that such overcompensation constituted State aid incompatible with the EC Treaty and ordered the Federal Republic of Germany to take the necessary steps to recover the aid from DPAG.

Procedure before the General Court and the judgment under appeal

- ¹³ DPAG brought an action for annulment of the contested decision before the General Court, relying, in particular, on breach by the Commission of Articles 87(1) EC and 86(2) EC, in so far as the Commission had not shown that there was any advantage to DPAG.
- ¹⁴ In particular, by its first complaint, DPAG maintained that the Commission had failed in its duty to examine whether the total amount of the transfer payments made by DB Telekom had exceeded the total amount of the net additional costs which DPAG had had to absorb to carry out its tasks in connection with SGEI. In its second complaint, it maintained that, in any event, the Commission had decided, wrongly, that the transfers made by DB Telekom had enabled it to cover the additional costs associated with its policy of selling below cost.
- ¹⁵ As regards the first complaint, the General Court first of all described the method followed by the Commission to reach the conclusion that DPAG had benefited from an advantage.
- ¹⁶ In that regard, the General Court noted, in paragraph 78 of the judgment under appeal, that the Commission had found, first, that DPAG had received, from 1990 to 1995, transfer payments from DB Telekom in the sum of DEM 11 081 million,

which it considered to be the only public resources relevant for the purposes of the contested decision. The Commission had found, second, that DPAG had recorded net additional costs in the sum of DEM 1 118,7 million generated by its policy of selling below cost, pursued from 1994 to 1999 in the door-to-door parcel delivery segments open to competition, and that those additional costs were not associated with the provision of an SGEI. The Commission had found, third, that, from 1990 to 1998, taking into account all sectors of activity, DPAG had recorded an overall deficit of DEM 2 289 million, so that it had not been able to cover those net additional costs through its own resources. From those three findings and since DPAG had adduced no evidence that it covered the net additional costs in question by means of resources other than the transfer payments made by DB Telekom, the Commission deduced that DPAG had necessarily covered those additional costs by those transfer payments, so that it had benefited from State aid in a corresponding sum.

- ¹⁷ Next, in order to analyse whether such a method was correct, the General Court observed, in paragraphs 80 to 82 of the judgment under appeal, that the Commission, without examining the information provided in that regard by the Federal Republic of Germany, had not taken a view on whether the door-to-door parcel delivery sector constituted an SGEI, but had acknowledged, at least implicitly, that DPAG 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 an SGEI.

- ¹⁸ The General Court also held, in paragraph 84 of the judgment under appeal, that, according to the contested decision, the Federal Republic of Germany had provided the Commission with information concerning the burdens associated with the tasks in respect of SGEI assigned to DPAG, which amounted to a sum of DEM 20 426 million, that is an amount much higher than that of DEM 11 081 million corresponding to the transfer payments made by DB Telekom to DPAG.

- 19 Finally, the General Court pointed out, in paragraph 85 of the judgment under appeal, that the Commission had failed to check whether the total amount of those transfers was lower than the total amount of DPAG's net additional costs relating to its tasks in respect of SGEI; if it was, those transfers would not have conferred any advantage on DPAG.
- 20 Consequently, in paragraph 88 of the judgment under appeal, the General Court concluded that the Commission had not shown, to the requisite legal standard, that the transfers made by DB Telekom to DPAG had, for the purposes of Article 87(1) EC, enabled the latter to receive an advantage.
- 21 In that regard, in response to the Commission's argument, the General Court stated in paragraph 91 of the judgment under appeal that the Commission's discretion did not extend to the point of entitling it to assume that the transfers made by DB Telekom had conferred an advantage on DPAG without having first examined whether the total amount of those transfers exceeded the total amount of the additional costs associated with the provision of an SGEI, even though the German authorities had provided information to that effect.
- 22 The General Court held, in paragraphs 93 and 94 of the judgment under appeal, that the Commission was required to carry out such a check, even in cases where, as it claimed in this case, the conditions formulated in the judgments in Case C-53/00 *Ferring* [2001] ECR I-9067 and Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747 were not fulfilled. However, the Commission merely found that the net additional costs generated by DPAG's policy of selling below cost could not be the subject of compensation, in view of the fact that they were not associated with the provision of an SGEI, but it did not check whether DPAG had recorded other net additional costs which were associated with the provision of an SGEI for

which DPAG had the right to claim compensation out of the total sum of the transfer payments made by DB Telekom.

- ²³ In the light of those findings, the General Court, in paragraph 96 of the judgment under appeal, upheld DPAG's first complaint.
- ²⁴ The General Court next examined, for the sake of completeness, the second complaint made by DPAG. In particular, in paragraphs 102 to 107 of the judgment under appeal, it examined, on the basis of the information contained in the contested decision and of that provided by the Federal Republic of Germany, whether the transfers made by DB Telekom between 1990 and 1995, in the sum of DEM 11 081 million had enabled DPAG to cover the net additional costs generated by its policy of selling below cost, in the sum of DEM 1 118,7 million. In paragraph 108 of the judgment under appeal, the General Court held that, in view of the losses suffered by DPAG during that same period, which amounted to DEM 16 363 million, such was not the case.
- ²⁵ On that basis, the General Court concluded, in paragraph 109 of the judgment under appeal, that the Commission's reasoning, according to which DPAG had benefited from an advantage of DEM 1 118,7 million, was rendered invalid by the finding that the final losses that DPAG had incurred from 1990 to 1995 were of such an amount that the transfer payments made by DB Telekom to DPAG proved insufficient to cover the net additional costs generated by DPAG's policy of selling below cost from 1994 to 1999.
- ²⁶ Having accepted those two complaints, the General Court annulled the contested decision without considering DPAG's other complaints.

Forms of order sought by the parties

- ²⁷ By its appeal, the Commission is asking the Court to set aside the judgment under appeal in its entirety, then, primarily, to dismiss DPAG's action for annulment or, in the alternative, to refer the case back to the General Court, and to order DPAG to pay the costs.
- ²⁸ BIEK and UPS have lodged a cross-appeal by which they ask the Court to set aside the judgment under appeal in its entirety and order DPAG to pay the costs.
- ²⁹ DPAG asks the Court to dismiss the Commission's appeal in its entirety and to order the Commission to pay the costs of the appeal. In addition, it maintains the claims it made at first instance for annulment of the contested decision and for an order that the Commission pay the costs of the proceedings before the General Court. DPAG also claims that the grounds of appeal raised in the cross-appeals lack any legal basis.
- ³⁰ The Federal Republic of Germany asks the Court to dismiss the appeal and order the Commission to pay the costs.

The main appeal

- ³¹ In support of its appeal, the Commission raises two grounds, the first alleging breach of Articles 87(1) EC and 86(2) EC, in that the General Court held that the

method used to conclude that there was State aid was unlawful, and the second alleging breach of Article 230 EC, on the ground that the General Court exceeded its powers by substituting its own method for calculating the additional costs associated with the provision of SGEI for that employed by the Commission.

The first ground of appeal, alleging breach of Articles 87(1) EC and 86(2) EC

The first limb

– Arguments of the parties

³² The Commission, BIEK and UPS submit that the General Court infringed Articles 87(1) EC and 86(2) EC, since, without explaining the reasons why the method used by the Commission to establish that there was an advantage was not correct, it decided that another method of analysis should have been applied to check whether such an advantage existed in this case.

³³ The Commission submits that the method used in the contested decision was reasonable, since it was based on the premiss that 'the money must come from somewhere, at least in the medium or long term, and that it does not simply grow on trees.' The

conclusion that DPAG's policy of selling at a loss was financed by State aid it received is the more inevitable since, as is clear from the facts, business in the door-to-door parcel delivery sector was carried on at a loss because of an aggressive pricing policy which could not cover the costs of the services provided and since DPAG was not making profits in other activities which it could have allocated to that sector.

³⁴ In those circumstances, it follows 'inevitably' from the uncontested finding that there were losses in the medium and long term in the door-to-door parcel delivery sector and that it had no resources of its own that, for that sector, DPAG depended on financial compensation relating to other areas of the undertaking's activity, which areas received State aid. Consequently, the relationship between the State financing and the policy of selling at a loss was so obvious that, in the Commission's submission, no further proof is necessary.

³⁵ DPAG retorts that the General Court was not obliged to state the reasons why the method chosen by the Commission was not correct, because the concept of State aid is an objective concept. In that regard, the Court of Justice has already held in paragraph 92 of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg* that, in order to escape classification as State aid, compensation for the services provided by the recipient undertakings in order to discharge public service obligations cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of those obligations. However, such a calculation is mandatory and any method which, like that used in this case by the Commission, omits it is necessarily incorrect.

³⁶ In any event, DPAG submits that the method used by the Commission is inappropriate to prove that the alleged deficit in the door-to-door parcel delivery sector was 'inevitably' financed by the transfer payments made by DB Telekom to DPAG. Indeed,

such a method does not 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. Thus, the simple fact that a loss could not be offset against own resources in the year in which it arose does not necessarily mean that they were offset by external resources.

- ³⁷ In the Federal Republic of Germany's submission, the present case does not concern the simple question of the method to be applied here, but relates to the effect of the burden of proof, which rests on the Commission, of the fact that DPAG had obtained an advantage. It submits that the judgment in *Altmark Trans and Regierungspräsidium Magdeburg* requires the calculation of the net additional costs occasioned by the obligations of providing SGEI and comparing them to the resources transferred in respect of compensation for those same obligations. It is only in the light of the result of that comparison that the existence of possible overcompensation can be established.

– Findings of the Court

- ³⁸ First of all, according to settled case-law, the classification as 'aid' within the meaning of Article 87(1) EC requires that all the conditions set out in that provision are fulfilled (Case C-142/87 *Belgium v Commission* [1990] ECR I-959 ('*Tubemeuse*'), paragraph 25; Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste v UFEX and Others* [2008] ECR I-4777, paragraph 125; and Case C-206/06 *Essent Netwerk Noord and Others* [2008] ECR I-5497, paragraph 63).

39 Thus, for a national measure to be classified as State aid, first, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on the recipient; fourth, it must distort or threaten to distort competition (see to that effect, in particular, Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraphs 38 and 39; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 56; and Case C-169/08 *Presidente del Consiglio dei Ministri* [2009] ECR I-10821, paragraph 52).

40 Since this ground of appeal concerns only the third of those conditions, it is appropriate to note that, according to settled case-law, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (*Enirisorse*, paragraph 30; *Servizi Ausiliari Dottori Commercialisti*, paragraph 59; and *Essent Netwerk Noord and Others*, paragraph 79).

41 In that context, with regard to undertakings responsible for an SGEI, the Court has held that where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, that measure is not caught by Article 87(1) EC (see, to that effect, *Ferring*, paragraph 27; *Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 87; *Enirisorse*, paragraph 31; and *Essent Netwerk Noord and Others*, paragraph 80).

- 42 However, for such compensation to escape classification as State aid in a particular case, a number of conditions must be satisfied (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 88; *Servizi Ausiliari Dottori Commercialisti*, paragraph 61; and *Essent Netwerk Noord and Others*, paragraph 81).
- 43 In particular, 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 (see, to that effect, *Ferring*, paragraph 32; *Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 92; *Servizi Ausiliari Dottori Commercialisti*, paragraph 66; and *Essent Netwerk Noord and Others*, paragraph 84).
- 44 It follows that, where the Commission must examine the validity of a system of financing an SGEI in the light of Article 87 EC, it is particularly required to check whether that condition is satisfied.
- 45 In that respect, with regard to the complaint that the judgment under appeal did not rely on deficiencies in the method employed by the Commission, it must be pointed out that the General Court first of all held, in paragraph 85 of that judgment, that the Commission had failed to check whether the total amount of transfer payments made by DB Telekom exceeded the total amount of the net additional costs in respect of SGEI borne by DPAG.
- 46 Next, it is clear, in particular from paragraphs 91 and 94 of the judgment under appeal, that the General Court considered that the Commission was not entitled to assume that those transfers constituted an advantage for the purposes of Article 87(1) EC precisely because it had failed to examine, first, whether the total amount of the transfer payments made by DB Telekom exceeded the total amount of the undisputed additional costs incurred by DPAG and, second, whether DPAG had recorded other

net additional costs associated with the provision of an SGEI for which it had the right to claim compensation out of the total amount of those payments under the conditions stated in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*.

- ⁴⁷ In those circumstances, the General Court cannot properly be accused of not having relied upon deficiencies in the method used by the Commission in the contested decision. Indeed, it follows from the foregoing that those deficiencies were noted by the General Court in its examination of the lawfulness of that method in the light of Article 87(1) EC.
- ⁴⁸ Since the General Court concluded, correctly, that the method applied by the Commission in the contested decision was defective, the first limb of the first ground of appeal must be rejected as unfounded.

The second limb

– Arguments of the parties

- ⁴⁹ For the purposes of the second limb of this ground of appeal, the Commission, supported by BIEK and UPS, maintains that the General Court wrongly accused the Commission of not having examined all the evidence, including that produced by the Federal Republic of Germany, and that it thereby disregarded the rules governing the burden of proof.

50 They submit that the fact that DPAG had no resources of its own was sufficient, by itself, to establish that it had used the State resources which it had received to finance the net additional costs of its policy of selling below cost in the door-to-door parcel delivery sector. In addition, the Commission and UPS submit that, even if the Commission had obtained and examined all the information and evidentiary materials to which the General Court refers in the judgment under appeal, it could not logically have reached a different conclusion.

51 The Commission maintains also that it was for DPAG to prove that the method used in the contested decision was unlawful and not that there was another method which could also have been envisaged. In any event, contrary to the General Court's decision, in paragraph 87 of the judgment under appeal, it was not for the Commission to prove that it was impossible to apply the method chosen by the General Court.

52 The Federal Republic of Germany submits in that regard that the allegation, by the Commission and UPS, that examination of the information provided by DPAG and by itself as regards the amount of the net additional costs associated with public interest obligations concerning postal services could not, in any event, have led the Commission to reach a different result as regards the existence of an advantage, is unfounded and contradicts the detailed figures presented by DPAG and that Member State.

– Findings of the Court

53 As regards, in the first place, the argument that the General Court disregarded the rules governing the burden of proof in criticising the Commission for not having examined all the evidence, it is appropriate to point out that, first, in paragraph 85

of the judgment under appeal, the General Court found that the Commission, in the contested decision, had not taken account of the information provided by the Federal Republic of Germany concerning certain additional costs associated with the performance of a task in respect of SGEL. Second, in paragraph 86 of that judgment, the General Court also held that the Commission had not noted or established that that Member State and DPAG had not provided it with the information necessary to check that the amount of the transfer payments made by DB Telekom did not exceed the undisputed net additional costs.

⁵⁴ However, the General Court, in paragraphs 85 to 88 of the judgment under appeal, was critical of the Commission for failing to examine the evidence which the parties to the administrative proceedings had submitted to it, evidence which might have been relevant for the purposes of the analysis concerning the existence of an ‘advantage’ for the purposes of Article 87(1) EC in respect of DPAG, as the Commission claimed. In those circumstances, it is appropriate to observe that the General Court did not disregard the rules governing the burden of proof at all.

⁵⁵ As regards the argument that, even if it had examined all the information and evidentiary materials to which the General Court referred in the judgment under appeal, the Commission could not logically have reached any other conclusion, it is sufficient to hold that it is precisely by taking account of that information that the General Court, in paragraphs 108 and 109 of the judgment under appeal, reached a conclusion different from that reached by the contested decision. It follows that that argument must be rejected as unfounded.

⁵⁶ In the second place, as regards the allegation that the General Court improperly imposed on the Commission, in paragraph 87 of the judgment under appeal, the burden of proving the ‘impossibility’ of applying the method chosen by the General Court itself, it must be held that that allegation is based on an erroneous reading of that judgment.

- 57 In fact, in that paragraph, the General Court held only that it accepted as justification for the use of a method different from that arising from the application of the criteria extracted from the judgment in *Altmark Trans and Regierungspräsidium Magdeburg* the fact that the Commission was prevented, for objective reasons, from undertaking an examination of the information provided by DPAG and the Federal Republic of Germany.
- 58 However, in that paragraph 87, the General Court confined itself to noting that the Commission had not put forward any material capable of establishing any such impediment to undertaking that examination. In those circumstances, that argument cannot be accepted either.
- 59 Having regard to the foregoing considerations, the second limb of the first ground of appeal must be rejected as unfounded.

The third limb

– Arguments of the parties

- 60 The Commission, supported by BIEK and UPS, complains that the General Court distorted the clear sense of the evidence in the Court file when it decided, first, in paragraph 82 of the judgment under appeal, that the Commission had not stated in

the contested decision that the information, with which the Federal Republic of Germany had provided it and according to which the door-to-door parcel delivery sector constituted an SGEI, was not valid and, second, that the Commission had acknowledged, at least implicitly, that DPAG had also recorded, apart from the net additional costs generated by its policy of selling below cost, net additional costs which were associated with the provision of an SGEI. However, according to the Commission, in paragraph 76 of the statement of reasons for the contested decision, it was stated that the sector in question does not constitute an SGEI and that the question of the existence of net additional costs associated with the provision of an SGEI was, in any event, not relevant in the context of the method of analysis which it had chosen.

⁶¹ DPAG submits, for its part, that this limb is manifestly unfounded, since, first, as regards those net additional costs, the General Court based itself on paragraph 43 of the statement of reasons for the contested decision, where it was a question of all the parcel services, of which the door-to-door parcel delivery sector forms only part. Second, the Commission's complaint is based on an erroneous reading of the judgment under appeal given that the General Court annulled the contested decision on the ground that, in any event, the Commission had failed to check whether the transfer payments made by DB Telekom were justified by those net additional costs associated with the provision of an SGEI.

⁶² The Federal Republic of Germany submits that, in the contested decision, the Commission only pronounced on certain specific services in the area of parcel deliveries in the light of their character as SGEI, but not on the service of parcel deliveries in its totality. In addition, in paragraph 72 of the statement of reasons for the contested decision, the Commission referred, without equivocation, to the 'precisely defined statutory mandate of DPAG' and the 'discharge of public service obligations'. Therefore, the General Court held, correctly, that the Commission had tacitly recognised the fact that, also in the door-to-door parcel delivery sector, public service obligations do exist in the form of a delivery obligation subject to an affordable uniform tariff.

– Findings of the Court

- ⁶³ It should be recalled at the outset that, according to settled case-law, it is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the Court has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject, as such, to review by the Court of Justice (see, among others, Case C-419/08 P *Trubowest Handel and Makarov v Council and Commission* [2010] ECR I-2259, paragraphs 30 and 31 and the case-law cited).
- ⁶⁴ In addition, it is important to note that the distortion must be obvious from the documents in the Court's file, without there being any need to carry out a new assessment of the facts and the evidence (*Trubowest Handel and Makarov v Council and Commission*, paragraph 32 and the case-law cited).
- ⁶⁵ For the purposes of the present limb, the Commission challenges, by its first complaint, the statement contained in paragraph 82 of the judgment under appeal, that the Commission did not, in the contested decision, take a view on the information made available to it by the Federal Republic of Germany, as regards the fact that the door-to-door parcel delivery sector constituted an SGEL, despite the fact that, in the contested decision, the Commission found that the sector did not constitute an SGEL.

⁶⁶ In that regard, it must be pointed out that, in paragraph 76 of the statement of reasons for the contested decision, the Commission referred to the statement of reasons of the PPfLV, according to which Article 2(2)(3) thereof excludes from the universal acceptance obligation for small parcels those for which special contracts are concluded with specific customers – for example, ‘self-labellers’ or customers with cooperation contracts – and that those business customers may be excluded from the acceptance obligation, since competition in that sector renders that obligation superfluous.

⁶⁷ However, as the Federal Republic of Germany observed, the Commission referred, in the paragraph of the statement of reasons cited, to certain specific services in the area of parcel delivery in the light of their character as SGEI, but not to the parcel delivery service in its entirety. In addition, it must also be pointed out, as did DPAG, that the General Court annulled the contested decision not because of the Commission’s approach as regards the classification of the services in question as SGEI, but on the ground that the Commission had failed to check whether the transfer payments made by DB Telekom constituted overcompensation when compared to the undisputed net additional costs associated with the provision of an SGEI.

⁶⁸ In those circumstances, the General Court cannot properly be accused of having distorted the facts in this case.

⁶⁹ Therefore, the Commission’s first complaint cannot be upheld.

⁷⁰ As regards its second complaint, which concerns the implicit acknowledgement by the Commission of the fact that DPAG had recorded net additional costs associated with the provision of an SGEI, it is sufficient to hold that the Commission noted, in paragraph 73 of the statement of reasons for the contested decision, that ‘[t]here is therefore a minimum amount of DPAG’s net additional costs which is in no way

linked to the discharge of public service obligations'. From that statement, the General Court was entitled to deduce, without distorting the clear sense of the evidence, that the Commission had acknowledged, at least implicitly, that DPAG also bore costs associated with an SGEI.

- ⁷¹ Since it follows from the preceding considerations that the General Court did not distort the facts submitted to its determination, the third limb of the first ground of appeal must also be rejected as unfounded.

The fourth limb

– Arguments of the parties

- ⁷² The Commission, supported by BIEK and UPS, challenges the reasoning developed, for the sake of completeness, in paragraphs 101 to 109 of the judgment under appeal, in which the General Court examined, in addition to the information contained in the contested decision, that provided by the Federal Republic of Germany. Those parties submit that such information, including particularly that concerning the repayments made by DPAG to the German State as well as the transfers by DB Telekom, is irrelevant to the application of the method used by the Commission, which justifies the fact that the Commission did not challenge its accuracy. In any event, the assessment thus undertaken by the General Court was, they submit, insufficient and erroneous, since, first, it is not clear therefrom, particularly, that DPAG could have survived financially without compensation from DB Telekom and, second, that it did not concern the question of whether DPAG had sufficient liquidity to offset the net additional costs

occasioned by its policy of selling below cost, despite the overall deficit recorded by that company.

⁷³ In that regard, DPAG contends that the Commission's complaint that the General Court did not establish that DPAG could have survived without financial compensation is irrelevant. Indeed, the General Court was entitled to confine itself to ruling out that resources from the transfer payments made by DB Telekom in the course of the years 1990 to 1994 were used to cover the net additional costs occasioned by the policy of selling below cost between 1995 and 1999, on the ground that they were by then exhausted.

⁷⁴ The Federal Republic of Germany adds that, in any event, the Commission was obliged to show that the State injection in question constituted overcompensation for the net additional costs incurred by the provision of an SGEI. In addition, no expense, taken in isolation, could be covered by DPAG's other own resources, given that it suffered losses during the period concerned. It submits that, in reality, the Commission's approach leads to the absurd result that any expense must have been financed by public resources.

– Findings of the Court

⁷⁵ It should be recalled that, according to settled case-law, a complaint directed against a ground included in a decision of the General Court purely for the sake of completeness cannot lead to the decision being set aside and is therefore nugatory (Case C-184/01 P *Hirschfeldt v EEA* [2002] ECR I-10173, paragraph 48; 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 order of 9 March 2007 in Case C-188/06 P *Schneider Electric v Commission*, paragraph 64).

- 76 In that regard, it follows from the analysis of the first three limbs of the present ground of appeal that the General Court, without making any error of law, accepted DPAG's first complaint in its action for annulment, according to which the Commission had infringed Article 87(1) EC in finding that the transfers made by DB Telekom had conferred an advantage on DPAG.
- 77 Consequently, even assuming that the reasoning contained in paragraphs 101 to 109 of the judgment under appeal is wrong in law, it is important to point out that it would not affect the validity of the determination of the complaint regarding the illegality of the contested decision in relation to Article 87(1) EC.
- 78 In those circumstances, the fourth limb of this ground of appeal is inoperative.
- 79 In the light of the foregoing considerations, the first ground of appeal raised by the Commission must be rejected in its entirety.

The second ground of appeal, alleging breach of Article 230 EC

Arguments of the parties

- 80 By its second ground of appeal, the Commission complains that the General Court disregarded the limits of its powers under Article 230 EC, in that it substituted its own method for calculating the additional costs associated with the provision of SGEI

for that employed by the Commission. However, if the Commission prefers a method which enables it to deal rapidly and efficiently with the objections put forward by complainants, within the framework of a sound internal administrative practice, it is not, in the Commission's submission, for the General Court to usurp its choice of method.

⁸¹ In addition, the Commission, supported by BIEK and UPS, claims that the General Court, in its reasoning developed in paragraphs 101 to 109 of the judgment under appeal, substituted itself for the Commission in examining information which had not been the subject of any examination in connection with the contested decision.

⁸² By contrast, DPAG contends that the General Court confined itself to using the method which is mandatory according to the Court of Justice's case-law. Indeed, according to that case-law and the Commission's administrative practice, the establishment of an advantage in State aid cases because of payments of State resources as compensation for discharging public service obligations presupposes, in its submission, that the costs occasioned by the discharge of public interest obligations are determined first of all.

⁸³ For its part, the Federal Republic of Germany contends that the General Court did not unlawfully substitute its own assessment for that of the Commission. In the paragraphs of the judgment under appeal covered by the present ground of appeal, the General Court confined itself to an examination from the accounting angle, after carrying out, in paragraphs 78 to 96 of that judgment, an analysis of the contested decision from the legal angle. In any event, breach of Article 87(1) EC having been established, that ground of appeal is, it submits, inoperative.

Findings of the Court

- ⁸⁴ As is clear from Article 230 EC, the object of an action for annulment is to review the legality of acts adopted by the Community institutions named therein, since the analysis of the pleas in law raised in such an action has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure (see, to that effect, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 103).
- ⁸⁵ In that regard, it is appropriate to point out that, in paragraphs 68 to 88 of the judgment under appeal, the General Court undertook an analysis of the method used by the Commission in the contested decision in the light of Article 87(1) EC, in particular in order to check whether the transfers which DPAG received from DB Telekom could have constituted an advantage for the purposes of that provision and the relevant case-law.
- ⁸⁶ In the course of that analysis, the General Court noted, in paragraphs 80 to 88 of the judgment under appeal, the defective elements in the calculation effected by the Commission for the purposes of the contested decision, from which it followed that the Commission had failed to prove that those transfers had conferred such an advantage on DPAG.
- ⁸⁷ In those circumstances, it must be held that the General Court did not substitute its own method for that of the Commission, but that its examination was confined to the judicial review of the contested decision's legality.

- 88 As regards the complaint relating to the fact that the General Court, by undertaking an examination of information which had not been the subject of any analysis in the contested decision, substituted itself for the Commission, it is appropriate to hold that, having regard, first, to the findings contained in paragraphs 76 to 78 of the present judgment as regards the fact that the findings made by the General Court in paragraphs 101 to 109 of the judgment under appeal were made for the sake of completeness and, second, to the case-law cited in paragraph 75 of the present judgment, it must be held that the second complaint is inoperative.
- 89 In view of the foregoing considerations, the General Court cannot validly be criticised for having exceeded its powers in breach of Article 230 EC. Therefore, the second ground of appeal must be rejected as unfounded.
- 90 Since neither of the two grounds of appeal relied upon by the Commission in support of its appeal has been upheld, the appeal must be rejected in its entirety.

The cross-appeals

Arguments of the parties

- 91 By their cross-appeals, BIEK and UPS submit that the General Court misapplied the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, since it failed to consider whether, in this case, any of the requirements under that judgment for excluding compensation for the provision of SGEI from the State aid rules was satisfied.

Indeed, in the first place, the practice implemented by DPAG of applying prices beneath the uniform legal tariff in respect of the door-to-door parcel delivery sector is not commensurate with a public service mission. In the second place, the conditions under which the transfers by DB Telekom were made were not established in advance in an objective and transparent manner. In the third place, in default of precise allocation, it was not possible to determine whether those transfers gave rise to overcompensation. Finally, the compensation deemed to have been accorded by means of those transfers arose irrespective of any analysis of the costs associated with the provision of an SGEI.

- ⁹² DPAG replies to those arguments that the General Court was not required to undertake any examination of compliance with the requirements imposed by the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*. Indeed, the finding that the Commission failed to check whether DPAG had to bear net additional costs associated with the performance of obligations in respect of SGEI was sufficient for the annulment of the contested decision.

Findings of the Court

- ⁹³ Having first decided that the Commission had acknowledged, at least implicitly, that DPAG bore costs partly associated with the provision of SGEI, as noted in paragraphs 66 to 73 of the present judgment, the General Court then, in the context of a review of legality, correctly examined the complaint made by DPAG concerning the method followed by the Commission as regards the calculation of any overcompensation in the sense of the third condition under the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, as noted in paragraphs 41 to 43 of the present judgment.

- ⁹⁴ In the context of that examination, the General Court concluded, in particular, in paragraph 94 of the judgment under appeal, that since that method failed to check whether DPAG had recorded other net additional costs associated with the provision of an SGEI, those additional costs could not be established to the requisite legal standard and, consequently, it held, in the light of the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, that the contested decision had to be annulled.
- ⁹⁵ In that context, it must be held, as the Advocate General noted in points 125 to 128 of his Opinion, that the General Court thus carried out an analysis of the legality of the contested decision within the limits of the powers conferred upon it by Article 230 EC and in the light of the relevant case-law relating to classification as State aid, as well as that relating to compensation for obligations in respect of SGEI, including the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*.
- ⁹⁶ It is also appropriate to note that it is precisely if it had examined the contested decision as against the other criteria stated in that judgment, as BIEK and UPS claim that it should have done, that the General Court would have substituted itself for the Commission by undertaking an examination thereof in its place, as that Court itself observes, correctly, in paragraph 95 of the judgment under appeal.
- ⁹⁷ However, it must be held, in accordance with settled case-law, that review by the Community judicature of complex economic assessments made by the Commission, such as those in this case, must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers (*Aalborg Portland and Others v Commission*, paragraph 279, and Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, paragraph 85).

- ⁹⁸ It follows that the General Court did not have to examine all the criteria stated by the Court of Justice in its judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, once the contested decision's illegality in the light of one of those criteria had been established.
- ⁹⁹ Having regard to the foregoing considerations, the cross-appeals must be rejected as unfounded.

Costs

- ¹⁰⁰ Under the first subparagraph of Article 69(2) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Pursuant to the first subparagraph of Article 69(4) of those rules, Member States which have intervened in the proceedings are to bear their own costs.
- ¹⁰¹ Since the Commission has been unsuccessful, it must be ordered to pay the costs of the main appeal, in accordance with the form of order sought by DPAG.
- ¹⁰² As regards the cross-appeals, even though BIEK and UPS have been unsuccessful, it must be held that, in its response to those appeals, DPAG did not seek an order that they pay the costs relating to them. It follows that each of those parties must bear its own costs relating to the cross-appeals.

On those grounds, the Court (First Chamber) hereby:

- 1. Dismisses the main appeal and the cross-appeals;**
- 2. Orders the European Commission to bear its own costs and to pay those incurred by Deutsche Post AG in connection with the main appeal;**
- 3. Orders Bundesverband Internationaler Express- und Kurierdienste eV and UPS Europe SA to bear their own costs relating to the main appeal;**
- 4. Orders Deutsche Post AG, Bundesverband Internationaler Express- und Kurierdienste eV and UPS Europe SA to bear their own costs relating to the cross-appeals;**
- 5. Orders the Federal Republic of Germany to bear its own costs.**

[Signatures]