



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

13 October 2011 ^{*i}

(Appeals – State aid – Regulation (EC) No 659/1999 – Article 10(3) – Decision requiring the production of information – Act open to challenge for the purposes of Article 263 TFEU)

In Joined Cases C-463/10 P and C-475/10 P,

TWO APPEALS pursuant to Article 56 of the Statute of the Court of Justice of the European Union, brought, respectively, on 24 and 27 September 2010,

Deutsche Post AG, established in Bonn (Germany), represented by J. Sedemund and T. Lübbig, Rechtsanwälte,

Federal Republic of Germany, represented by T. Henze, J. Möller and N. Graf Vitzthum, acting as Agents,

applicants,

the other party to the proceedings being:

European Commission, represented by B. Martenczuk and T. Maxian Rusche, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Third Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, J. Malenovsky, R. Silva de Lapuerta, E. Juhász and D. Sváby, Judges,

Advocate General: Y. Bot,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 26 May 2011,

after hearing the Opinion of the Advocate General at the sitting on 30 June 2011,

gives the following

^{*} Language of the case: German.

Judgment

- 1 By their appeals, Deutsche Post AG ('Deutsche Post') and the Federal Republic of Germany seek the annulment, respectively, of the orders of the General Court of the European Union of 14 July 2010 in Case T-570/08 *Deutsche Post v Commission* and Case T-571/08 *Germany v Commission* (hereinafter collectively referred to as 'the contested orders'), whereby the General Court dismissed as inadmissible their actions for annulment of the Commission decision of 30 October 2008, requiring the Federal Republic of Germany to provide information in the proceedings relating to State aid to Deutsche Post ('the act at issue').

Legal context

- 2 Article 2(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] requires a Member State notifying the European Commission of plans to grant new aid to provide in its notification 'all necessary information in order to enable the Commission to take a decision pursuant to Articles 4 and 7'.

- 3 Article 5 of Regulation No 659/1999 provides:

'1. Where the Commission considers that information provided by the Member State concerned with regard to a measure notified pursuant to Article 2 is incomplete, it shall request all necessary additional information. ...

2. Where the Member State concerned does not provide the information requested within the period prescribed by the Commission or provides incomplete information, the Commission shall send a reminder, allowing an appropriate additional period within which the information shall be provided.

3. The notification shall be deemed to be withdrawn if the requested information is not provided within the prescribed period ...'

- 4 Article 10 of Regulation No 659/1999 provides:

'1. Where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay.

2. If necessary, it shall request information from the Member State concerned. Article 2(2) and Article 5(1) and (2) shall apply *mutatis mutandis*.

3. Where, despite a reminder pursuant to Article 5(2), the Member State concerned does not provide the information requested within the period prescribed by the Commission, or where it provides incomplete information, the Commission shall by decision require the information to be provided (hereinafter referred to as an 'information injunction'). The decision shall specify what information is required and prescribe an appropriate period within which it is to be supplied.'

- 5 According to Article 13(1) of Regulation No 659/1999:

'The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by

means of a decision pursuant to Article 7. If a Member State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.’

- 6 Article 18(3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1) provides that ‘[w]here the Commission requires undertakings and associations of undertakings to supply information by decision, it shall ... indicate the right to have the decision reviewed by the Court of Justice’.

Background to the dispute

- 7 On 12 September 2007, the Commission initiated the formal investigation procedure for the purposes of Article 88(2) EC in relation to the State aid in favour of Deutsche Post AG [C 36/07 (ex NN 25/07)]. A summary of that decision was published in the *Official Journal of the European Union* (OJ 2007 C 245, p. 21).
- 8 On 17 July 2008, the Commission sent the Federal Republic of Germany a request for information which included a questionnaire on Deutsche Post’s revenue and costs for the period from 1989 to 2007. On 12 and 21 August 2008, the Commission sent a reminder letter, again asking that State to supply the information requested.
- 9 In its replies of 5 August, 14 August and 29 September 2008, the Federal Republic of Germany confirmed that it refused to send the data relating to Deutsche Post’s products and charges after 1995, taking the view that the Commission’s examination should be confined to the period from 1989 to 1994 and that responding to that questionnaire would require a disproportionate investment in terms of time and work.
- 10 By the act at issue, the Commission required the Federal Republic of Germany, pursuant to Article 10(3) of Regulation No 659/1999, to provide, within 20 days, all the information necessary to reply to that questionnaire. The Commission added that, if, despite that injunction, the German authorities did not provide the information requested within the prescribed period, it would take its decision on the basis of the information available, in accordance with Article 13(1) of Regulation No 659/1999.

The procedure before the General Court and the contested orders

- 11 By applications lodged at the Registry of the General Court on 22 December 2008, Deutsche Post (Case T-570/08) and the Federal Republic of Germany (Case T-571/08) each brought an action for annulment of the act at issue.
- 12 By separate documents lodged at the Registry of the General Court on 19 March 2009, the Commission raised, in each of those cases, an objection of inadmissibility pursuant to Article 114(1) of the Rules of Procedure of the General Court. The General Court upheld that objection, ruling that the act at issue did not constitute an act open to challenge for the purposes of Article 263 TFEU.
- 13 Thus, in paragraphs 24 to 26 of the order in *Deutsche Post v Commission*, and 22 to 25 of the order in *Germany v Commission*, the General Court states, first, that it is necessary to look at the substance of a measure rather than its form, in order to determine whether it constitutes an act

open to challenge for the purposes of Article 263 TFEU and, second, that an intermediate measure the aim of which is to prepare the final decision and which does not have legal effects cannot form the subject-matter of an action for annulment. The General Court refers to that effect, in particular, to Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraphs 9 and 10, and Case C-521/06 P *Athinaiki Techniki v Commission* [2008] ECR I-5829, paragraph 46).

- 14 As for the effects of the act at issue, the General Court emphasises, in paragraphs 29 and 30 of the order in *Deutsche Post v Commission*, and in paragraphs 28 and 29 of the order in *Germany v Commission*, that no sanction is provided for if the Member State does not comply with an information injunction. Such an injunction was designed to ensure compliance with the principle of a fair hearing.
- 15 In paragraphs 31 and 32 of the order in *Deutsche Post v Commission*, and in paragraphs 30 and 31 of the order in *Germany v Commission*, the General Court indicates that the act at issue falls within the context of the administrative procedure for examining the aid measure in question, between the decision to open the formal investigation procedure and the final decision. According to the General Court, the act at issue does not prejudice the final decision, since the Commission can still plead at that stage that no State aid exists, that the aid in question is compatible with the internal market or is not compatible. It follows, in the view of the General Court, that the act at issue is an intermediate measure, the aim of which was to prepare the final decision of the Commission.
- 16 In reply to the argument of Deutsche Post and the Federal Republic of Germany, which, with reference to the case-law on the admissibility of an action brought against a decision to initiate the formal investigation procedure of Article 88(2) EC (see Case C-400/99 *Italy v Commission* [2001] ECR I-7303), argued that the provisional character of a measure does not necessarily mean that it is not open to challenge, the General Court takes the view, in paragraph 36 of the order in *Deutsche Post v Commission*, and paragraph 35 of the order in *Germany v Commission*, that the effects of a decision to initiate the formal investigation procedure and those of the act at issue are not comparable.
- 17 Regarding the alleged deterioration in the procedural position of Deutsche Post and the Federal Republic of Germany in the event of non-compliance with the act at issue, the General Court stated, in paragraph 42 of the contested orders, that it is the refusal of the German authorities to supply the Commission with the requested information, which was contained in the act at issue, and not the act at issue as such which is likely to deprive the persons concerned of the possibility of complaining of the insufficiency of the factual basis of the final decision. According to the General Court, if the German authorities consider that the information requested by the Commission is not necessary in order to establish the facts or the researches requested are too onerous in relation to the desired result, they may choose to ignore the injunction issued to them.
- 18 The General Court concludes, in paragraph 46 of the order in *Deutsche Post v Commission* and paragraph 45 of the order in *Germany v Commission*, that the act at issue was not an act open to challenge for the purposes of Article 263 TFEU.

Forms of order sought and procedure before the Court of Justice

Case C-463/10 P Deutsche Post v Commission

- 19 Deutsche Post claims that the Court should:
- set aside the order in *Deutsche Post v Commission*,
 - annul the act at issue, and
 - order the Commission to pay the costs.
- 20 The Commission contends that the Court should:
- dismiss the appeal, and
 - order Deutsche Post to pay the costs.

Case C-475/10 P Germany v Commission

- 21 The Federal Republic of Germany claims that the Court should:
- set aside the order in *Germany v Commission*, and
 - order the Commission to pay the costs.
- 22 The Commission contends that the Court should:
- dismiss the appeal, and
 - order the Federal Republic of Germany to pay the costs.
- 23 By order of 15 December 2010, the President of the Court of Justice decided to join Cases C-463/10 P and C-475/10 P for the purposes of the oral procedure and the judgment.

The appeals

- 24 In support of their appeals, Deutsche Post and the Federal Republic of Germany argue that, in the contested orders, the General Court committed various errors of law in the interpretation of the concept of an act open to challenge for the purposes of Article 263 TFEU. In that respect, they make five pleas in law. The first claims infringement of Article 288 TFEU; the second disregard of the case-law whereby, in the area of State aid, preparatory measures may constitute acts open to challenge; the third disregard of the legal effects of an injunction to provide information; the fourth infringement of the principle of effective legal protection; and, finally, the fifth disregard of the allocation of competences between the Commission and the Member States under Articles 107 TFEU et 108 TFEU.
- 25 As the first four pleas are closely linked, it will be appropriate to examine them together.

Arguments of the parties

- 26 The Federal Republic of Germany and Deutsche Post argue that Article 10(3) of Regulation No 659/1999 expressly empower the Commission to adopt a formal decision. By virtue of Article 288 TFEU, they argue, such a decision is obligatory and thus constitutes, by its nature, an act open to challenge for the purposes of Article 263 TFEU. The General Court erred in law at paragraph 26 of the order in *Deutsche Post v Commission*, and at paragraph 25 of the order in *Germany v Commission*, by not in any way taking account of the form of the act at issue.
- 27 According to the Federal Republic of Germany, the fact that the act at issue constituted an intermediate measure in the context of the procedure for examining State aid did not prevent it from being an act open to challenge. The interests of the parties concerned were not sufficiently protected by the challengeable nature of the final decision.
- 28 The applicants then maintain that, independently of the form of the act at issue, and contrary to what the General Court held at paragraph 46 of the order in *Deutsche Post v Commission* and at paragraph 45 of the order in *Germany v Commission*, an injunction to provide information under Article 10(3) of Regulation No 659/1999 produces binding legal effects, which have a direct impact on the Member State and the undertaking concerned. According to the Federal Republic of Germany, such a decision closed the administrative procedure on State aid inasmuch as it allowed the Commission, in the case where the Member State concerned failed to comply with that injunction, to give its decision on the basis of information appearing on the file. Moreover, a Member State which failed to perform the obligation under Article 10(3) of Regulation No 659/1999, read in combination with Article 288 TFEU and Article 4(3) TEU, could form the subject-matter of proceedings for failure to fulfil obligations under Article 258 TFEU.
- 29 The Commission replies that, in accordance with consistent case-law, only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position are acts or decisions which may be the subject of an action for annulment for the purposes of Article 263 TFEU (see, in particular, *IBM v Commission*, paragraph 9; Case C-308/95 *Netherlands v Commission* [1999] ECR I-6513, paragraph 26; Case C-443/97 *Spain v Commission* [2000] ECR I-2415, paragraph 27; Case C-147/96 *Netherlands v Commission* [2000] ECR I-4723, paragraph 25; Case C-131/03 P *Reynolds Tobacco and Others v Commission* [2006] ECR I-7795, paragraph 54). A ‘decision’ within the meaning of Article 288 TFEU did not necessarily produce such effects. According to the Commission, it is not the form of the act or decision in question, but its substance, that determines whether it is an act open to challenge. Consequently, it argues, an action for annulment against a decision within the meaning of Article 288 TFEU or an act taking another form is possible only where that decision or act involve legal effects vis-à-vis third parties.
- 30 The Commission argues that the General Court was right to hold that the act at issue does not produce binding legal effects capable of affecting the interests of the applicants.
- 31 The Commission explains in that respect that, in the context of a proceeding in the matter of State aid, Member States are required, under Article 4(3) TEU, to send the Commission all the information it needs in order to judge whether or not a State aid measure exists and whether it is compatible with the internal market. The obligation on the Member State to put the requested information at the Commission’s disposal thus follows from Article 4(3) TEU, rather than from the information injunction.

- 32 The information injunction is concerned with compliance with the principle that both parties should be heard in the context of the administrative procedure. After the request for information and the reminder provided for in Article 10(3) of Regulation No 659/1999 in conjunction with Article 5(2) of that regulation, the Member State has a final opportunity to provide the information sought before the Commission makes its decision on the basis of the information which it has.
- 33 The Commission states that, in State aid law, unlike in competition law, it does not have any power to initiate an investigation before the adoption of a final decision. The Commission cannot therefore elucidate the facts without the loyal cooperation of the Member States. It is not the information injunction but the refusal by the Member State to comply with that injunction which allows the Commission to take a decision on the basis of the information available. Moreover, the fact that the Commission considers itself to be sufficiently well-informed and ceases to seek information does not, in itself, produce any legal effect. What does, on the contrary, produce such effects is the legal assessment of those facts which it is called upon to make in the final decision. Therefore, the information injunction constitutes only a preparatory act which does not affect the legal position of the Member State concerned.
- 34 The Commission adds that the opportunity for the applicants to bring an annulment action against the final decision on the compatibility of the aid with the internal market guarantees them sufficient legal protection. Any legal defects vitiating the preparatory acts may be relied upon in an action directed against the definitive act for which they represent a preparatory step (*IBM v Commission*, paragraph 12).
- 35 Finally, the Commission insists that no sanction arises as a result of failure to comply with the information injunction. By not complying with the injunction, the Member State implicitly indicates that the information which the Commission has is complete and that the Commission may adopt its decision on the basis thereof. The mere possibility that proceedings for failure to fulfil obligations might be opened against that Member State is neither a sanction nor a circumstance capable of affecting the interests of that State. Since Member States are required, under Article 4(3) TEU, to send the Commission all the information which it needs in order to determine whether or not a State aid measure exists and whether it is compatible with the internal market, proceedings for failure to fulfil obligations could even be opened in the absence of an information injunction. Moreover, the Commission argues, the interests of the Member State are affected only where the Commission decides actually to pursue the Member State for infringement of the Treaty.

Findings of the Court

- 36 According to consistent case-law, developed in the context of actions for annulment brought by Member States or institutions, any measures adopted by the institutions, whatever their form, which are intended to have binding legal effects are regarded as acts open to challenge, within the meaning of Article 263 TFEU (see, in particular, Case 22/70 *Commission v Council* ('ERTA') [1971] ECR 263, paragraph 42; Case C-316/91 *Parliament v Council* [1994] ECR I-625, paragraph 8; *Spain v Commission*, cited above, paragraph 27; Joined Cases C-138/03, C-324/03 and C-431/03 *Italy v Commission* [2005] ECR I-10043, paragraph 32; Case C-301/03 *Italy v Commission* [2005] ECR I-10217, paragraph 19; Case C-370/07 *Commission v Council* [2009] ECR I-8917, paragraph 42). The case-law further shows that a Member State, such as the applicant in Case C-475/10 P, may admissibly bring an action for annulment of a measure producing binding

legal effects without having to demonstrate that it has an interest in bringing proceedings (see, to that effect, Case 45/86 *Commission v Council* [1987] ECR. 1493, paragraph 3 and *Commission v Council* [2009] ECR I-8917, paragraph 16).

- 37 Where the action for annulment against an act adopted by an institution is brought by a natural or legal person, the Court of Justice had repeatedly held that the action lies only if the binding legal effects of that act are capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (see, in particular, *IBM v Commission*, paragraph 9; *Athinaiki Techniki v Commission*, paragraph 29; Case C-322/09 P *NDSHT v Commission* [2010] ECR I-0000, paragraph 45).
- 38 It must, however, be emphasised that the case-law cited in the paragraph above was developed in the context of actions brought before the EU judiciary by natural or legal persons against measures of which they were the addressees. Where, as in the case giving rise to the order in *Deutsche Post v Commission*, an action for annulment is brought by a non-privileged applicant against a measure that has not been addressed to it, the requirement that the binding legal effects of the measure being challenged must be capable of affecting the interests of the applicant by bringing about a distinct change in his legal position overlaps with the conditions laid down in the fourth paragraph of Article 263 TFEU.
- 39 It must also be noted that, in the contested orders, the General Court allowed the objection of inadmissibility raised by the Commission, holding that the act at issue did not constitute an act open to challenge for the purposes of Article 263 TFEU.
- 40 For the purposes of assessing whether the General Court erred in law by holding, in these orders, that an information injunction under Article 10(3) of Regulation No 659/1999 cannot form the subject-matter of an action for annulment, it is therefore necessary, having regard to the case-law cited in paragraph 36 of this judgment, to examine whether such an injunction constitutes a measure which is intended to produce binding legal effects.
- 41 In that respect, it should be remembered that Article 10 of Regulation No 659/1999 makes provision for a procedure in two stages designed to allow the Commission to obtain from the Member State concerned the necessary information concerning an allegedly unlawful State aid measure, so that the Commission can assess the nature of the measure and its compatibility with the internal market.
- 42 As regards the first stage, Article 10(2) of Regulation No 659/1999 provides that the Commission may request the Member State concerned to provide it with information concerning the allegedly unlawful aid.
- 43 In a second stage, if the Member State, despite the reminder issued to it, does not provide the information requested within the prescribed period, the Commission, in accordance with Article 10(3) of Regulation No 659/1999, ‘shall by decision require the information to be provided’. Consequently, the second stage of the procedure is represented by the adoption of a ‘decision’ within the meaning of Article 288 TFEU by the Commission, which, moreover, that institution does not deny.
- 44 In accordance with Article 288 TFEU, a ‘decision shall be binding in its entirety’. By providing that an information injunction should take the form of a decision, the EU legislature intended to confer a binding character on such a measure.

- 45 It follows from the above that a decision taken pursuant to Article 10(3) of Regulation No 659/1999 is intended to produce binding legal effects within the meaning of the case-law cited in paragraph 36 of this judgment, and therefore constitutes an act open to challenge for the purposes of Article 263 TFEU.
- 46 The above analysis is corroborated by the case-law concerning decisions to request information taken on the basis of Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition, Series I, Chapter 1959-1962, p. 87), which, like Article 10 of Regulation No 659/1999, provided for a procedure in two stages, the second being constituted by the adoption by the Commission of a decision capable of forming the subject-matter of an action for annulment (Case 136/79 *National Panasonic v Commission* [1980] ECR 2033; Case 374/87 *Orkem v Commission* [1989] ECR 3283). Similarly, it is unequivocally apparent from Article 18(3) of Regulation No 1/2003 that a request for information taken in the form of a decision constitutes an act open to challenge for the purposes of Article 263 TFEU.
- 47 The case-law cited by the General Court in the contested orders, according to which it is necessary to look at the substance of a measure rather than its form for the purposes of assessing its binding character, does not change that analysis.
- 48 Moreover, contrary to what the Commission claims, the absence of any sanction laid down by Regulation No 659/1999 in the event of a Member State not complying with an information injunction does not constitute a decisive factor in assessing whether a measure may form the subject-matter of an action for annulment.
- 49 By holding in paragraphs 31, 32 and 46 of the order in *Deutsche Post v Commission*, and in paragraphs 30, 31 and 45 of the order in *Germany v Commission*, that the act at issue, by reason of its preparatory nature, did not constitute an act open to challenge within the meaning of the case-law, the General Court also erred in law.
- 50 In that regard, admittedly, intermediate measures whose aim is to prepare the final decision do not, in principle, constitute acts which may form the subject-matter of an action for annulment (*IBM v Commission*, paragraph 10; *Athinaiki Techniki v Commission*, paragraph 42; Case C-362/08 P *Internationaler Hilfsfonds v Commission* [2010] ECR I-669, paragraph 52). However, the intermediate acts thus referred to are, first and foremost, acts which express a provisional opinion of the institution (see, to that effect, *IBM v Commission*, paragraph 20; Joined Cases C-133/87 and C-150/87 *Nashua Corporation and Others v Commission and Council* [1990] ECR I-719, paragraphs 8 to 10; Case C-282/95 P *Guérin Automobiles v Commission* [1997] ECR I-1503, paragraph 34; Case C-147/96 *Netherlands v Commission* [2000] ECR I-4723, paragraph 35).
- 51 An action for annulment against measures expressing a provisional opinion of the Commission might make it necessary for the EU judicature to arrive at a decision on questions on which the institution concerned has not yet had an opportunity to state its position and would as a result anticipate the arguments on the substance of the case, confusing different procedural stages both administrative and judicial. To allow such an action would thus be incompatible with the system of the division of powers between the Commission and the EU judicature and of the remedies laid down by the Treaty, as well as the requirements of the sound administration of justice and the proper course of the administrative procedure to be followed in the Commission (*IBM v Commission*, paragraph 20).

- 52 However, in this case, an action for annulment directed against the act at issue, whereby the Commission requests information from the German authorities on the revenues and costs of Deutsche Post, for the period from 1989 to 2007, does not involve a risk of confusion of the various stages of the administrative and judicial procedures (*IBM v Commission*, paragraph 20). Such an action for annulment should not lead the EU judicature to rule on the existence of a State aid measure or its possible compatibility with the internal market.
- 53 Next, the case-law shows that an intermediate measure is also not capable of forming the subject-matter of an action if it is established that the illegality attaching to that measure can be relied on in support of an action against the final decision for which it represents a preparatory step. In such circumstances, the action brought against the decision terminating the procedure will provide sufficient judicial protection (*IBM v Commission*, paragraph 12; Case 53/85 *AKZO Chemie and AKZO Chemie UK v Commission* [1986] ECR 1965, paragraph 19; Case C-400/99 *Italy v Commission* [2001] ECR I 7303, paragraph 63).
- 54 However, if that latter condition is not satisfied, it will be considered that the intermediate measure – independently of whether the latter expresses a provisional opinion of the institution concerned – produces independent legal effects and must therefore be capable of forming the subject-matter of an action for annulment (*AKZO Chemie and AKZO Chemie UK v Commission*, paragraph 20; Case C-170/89 *BEUC v Commission* [1991] I-5709, paragraphs 9 to 11; Case C-39/93 P *SFEI and Others v Commission* [1994] ECR I-2681, paragraph 28; Case C-400/99 *Italy v Commission* [2001] ECR I-7303, paragraphs 57 to 68; *Athinaiki Techniki v Commission*, paragraph 54).
- 55 In this case, it must be held that an information under Article 10(3) of Regulation No 659/1999 produces independent legal effects.
- 56 Indeed, an action brought against the decision terminating the procedure concerning the alleged State aid in favour of Deutsche Post is not capable of ensuring sufficient legal protection for the applicants.
- 57 In that respect it should be noted, first, that if, as the applicants claim in these cases, the injunction is disproportionate in that the information requested is not relevant for assessing the State measure in the light of Articles 107 TFEU and 108 TFEU, the illegalities vitiating the intermediate measure would not be capable of affecting the legality of the Commission's final decision, since that latter decision will not be based on information obtained in response to the said injunction.
- 58 Second, where the Commission requests a Member State, pursuant to Article 10(3) of Regulation No 659/1999, to provide the information requested, it adopts a 'decision' within the meaning of Article 288 TFEU. It follows that the refusal of the Member State concerned to comply with such an injunction constitutes a failure to fulfil an obligation under the treaties within the meaning of Article 258 TFEU.
- 59 In the context of an action for failure to fulfil obligations, a Member State which is the addressee of a decision, such as an information injunction, cannot validly justify non-performance of the latter on the basis of its alleged illegality. It is in the context of a distinct procedure, namely that of an action for annulment under Article 263 TFEU, that any challenge to the legality of such an injunction must be made (see, to that effect, Case C-261/99 *Commission v France* [2001] ECR I-2537, paragraph 18, Case C-419/06 *Commission v Greece* [2008] ECR I-0000, paragraph 52).

- 60 The events of the possible illegality attaching to the intermediate measure are thus not capable of being removed by an action brought against the final decision. The failure to fulfil obligations flowing from Article 10(3) of Regulation No 659/1999 on the part of a Member State, which does not take any action in response to an information injunction, may be found independently of the outcome of a possible application for annulment brought against the final decision.
- 61 Finally, this Court must reject the Commission's argument that the possibility of bringing an action for annulment against a decision taken pursuant to Article 10(3) of Regulation No 659/1999 would lead to a situation in which a Member State, which refuses to reply to a request for information concerning an aid measure notified or otherwise, would enjoy more extensive legal protection where an unnotified aid measure is at issue.
- 62 It should be noted in that regard that Article 5(3) of Regulation No 659/1999 provides that if the Member State concerned, after receiving a reminder, does not provide the requested by an request for information by the Commission concerning a notified aid measure, or provides incomplete information, the notification is deemed to be withdrawn. In those circumstances, the withdrawal of the notification has the effect that that aid must be regarded as unnotified aid, so that the refusal of the Member State concerned to provide the information requested will lead, both in the case of aid initially notified and in the case of aid which has never been notified, to the adoption of an act open to challenge, namely a 'decision' within the meaning of Article 10(3) of Regulation No 659/1999.
- 63 It follows that, by holding that the act at issue could not form the subject-matter of an action for annulment, the General Court erred in law. In those circumstances, without it being necessary to examine the fifth plea, the first to fourth pleas must be upheld.
- 64 In Case C-463/10 P, however, the Commission asks the Court, in the event that it should hold that the act at issue constitutes an act open to challenge for the purposes of Article 263 TFEU, to carry out a substitution of grounds as regards the order in *Deutsche Post v Commission*, in order to indicate that the action formed by Deutsche Post was inadmissible since that undertaking did not have the capacity to bring an action for the purposes of the fourth paragraph of Article 263 TFEU. In the objection of inadmissibility raised by the Commission in that case, that institution had indeed maintained that the act at issue did not concern Deutsche Post either directly or individually.
- 65 In that respect, it should be recalled that, under the fourth paragraph of Article 263 TFEU, a natural or legal person may institute proceedings against a decision addressed to another only if the decision is of direct and individual concern to that natural or legal person.
- 66 Concerning, first, the question whether Deutsche Post is directly concerned by the act at issue, with is addressed to the Federal Republic of Germany, it follows from settled case-law that in order to satisfy that requirement two cumulative criteria must be met, namely, first, the contested Community measure must directly affect the legal situation of the individual and, second, it must leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules without the application of other intermediate rules (Joined Cases C-445/07 P and C-455/07 P *Commission v Ente per le Ville Vesuviane* and *Ente per le Ville Vesuviane v Commission* [2009] ECR I-7993, paragraph 45 and case-law cited).

- 67 According to the Commission, that condition is not met in this case, since the act at issue merely requests the Federal Republic of Germany to provide certain information. That injunction thus did not give rise to the adoption of a national measure which was purely automatic in character and resulted solely from EU rules. It was the conduct of the Federal Republic of Germany which would determine whether the latter would turn to Deutsche Post or how it would cause that undertaking to communicate the information.
- 68 In this case, it must be held that the act at issue directly affects Deutsche Post for the purposes of the fourth paragraph of Article 263 TFEU.
- 69 First of all, Deutsche Post, as beneficiary of the measure concerned by the information referred to by the act at issue and as holder of that information, will be obliged to act on the information injunction.
- 70 Moreover, the definitive and exhaustive content of the information requested is apparent from the act at issue itself, without leaving any discretion in that respect to the Federal Republic of Germany.
- 71 As for whether Deutsche Post is individually concerned by the act at issue, it should be recalled that, according to consistent case-law of the Court of Justice, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguishes them individually just as in the case of the person addressed (see, among others, Case C-260/05 P *Sniace v Commission* [2007] I-10005, paragraph 53 and case-law cited).
- 72 According to the Commission, Deutsche Post was not individually concerned by the act at issue, since the measure was not addressed to Deutsche Post and did not impose any burden on it.
- 73 In that respect, it should be noted that the fact that the act at issue is not addressed to Deutsche Post is irrelevant for assessing whether that undertaking is individually concerned by that measure, for the purposes of the fourth paragraph of Article 263 TFEU.
- 74 Next, it must be noted that the information injunction refers to a procedure for examining a State aid measure from which Deutsche Post is alleged to have benefited. The information concerned by the act at issue concern only Deutsche Post. The latter is thus individually concerned by that measure for the purposes of the case-law cited in paragraph 71 of this judgment.
- 75 Since Deutsche Post is directly and individually concerned by the act at issue, there is no need, in Case C-463/10 P, to carry out the substitution of grounds suggested by the Commission.
- 76 It follows from the foregoing that the appeal must be upheld and the contested orders set aside.

Reference of the cases back to the General Court

- 77 Under the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

- 78 The Court has the necessary information to give final judgment, in the two cases, on the objection of inadmissibility raised by the Commission during the procedure at first instance.
- 79 For the reasons set out in paragraphs 36 to 62 of this judgment, that objection of inadmissibility, based on the argument that the act at issue is not capable of forming the subject-matter of an action for annulment, must be dismissed. Moreover, in so far as, in Case T-570/08 *Deutsche Post v Commission*, the objection of inadmissibility is also based on the argument that the act at issue did not directly and individually concern the applicant, that objection cannot be accepted either for the reasons set out in paragraphs 65 to 75 of this judgment.
- 80 However, in the circumstances of this case, the Court is not in a position to rule on the substance of the actions brought by Deutsche Post and the Federal Republic of Germany.
- 81 It should be noted in that respect that the arguments presented to the General Court and the findings made by the latter related solely to the admissibility of the actions, given that, in the two cases, the General Court upheld the Commission's plea of inadmissibility under Article 114(1) of the Rules of Procedure of the General Court without going into the substance of the case or initiating the oral procedure.
- 82 The cases must therefore be referred back to the General Court for a decision on the applicants' pleas that the act at issue should be annulled.

Costs

- 83 Since the cases are being referred back to the General Court, it is appropriate to reserve the costs relating to the present appeal proceedings.

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

- 1. Annuls the orders of the General Court of the European Union of 14 July 2010, *Deutsche Post v Commission* (T-570/08), and *Germany v Commission* (T-571/08).**
- 2. Dismisses the objections of inadmissibility raised by the European Commission before the General Court of the European Union.**
- 3. Refers the cases back to the General Court of the European Union for a decision on the pleas of Deutsche Post AG (T-570/08) and the Federal Republic of Germany (T-571/08) for the annulment of the Commission's decision of 30 October 2008 ordering the Federal Republic of Germany to provide information in the proceedings concerning State aid in favour of Deutsche Post AG.**
- 4. Reserves the costs.**

[Signatures]

ⁱ — The wording of paragraph 50 of this judgment has been amended since it was first put online.