JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

10 February 2009 *

In Case T-388/03,

Deutsche Post AG, established in Bonn (Germany),

DHL International, established in Diegem (Belgium),

represented by J. Sedemund and T. Lübbig, lawyers,

applicants,

v

Commission of the European Communities, represented by V. Kreuschitz and M. Niejahr, acting as Agents,

defendant,

* Language of the case: German.

APPLICATION for annulment of Commission Decision C(2003) 2508 final of 23 July 2003 raising no objections, following the preliminary examination procedure provided for in Article 88(3) EC, to various measures adopted by the Belgian authorities in favour of La Poste SA, the Belgian public postal undertaking,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of I. Pelikánová, President, K. Jürimäe and S. Soldevila Fragoso (Rapporteur), Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 14 May 2008,

gives the following

Judgment

Background to the dispute

1 La Poste SA is the public undertaking responsible for the universal postal service in Belgium. On 1 October 1992, with the liberalisation of the postal market, La Poste

succeeded the Régie des Postes, which had fallen directly under the Belgian Postal Ministry. Since then, La Poste has been an autonomous public undertaking wholly owned by the Belgian State.

2 La Poste's public service duties, the charging system applicable in respect of those duties, the rules of conduct with regard to users and the subsidies are determined by legislation and detailed in a management contract with the State. Four contracts have, accordingly, been concluded between the State and La Poste since 1992.

3 In addition to its role as universal postal service operator, La Poste is responsible for numerous other tasks of public interest, including basic banking activities open to all, the delivery of press materials at reduced rates, the delivery of printed electoral materials, the payment of pensions at home, the sale of fishing licences and the receipt of administrative fines. The management contract determines the rules for compensating the additional net cost of services of general economic interest ('SGEIs').

4 The universal postal services sector accounts for 84% of La Poste's turnover. The express parcels sector represents 4% of its turnover, corresponding to an 18% market share in that sector.

5 The applicants, Deutsche Post AG and its Belgian subsidiary DHL International (together 'Deutsche Post Group'), operate in the postal services sector, in particular on the express parcel services market. Deutsche Post Group holds a 35 to 45% share of the Belgian express parcel services market.

Preliminary examination procedure

6 In 1999, the Belgian State decided, in principle, on a financial contribution to La Poste, subject to the drawing up of a business plan approved by its management bodies and combined with a redundancy scheme. That business plan, which was adopted on 28 June 2002, sought to increase the productivity and profitability of the undertaking, to improve the quality of service offered and to develop new activities, and it required considerable investment.

7 On 8 October 2002, the Belgian Government agreed on an increase of EUR 297.5 million in La Poste's capital. That increase in capital was to be effected in the form of a subscription for an increase in capital, paid for by shares representing capital with rights identical to those of shares already issued.

8 By letter of 3 December 2002, the Kingdom of Belgium notified the Commission of a proposal to increase La Poste's capital by EUR 297.5 million, in accordance with the provisions of Article 88(3) EC. Three meetings took place between the Commission and the Belgian authorities, on 12 December 2002 and 6 February and 3 April 2003, and they exchanged a number of letters.

9 Having learned of the existence of an examination procedure from a statement of the Belgian Minister for Telecommunications of 1 July 2003 followed by an article in the Belgian newspaper *Le Soir* on 14 July 2003, the applicants lodged with the Commission, by fax dated 22 July 2003 and registered on 23 July 2003, a request for information on the state of the procedure with a view to possibly participating in the procedure in accordance with the provisions of Article 20 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1).

10 On 23 July 2003, the Commission decided to raise no objections following the preliminary examination procedure provided for in Article 88(3) EC (Decision C(2003) 2508 final; 'the contested decision'), the notified measure not constituting State aid.

The contested decision

11 In the contested decision, the Commission set out the arguments of the Belgian authorities concerning their plan to increase La Poste's capital. The Belgian authorities thus maintain that they considered the proposal from the perspective of a private investor in a market economy. The contribution is part of a programme of measures to increase the productivity of the undertaking in the light of the opening up of postal markets and is intended to provide further capital, with an expectation of a return on investment. They consider that the undertaking has real prospects for growth in its new activities.

12 The Belgian authorities are, moreover, of the view that, since 1992, La Poste has had to bear costs of certain of its SGEI obligations (postal activities, banking activities for persons without a bank account) which have been only partly compensated by State funding. The fact that four fifths of La Poste's workers are employed as public officials has also led to significant additional costs (payment of pensions from 1992 to 1997 instead of contributions), as has the implementation of early retirement.

13 In its legal assessment of the notified measure, the Commission proceeded on the basis that, through each of the management contracts, the Belgian State conferred on La Poste specific tasks of general economic interest reflecting La Poste's public service mission. It stated that, in accordance with the case-law, if the compensatory payments

by the State from which La Poste benefited did not exceed the net additional cost of the SGEIs for which it was responsible, such measures did not constitute State aid within the meaning of Article 87(1) EC. However, if that compensation constituted State aid, it would, nevertheless, be compatible with the common market under Article 86(2) EC.

14 Before going on to assess the notified measure, the Commission, in the contested decision, satisfied itself that, since its transformation into an autonomous public undertaking, La Poste had not benefited from measures liable to be classified as State aid incompatible with the common market within the meaning of Article 87 EC. In the context of that examination, it identified six measures, namely an exemption from payment of corporation tax, the cancellation of a provision for pensions of EUR 100 million in 1997, the possibility of benefiting from a State guarantee for loans taken out, an exemption from property tax on buildings used in order to provide public services, overcompensation for financial services of general interest during the first management contract (1992-97) and two unnotified increases in capital in 1997 totalling EUR 62 million. In addition, the Commission stated that additional net costs of the SGEIs had been undercompensated.

15 The Commission was of the view that it should, first of all, carry out an assessment of those six measures, since the legality of the increase in capital notified was conditional upon them.

Measure 1: The exemption from payment of corporation tax

16 Having noted that La Poste showed an aggregate net loss of EUR 238.4 million from 1992 to 2002, the Commission found that, for that period, it was not possible to classify this measure as State aid, since it did not lead to any transfer of State resources.

Measure 2: The cancellation of a provision for pensions in 1997

17 The Commission found that a provision of EUR 100 million was created in 1992 when La Poste was transformed into an autonomous public undertaking, in order to cover a part of the pension payments in respect of rights acquired by employees from 1972 to 1992. In return, buildings necessary for the public service, and consequently inalienable, were transferred to La Poste. In 1997, when the pension system for postal workers employed as public officials was brought into line with the general system, that provision, which, since its creation, had never been called upon, was transferred to the revaluation reserve. The Commission, being of the view that La Poste had derived no advantage from the cancellation of the provision, found that that measure did not constitute State aid.

Measure 3: The benefit of a State guarantee for loans taken out

18 The Commission found that, like the Régie des Postes, La Poste had retained the option of calling on a State guarantee when taking out a loan and that, if it used that option, it had to pay an annual premium to the Treasury of 0.25%. As La Poste had not made use of that possibility in all the time since 1992, the Commission found that no advantage had been conferred upon it and that that measure did not constitute State aid.

Measure 4: The exemption from property tax on buildings used for providing public services

19 The Commission observed that La Poste was exempt from paying property tax on the immovable property which it owned which was used for public services. It found that that exemption from property tax, which a priori conferred a financial advantage upon it, was liable to constitute State aid within the meaning of Article 87(1) EC.

Measure 5: The overcompensation in respect of financial services of general interest during the first management contract (1992-97)

20 The Commission was of the view that separate accounting for the period 1992-97 revealed overcompensation of La Poste by the State for financial services of general interest and that that overcompensation potentially constituted State aid within the meaning of Article 87(1) EC.

Measure 6: The unnotified increases in capital in 1997 totalling EUR 62 million

21 The Commission indicated that those two increases in capital occurring in March and December 1997, which were intended to make good insufficient compensation for SGEIs, potentially constituted State aid within the meaning of Article 87(1) EC.

22 The Commission went on, next, to examine the measures liable to constitute State aid (measures 4 to 6) in the light of the provisions of Article 86(2) EC. Having thus calculated the difference between the overcompensation corresponding to those three measures and the undercompensation which it had itself established of the SGEIs, the Commission found that there remained an undercompensation of net additional costs of SGEIs and that, consequently, the three measures concerned did not constitute State aid within the meaning of Article 87(1) EC.

23 Moreover, the Commission found that, as the undercompensation of net additional costs of SGEIs over the period 1992-2002 was greater than the amount of the increase in capital notified, that increase in capital did not, in itself, constitute State aid within the meaning of Article 87(1) EC, since it did not confer any advantage on La Poste. The Commission thus decided not to raise objections in respect of that measure.

Procedure and forms of order sought

24 The applicants brought the present action by application lodged at the Registry of the Court of First Instance on 27 November 2003.

25 By separate document, lodged at the Registry of the Court of First Instance on 18 February 2004, the Commission raised an objection of inadmissibility pursuant to Article 114(1) of the Rules of Procedure of the Court of First Instance.

26 On 14 April 2004, the applicants presented their observations on that objection of inadmissibility.

27 By order of the Court of First Instance of 15 December 2004, the application for a ruling on admissibility was reserved for the final judgment.

28 The applicants claim that the Court of First Instance should:

— annul the contested decision;

— order the Commission to pay the costs.

29 The Commission contends that the Court of First Instance should:

— dismiss the action as inadmissible;

— in the alternative, dismiss it as unfounded;

— order the applicants to pay the costs.

Law

Admissibility

30 The objection of inadmissibility raised by the Commission is based on the applicants' lack of standing to bring proceedings and their lack of legal interest in bringing proceedings.

Standing to bring proceedings

— Arguments of the parties

31 The Commission contends that the action is not admissible, since the applicants are not individually concerned within the meaning of the fourth paragraph of Article 230 EC.

32 First, the Commission states, in arguments presented before judgment was delivered in Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, that, in order for an action to be admissible when brought by a competitor of the beneficiary against a decision not to raise objections that is adopted following the preliminary examination procedure provided for in Article 88(3) EC, the case-law requires that the applicant's position on the market concerned is substantially affected by the aid measure (Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraphs 20 to 26, and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 19).

33 Second, the Commission is of the view that the contested decision, even if it concerns the applicants in some respect, does not concern them individually within the meaning of the fourth paragraph of Article 230 EC and the case-law resulting from Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, inasmuch as they are not more concerned by the contested decision than any other undertaking which competes with the beneficiary on one or other of the markets on which the beneficiary is present.

34 The Commission contends that the applicants' assertion that, in paragraphs 27 and 28 of the contested decision, the Commission refers to the existence of direct competition between an undertaking of the Deutsche Post Group and La Poste is of no consequence, given that reference is made to that circumstance in the descriptive section of the contested decision and no legal effects are attributed to it. According to the Commission, the authorised aid was not related to the sectors of activity cited in paragraph 27 of the contested decision, which are of almost no significance for La Poste.

35 Lastly, the Commission stated at the hearing that, pursuant to the recent case-law of the Court of Justice (*Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 32

above, and judgment of 29 November 2007 in Case C-176/06 P *Stadtwerke Schwäbisch Hall and Others* v *Commission*, not published in the ECR), the action is inadmissible, since the applicants have claimed infringement of their procedural guarantees only very generally and, in the form of order sought by them, they seek annulment of the contested decision and not the initiation of the formal investigation procedure. The Commission therefore considers that, for their action to be admissible, the applicants should have established that they were substantially affected by the contested decision.

36 The applicants submit, first, that the case-law recognises the right for competitors of the beneficiary of an aid measure to challenge the decision of the Commission finding that that measure is incompatible with the common market following the preliminary examination procedure provided for in Article 88(3) EC (*Cook* v *Commission*, paragraph 32 above, paragraphs 20 to 24; *Matra* v *Commission*, paragraph 32 above, paragraphs 15 to 20, and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 45). That case-law establishes that undertakings with an interest in the administrative procedure have standing to bring proceedings where the Commission closes the procedure at the stage of the preliminary examination without initiating the formal investigation provided for in Article 88(2) EC, on the ground that, without such standing, undertakings would not be able to secure compliance with the procedural guarantees connected with the formal investigation procedure (*Cook* v *Commission*, paragraph 32 above, paragraph 24; *Matra* v *Commission*, paragraph 32 above, paragraph 17; and *Commission* v *Sytraval and Brink's France*, paragraph 40).

37 The applicants state that on 22 July 2003, even before the adoption of the contested decision, they requested the Commission to treat them as interested parties within the meaning of Article 1(h) and Article 20 of Regulation No 659/1999 and that by adopting the contested decision on 23 July 2003 the Commission did not take their request into account, thus depriving them of their procedural rights.

38 The applicants also observe that the measures which the contested decision declared to be compatible with the common market distort competition to their detriment, since the applicants operate as direct competitors of La Poste on the Belgian market, particularly in the express parcel delivery sector. In support of that argument, they claim that Deutsche Post Group achieved a total consolidated turnover of EUR 124.8 million in Belgium over the trading year prior to the adoption of the contested decision; that the Commission refers in the contested decision expressly to the direct competition existing between Deutsche Post Group and La Poste; that the applicants represent 35 to 45% of the Belgian market in the express parcel and document delivery sector (Commission decision of 21 October 2002 declaring a concentration to be compatible with the common market (Case No COMP/M.2908 — Deutsche Post/DHL (II), paragraph 23) while La Poste has only an 18% share of the market; and that only a leading group of four international undertakings operate on the liberalised postal markets in Belgium, namely DHL/DPAG, UPS, TPG/TNT and FedEx (the Deutsche Post/DHL decision, paragraph 26).

— Findings of the Court

39 In accordance with the fourth paragraph of Article 230 EC, a natural or legal person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to the former.

40 According to settled case-law, 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 (*Plaumann* v *Commission*, paragraph 33 above, at 107, and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 32 above, paragraph 33).

41 In the case of a Commission decision on State aid, it should be pointed out that, in the context of the procedure for review of State aid by the Commission laid down in Article 88 EC, the preliminary stage of the review procedure under Article 88(3) EC, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, must be distinguished from the detailed examination under Article 88(2) EC. It is only in connection with the latter examination, which is designed to enable the Commission to be fully informed of all the facts of the case, that the EC Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (*Cook* v *Commission*, paragraph 32 above, paragraph 22; *Matra* v *Commission*, paragraph 32 above, paragraph 16; *Commission* v *Sytraval and Brink's France*, paragraph 36 above, paragraph 38; and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 32 above, paragraph 34).

42 Where, without initiating the formal investigation procedure under Article 88(2) EC, the Commission finds, on the basis of Article 88(3) EC, that aid is compatible with the common market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision before the Community judicature (*Cook* v *Commission*, paragraph 32 above, paragraph 23; *Matra* v *Commission*, paragraph 32 above, paragraph 17; *Commission* v *Sytraval and Brink's France*, paragraph 36 above, paragraph 40; and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 32 above, paragraph 35). For those reasons, an action for the annulment of such a decision brought by a person who is concerned within the meaning of Article 88(2) EC is admissible where he seeks, by instituting proceedings, to safeguard the procedural rights available to him under the latter provision (*Cook* v *Commission*, paragraph 32 above, paragraphs 23 to 26; *Matra* v *Commission*, paragraph 32 above, paragraphs 17 to 20; and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 32 above, paragraph 35).

43 The parties concerned within the meaning of Article 88(2) EC who are thus entitled under the fourth paragraph of Article 230 EC to institute proceedings for annulment are those persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular undertakings competing with the beneficiaries of that aid and trade associations (*Commission* v *Sytraval and Brink's France*, paragraph 36 above, paragraph 41, and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 32 above, paragraph 36).

44 On the other hand, if the applicant challenges the substance of the decision appraising the aid as such, the mere fact that it may be regarded as concerned within the meaning of Article 88(2) EC cannot suffice to render the action admissible. The applicant must then demonstrate that it has a particular status within the meaning of the case-law resulting from *Plaumann*, paragraph 33 above. That would apply in particular where the applicant's market position is substantially affected by the aid to which the decision at issue relates (*Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 32 above, paragraph 37).

45 In the present case, the applicants rely on seven pleas in law in support of their action. The first plea alleges infringement of the rights of the defence, the Commission having made available to them only a non-confidential version of the contested decision with the majority of the figures withheld out of respect for the principle of commercial secrecy. The second plea alleges failure to comply with the provisions of Article 88(3) EC, the Commission having decided not to initiate the procedure provided for in Article 88(2) EC, even though it experienced serious difficulties in its assessment of the compatibility of the State aid with the common market. In the third, fourth and fifth pleas, the applicants claim that the examination by the Commission of the measures corresponding to the exemption from corporation tax, the cancellation of a provision and the possibility of benefiting from a State guarantee for loans was insufficient or incomplete, and the applicants challenge the failure to classify those measures as State aid. In support of their sixth plea, the applicants challenge the method and content of the calculation by the Commission of the difference between items of overcompensation and undercompensation in respect of the additional cost of SGEIs. Lastly, in support of their seventh plea, the applicants claim that, contrary to the principles laid down by the Court of Justice in its judgment in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747 ('*Altmark*'), the Commission did not verify whether the SGEIs were provided at the least cost to the community.

46 As the applicants are, therefore, simultaneously challenging the Commission's refusal to initiate the formal investigation procedure and the substance of the contested decision, it is necessary, in order to determine whether they are entitled to bring the

present proceedings, to analyse, first, their standing to challenge the substance of the contested decision and, second, their standing to ensure that their procedural rights are respected.

47 First, the applicants have not established that their position on the market may be significantly affected by the aid to which the contested decision relates.

48 The mere fact that the decision in question may exercise an influence on the competitive relationships existing on the relevant market and that the undertakings concerned are in a competitive relationship with the beneficiary of that decision does not constitute a significant effect (see, to that effect, Joined Cases 10/68 and 18/68 *Eridania and Others* v *Commission* [1969] ECR 459, paragraph 7). An undertaking cannot therefore rely solely on its status as a competitor of the undertaking benefiting from the measure in question but must additionally show the magnitude of the prejudice to its position on the market (see, to that effect, Case C-106/98 P *Comité d'entreprise de la Société française de production and Others* v *Commission* [2000] ECR I-3659, paragraphs 40 and 41).

49 The applicants have adduced no evidence capable of establishing that their competitive situation on the Belgian postal market was special, merely claiming that they were among a number of undertakings on the market concerned. In addition, the mere fact that the applicants were mentioned by name in the contested decision does not suffice to establish that they have been significantly affected by the measures from which La Poste has benefited and which were authorised by the contested decision, since, in the passages concerned, the Commission merely stated that the Belgian postal market was comparatively more open that those of other Member States, La Poste having only 18% of the express parcel delivery market and the remainder being in the hands of international operators, and that La Poste's operating margin for the traditional postal

service, essentially comprised of letters, was much lower than that of the Netherlands postal operator TPG or Deutsche Post World Net (see, to that effect, the order in Case T-358/02 *Deutsche Post and DHL* v *Commission* [2004] ECR II-1565, paragraphs 39 to 41).

50 Lastly, the applicants adduced figures relating to the share of the market which they hold in the express parcel delivery sector in Belgium.

51 Those figures in themselves are, however, not such as to demonstrate that their competitive position, compared with that of La Poste's other competitors, was significantly affected by the contested decision.

52 On the other hand, in their capacity as direct competitors of La Poste on the express parcel delivery market, the applicants have the status of concerned parties within the meaning of Article 88(2) EC.

53 It must therefore, second, be verified whether the applicants in bringing their action are in fact seeking to defend their procedural rights resulting from Article 88(2) EC.

54 The Court of First Instance must interpret an applicant's pleas in terms of their substance rather than of their classification (Joined Cases 19/60, 21/60, 2/61 and 3/61 *Fives Lille Cail and Others* v *High Authority* [1961] ECR 281). Consequently, it may also examine other arguments which an applicant advances in order to verify whether they too contribute evidence of arguments in support of a plea, put forward by the applicant, expressly claiming the existence of doubts which would have justified the initiation of

the procedure referred to in Article 88(2) EC (Case T-158/99 *Thermenhotel Stoiser Franz and Others* v *Commission* [2004] ECR II-1, paragraphs 141, 148, 155, 161 and 167, and judgment of 20 September 2007 in Case T-254/05 *Fachvereinigung Mineralfaserindustrie* v *Commission*, not published in the ECR, paragraph 48). However, it is not for the Court of First Instance to interpret an action brought by an applicant to challenge exclusively the substance of a decision appraising the aid as such as one seeking, in fact, to safeguard the applicant's procedural rights pursuant to Article 88(2) EC, if the applicant has not expressly raised a plea to that effect. In such as case, the interpretation of the plea would lead to a reclassification of the subject-matter of the action (see, to that effect, *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 32 above, paragraphs 44 and 47, and *Stadtwerke Schwäbisch Hall and Others* v *Commission*, paragraph 35 above, paragraph 25). At the very least, the Court of First Instance must rely for this purpose on evidence or arguments presented by the applicant showing that the applicant seeks, essentially, to safeguard his procedural rights.

55 The applicants expressly claim, by their second plea, that the procedural rights which they derived from Article 88(2) EC were infringed when the contested decision was adopted.

56 Moreover, it is apparent from the application that its third, fourth, fifth and seventh pleas provide arguments in support of the second plea, since the applicants claim there that, in certain specific respects, the Commission's examination was insufficient and incomplete and that the formal investigation procedure should have been initiated (paragraphs 29, 37, 41 and 42 of the application). Furthermore, the seventh plea, alleging a failure to verify that the SGEIs were provided at the least cost to the community, constitutes an argument which could enable it to be established that the formal investigation procedure should have been initiated by the Commission. Consequently, the applicants also seek to assert by those pleas, which are designed to show that the measures at issue could not have been examined appropriately in the context of the preliminary examination procedure, that their procedural rights pursuant to Article 88(2) EC were infringed when the contested decision was adopted.

57 It follows from all of the foregoing that the applicants have standing to bring proceedings.

Legal interest in bringing proceedings

— Arguments of the parties

58 The Commission contends that the action which the applicants have brought is not admissible, since they have no legal interest in the outcome of the dispute. The case-law requires an applicant always to establish that he has a personal legal interest in bringing proceedings. Whether that interest exists is to be assessed in relation to the objective of the action.

59 In the present case, the Commission is of the view that, if the contested decision is annulled, there is for the applicants a risk that Commission Decision 2002/753/EC of 19 June 2002 on measures implemented by the Federal Republic of Germany for Deutsche Post (OJ 2002 L 247, p. 27), which declares those measures to be incompatible with the common market, will be confirmed.

60 The applicants make the point that the objective of their action is to preserve their interests as direct competitors of La Poste, the beneficiary of the aid at issue, and that their action is totally independent of the other cases they may have before the Court of First Instance.

— Findings of the Court

61 In the case of Commission decisions on State aid, it is only in connection with the detailed investigation stage envisaged by Article 88(2) EC, which is designed to enable the Commission to be fully informed of all the facts of the case, that the EC Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (*Cook* v *Commission*, paragraph 32 above, paragraph 22; *Matra* v *Commission*, paragraph 32 above, paragraph 16; *Commission* v *Sytraval and Brink's France*, paragraph 36 above, paragraph 38; and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 32 above, paragraph 34).

62 In their capacity as concerned parties within the meaning of Article 88(2) EC, the applicants have a legal interest in securing the annulment of the contested decision, taken at the end of the preliminary examination procedure, since, pursuant to the provisions of Article 88 EC, such an annulment would require the Commission to initiate the formal investigation procedure, permitting them to present their observations and thus exert an influence on the new Commission decision.

63 On the other hand, in order to determine whether the applicants have a legal interest in bringing proceedings, it is not for the Court of First Instance to compare the pleas raised in the context of the present action with the arguments in defence presented by the applicants in a separate case.

64 It follows from the foregoing that the applicants have a legal interest in bringing proceedings.

65 The action is thus admissible and the objection of inadmissibility raised by the Commission must, accordingly, be dismissed.

The purpose of the review by the Court of First Instance and the admissibility of the pleas in the action

The purpose of the review by the Court of First Instance

66 With regard to the purpose of the review which is to be carried out by the Court of First Instance, it is necessary to state that, when an applicant seeks to safeguard his procedural rights pursuant to Article 88(2) EC, he may rely on any of the grounds set out in the second paragraph of Article 230 EC, provided that they are directed at the annulment of the contested decision and, in any event, the initiation by the Commission of the procedure referred to in Article 88(2) EC (see, to that effect, Case T-157/01 *Danske Busvognmænd* v *Commission* [2004] ECR II-917, paragraph 41). On the other hand, it is not for the Court of First Instance to rule at that stage of the Commission's procedure for examination of aid on whether aid exists or whether it is compatible with the common market (Opinion of Advocate General Mengozzi in Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, point 71).

67 Pleas invoked in an application which are aimed at obtaining a ruling from the Court of First Instance on the existence of aid or on its compatibility with the common market must consequently be rejected as inadmissible. This applies, in the present case, to the sixth plea, alleging that the Commission used an incorrect method to calculate the difference between items of overcompensation and undercompensation in respect of

the additional cost of the SGEIs, and to the third, fourth and fifth pleas, inasmuch as they allege that the Commission erred in considering that the measures examined did not constitute State aid.

68 In the same way, the first plea, alleging infringement of the rights of the defence, must be declared inadmissible, since the applicants have not established or even alleged that the figures withheld in the non-confidential version of the contested decision were necessary for them to secure the initiation by the Commission of the procedure referred to in Article 88(2) EC. It is apparent, in fact, from the application that they intended solely to use those data in order to check that the Commission had not erred in finding that the measures examined did not constitute State aid.

69 In contrast, the second plea, alleging failure to comply with the provisions of Article 88(3) EC, and the third, fourth, fifth and seventh pleas, inasmuch as they seek to establish that the examination by the Commission during the preliminary examination stage was insufficient or incomplete, may be examined by the Court.

Admissibility of the plea alleging that the Commission's examination was insufficient in the light of the criteria laid down in *Altmark*

70 Since the Commission contends that a new plea is involved, it is necessary to examine the admissibility of the seventh plea inasmuch as it seeks to establish that the examination carried out by the Commission was insufficient in the light of the criteria laid down in *Altmark*, paragraph 45 above.

71 In that regard, it is appropriate to recall that, under Article 48(2) of the Rules of Procedure,'[n]o new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure'. However, a plea which constitutes an amplification of a plea previously put forward, directly or by implication, in the application initiating proceedings, and is closely linked to that plea is admissible (Case T-212/97 *Hubert* v *Commission* [1999] ECR-SC I-A-41 and II-185, paragraph 87, and the order in Case T-110/98 *RJB Mining* v *Commission* [2000] ECR II-2971, paragraph 24).

72 In the present case, the applicants claim in their reply, under the heading 'Infringement of the criteria laid down in [*Altmark*]', that the Commission adopted an incorrect interpretation of the concept of State aid and present a line of argument seeking to establish that the Commission omitted to examine in the contested decision whether the costs of the SGEIs which were compensated by the Belgian State were equivalent to or lower than those of a typical undertaking which was well run, as envisaged in *Altmark*, paragraph 45 above. They seek thus to claim that the examination carried out by the Commission in the context of the procedure laid down in Article 88(3) EC did not enable it, at the end of its preliminary investigation, to overcome the difficulties linked to the assessment of whether the level of compensation awarded by the Belgian State to La Poste was appropriate.

73 That plea is closely linked with the second plea, alleging failure to comply with the provisions of Article 88(3) EC and a need to initiate the formal investigation procedure in respect of aid provided for in Article 88(2) EC. In claiming that the Commission lacked sufficient information to enable it to determine whether the public services were provided at an appropriate cost, the applicants seek to establish that the Commission should have initiated the formal investigation procedure. In those circumstances, this plea, implicitly constituting a part of the second plea in the application, is to be considered to be admissible.

Substance

Arguments of the parties

— The second plea, alleging that it was necessary to initiate the procedure provided for in Article 88(2) EC

74 The applicants claim that the Commission failed to comply with the provisions of Article 88(3) EC in deciding not to initiate the procedure provided for in Article 88(2) EC. According to the case-law, initiation of the formal investigation procedure is indispensable once the Commission experiences serious difficulties in its assessment of the compatibility of the State aid with the common market and is unable to overcome all of the difficulties raised by that assessment in the course of the initial examination (Case C-204/97 *Portugal* v *Commission* [2001] ECR I-3175, paragraphs 33 to 35). In the present case, the excessive length of the preliminary examination procedure, the scope of the questions to be decided in the context thereof and the content of the documents concerning that procedure produced by the Commission at the request of the Court show that the formal investigation procedure had to be opened.

75 The applicants also seek to rely on paragraph 35 of the judgment in *Portugal* v *Commission*, paragraph 74 above, in accordance with which the Commission is required to examine all the facts and points of law which third parties and particularly undertakings whose interests are affected by the granting of the aid bring to its notice.

76 The applicants state, lastly, that the requests for information sent by the Commission in the course of the preliminary examination procedure may serve only to supplement the notification and that it is only during the formal investigation procedure that complete

information can be assembled. In the present case, the volume of documents produced was very great and the scope of the Commission's investigation was extremely wide.

77 The Commission is of the view that it is for the applicants to establish that it experienced serious difficulties in assessing whether the notified measure was compatible with the common market. The Commission also contends that the length of the preliminary examination procedure was not excessive and that it is justified by the large amount of information which it had to collect, setting, on each occasion, a deadline for the Belgian Government.

— The third plea, inasmuch as it alleges that the Commission's examination of the exemption from corporation tax was incomplete

78 The applicants note that the only reason why the Commission declined to classify this measure as State aid was the net loss shown by La Poste for the period from 1992 to 2002. They are of the view that the examination of a measure potentially capable of constituting State aid must also be carried out by assessing its future effects (Case 57/86 *Greece* v *Commission* [1988] ECR 2855, paragraph 10).

79 The Commission contends that the objective of the contested decision is not to examine the exemption from corporation tax in the light of the rules on State aid, but merely to establish whether that exemption conferred an advantage on La Poste which must be taken into account in the calculation of the difference between the net additional costs and the total public expenditure.

— The fourth plea, inasmuch as it alleges that the Commission's examination of the cancellation of the provision for pensions was incomplete

80 The applicants maintain that the transfer of immovable property by the Belgian State constitutes a considerable economic advantage, even if those properties are inalienable, and that that point was not subject to sufficient examination by the Commission. They are of the view that La Poste thus acquired immovable property gratuitously, freeing it from considerable property purchase or property rental costs.

81 The Commission contends that La Poste never benefited from a real subsidy to help it finance the pensions of its employees, but rather from a mere accounting operation — a provision — counterbalanced by the inalienable properties transferred by the State. According to the Commission, abolishing the provision for pensions did not secure any advantage for La Poste. In contrast, ending the obligation to bear the costs of pensions for its employees from 1997 did constitute an advantage, which was, however, compensated by La Poste's assumption of the obligation to bear the employer's contributions.

— The fifth plea, inasmuch as it alleges that the Commission examination of the possibility of benefiting from the State guarantee for loans was incomplete

82 The applicants claim that the mere existence of the possibility of benefiting from a State guarantee for its loans affords La Poste financing conditions to which other undertakings do not have access and that the Commission moreover followed similar reasoning in cases concerning the guarantees offered by the Federal Republic of Germany to its public banks or by France in respect of liabilities of Électricité de France. The applicants are of the view that, in the contested decision, the Commission failed to

establish in what way the mechanism from which La Poste benefits is not automatic in nature. Lastly, they consider that the Commission should have made a comparison of the amount of the annual premium which La Poste is required to pay to the State with the amount it would be required to pay under normal market conditions.

83 According to the Commission, that possibility of benefiting from a State guarantee does not constitute State aid, because La Poste was able to dispense with the guarantee. It states moreover that the mere possibility of benefiting from a guarantee cannot be equated with an actual guarantee in its assessment of the compatibility of such a measure with the common market.

— The seventh plea, inasmuch as it alleges that, in the light of the criteria laid down in *Altmark*, the examination carried out by the Commission was insufficient

84 In their reply, the applicants claim that the Commission has misinterpreted the judgment in *Altmark*, paragraph 45 above, in which the Court stated that the compensation of SGEI costs constitutes only one of the criteria which must be fulfilled for a financial advantage not to constitute State aid within the meaning of Article 87 EC. They maintain that the Commission should, in particular, have verified that the services of general interest were provided at the least cost to the community (*Altmark*, paragraph 45 above, paragraph 95), which does not appear to have been the case in the present instance.

85 The Commission merely contends that this plea was not raised by the applicants in their application and that it is, therefore, inadmissible.

Findings of the Court

— General rules relating to the procedure laid down in Article 88 EC

86 It is appropriate at the outset to recall the general rules of the system established by the Treaty for monitoring State aid, as identified by case-law (*Commission* v *Sytraval and Brink's France*, paragraph 36 above, paragraphs 33 to 39; Case T-95/96 *Gestevisión Telecinco* v *Commission* [1998] ECR II-3407, paragraphs 49 to 53; Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraphs 164 to 166; and Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraphs 39 to 49).

87 Under Article 88(3) EC, the Commission carries out an examination of proposed State aid which is intended to enable it to form a *prima facie* opinion as to whether the aid in question is partially or entirely compatible with the common market. The formal investigation procedure provided for in Article 88(2) EC, on the other hand, seeks to protect the rights of third parties who are potentially concerned (see paragraphs 42 and 43 above) and must, moreover, enable the Commission to be fully informed of all the facts of the case before taking its decision, in particular by receiving the observations of interested third parties and Member States (Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13). Whilst its powers are circumscribed as far as the decision to initiate the formal procedure is concerned, the Commission nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether they present serious difficulties. In accordance with the objective of Article 88(3) EC and its duty of good administration, the Commission may, amongst other things, engage in talks with the notifying State or with third parties in an endeavour to overcome, during the preliminary examination procedure, any difficulties encountered (*Prayon-Rupel* v *Commission*, paragraph 86 above, paragraph 45).

88 According to settled case-law, the procedure under Article 88(2) EC is obligatory if the Commission experiences serious difficulties in establishing whether or not aid is compatible with the common market (*Germany* v *Commission*, paragraph 87 above, paragraph 13; *Cook* v *Commission*, paragraph 32 above, paragraph 29; *Matra* v *Commission*, paragraph 32 above, paragraph 33; and Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501, paragraph 58).

89 It is for the Commission to decide, on the basis of the factual and legal circumstances of the case, whether the difficulties involved in assessing the compatibility of the aid require the initiation of that procedure (*Cook* v *Commission*, paragraph 32 above, paragraph 30). That decision must satisfy three requirements.

90 Firstly, under Article 88 EC the Commission's power to find aid to be compatible with the common market upon the conclusion of the preliminary examination procedure is restricted to aid measures that raise no serious difficulties. That criterion is thus an exclusive one. The Commission may not, therefore, decline to initiate the formal investigation procedure in reliance upon other circumstances, such as third party interests, considerations of economy of procedure or any other ground of administrative or political convenience (*Prayon-Rupel* v *Commission*, paragraph 86 above, paragraph 44).

91 Secondly, where it encounters serious difficulties, the Commission must initiate the formal procedure, having no discretion in this regard.

92 Thirdly, the notion of serious difficulties is an objective one. Whether or not such difficulties exist requires investigation of both the circumstances under which the contested measure was adopted and its content. That investigation must be conducted objectively, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the common market (*SIDE* v *Commission*, paragraph 88 above, paragraph 60). It follows that judicial review by the Court of First Instance of the existence of serious difficulties will, by nature, go beyond consideration of whether or not there has been a manifest error of assessment (see, to that effect, *Cook* v *Commission*, paragraph 32 above, paragraphs 31 to 38; *Matra* v *Commission*, paragraph 32 above, paragraphs 34 to 39; *SIDE* v *Commission*, paragraph 88 above, paragraphs 60 to 75; *BP Chemicals* v *Commission*, paragraph 86 above, paragraphs 164 to 200; and *Prayon-Rupel* v *Commission*, paragraph 86 above, paragraph 47).

93 The applicants bear the burden of proving the existence of serious difficulties and may discharge that burden of proof by reference to a body of consistent evidence, concerning, first, the circumstances and the length of the preliminary examination procedure and, second, the content of the contested decision.

94 According to the case-law, the fact that the time spent considerably exceeded the time usually required for a preliminary examination under Article 88(3) EC may, with other factors, justify the conclusion that the Commission encountered serious difficulties of assessment necessitating initiation of the procedure under Article 88(2) EC (*Germany* v *Commission*, paragraph 87 above, paragraphs 15 and 17; Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125, paragraph 102; and *Prayon-Rupel* v *Commission*, paragraph 86 above, paragraph 93).

95 It is also apparent from the case-law that if the examination carried out by the Commission during the preliminary examination procedure is insufficient or incomplete, this constitutes evidence of the existence of serious difficulties (see, to that effect, *Cook* v *Commission*, paragraph 32 above, paragraph 37; *Portugal* v *Commission*, paragraph 74 above, paragraphs 46 to 49; *SIDE* v *Commission*, paragraph 88 above, paragraphs 61, 67 and 68; and *Prayon-Rupel* v *Commission*, paragraph 86 above, paragraph 108).

— Evidence of serious difficulties relating to the length and circumstances of the preliminary examination procedure

96 The Court should examine first of all whether the length and the circumstances of the preliminary examination procedure constitute evidence of the existence of serious difficulties, by verifying whether the procedure conducted by the Commission considerably exceeded what is normally required for a preliminary examination carried out pursuant to Article 88(3) EC.

97 As regards, first, the length of time that elapsed between notification of the aid proposal and adoption of the decision by the Commission at the end of the preliminary examination procedure, it should be pointed out that Article 4(5) of Regulation No 659/1999 provides for a two-month period for that procedure, which may be extended by mutual consent or where the Commission requires additional information.

98 In the present case, the aid was notified to the Commission by the Belgian State on 5 December 2002, and the contested decision was adopted on 23 July 2003, just over seven months later. During that period, three meetings were organised, on 12 December 2002 and 6 February and 3 April 2003, between the Commission and the Belgian authorities, and three requests for additional information were sent by the Commission to the Kingdom of Belgium, on 23 December 2002 and 3 March and 5 May 2003. That period of seven months manifestly exceeded the one with which the Commission is, in principle, required to comply in completing its preliminary examination.

99 Secondly, as regards the particular circumstances of the preliminary procedure, it must be pointed out that, in accordance with the purpose of Article 88(3) EC and the Commission's duty of good administration, that institution may, in the course of the preliminary examination procedure, find it necessary to request supplementary information from the notifying State (see, to that effect, *Matra* v *Commission*,

paragraph 32 above, paragraph 38). Whilst such requests are not proof of the existence of serious difficulties, they may, in conjunction with the duration of the preliminary examination, be evidence thereof.

100 By way of measures of organisation of procedure, the Court of First Instance called upon the Commission to produce the requests for information sent to the Belgian authorities on 23 December 2002 and 3 March and 5 May 2003, the responses provided by the Belgian State on 28 January, 3 April and 13 June 2003 and the minutes of the meetings organised with the Belgian authorities on 12 December 2002 and 6 February and 3 April 2003.

101 A number of matters contained in the documents produced by the Commission should be noted. First, it is apparent from those documents that the scope covered by the Commission's investigation during the preliminary examination procedure was very wide. Both the meetings and the exchanges of information between the Commission and the Belgian authorities concerned not only the notified measure, but also increases in capital in 1997 which were not notified to the Commission, the possible existence of cross-subsidies between the public service activities and competitive activities and La Poste's special tax regime, even if certain of those matters do not appear in the contested decision.

102 Moreover, the documents show that, during the preliminary examination procedure, the Commission repeatedly pointed out the complexity of the case on a number of occasions, in particular in the minutes of the meeting of 12 December 2002, which state that 'the Commission indicated that, in view of the complexity of La Poste's situation, especially its past situation, and the need for legal certainty which it may have, particularly in the context of a possible future privatisation, it was necessary to initiate the procedure', and at the meeting of 6 February 2003.

103 It is also apparent from those documents that the Commission hesitated for several months as to the choice of legal basis upon which to adopt its decision. Thus, at the first meeting, on 12 December 2002, the Commission stated that 'an agreement on its part on the aid might take several different forms, be it a decision finding that the measures at issue do not constitute aid, are aid intended to support the public service or are restructuring aid. At the second meeting on 6 February 2003 and following an exchange of information in writing, the Commission was still uncertain whether it was appropriate to base its approach on that of a private investor in a market economy, and thus on Article 87 EC, or on Article 86(2) EC. As is apparent from the minutes of the meeting of 12 December 2002, the Belgian authorities stated their clear preference for the first solution, seeking to promote the idea of a profitable investment, whilst the Commission appeared to have doubts regarding La Poste's conduct in the development of its competitive activities, as indicated by the minutes of the meeting of 6 February 2003 and by the Commission's numerous, repeated requests for information concerning the assumptions as to the possible development of La Poste's activity.

104 The minutes of the meeting of 6 February 2003 moreover permit the finding that the Belgian authorities stressed the need to obtain a Commission decision in a short period because of an election on 18 May 2003 which could have called into question the increase in capital envisaged.

105 Lastly, the Commission appears to have wished to avoid sending a third request for information, since the minutes of the meeting of 6 February 2003 stated that its representative '[would] try as far as possible and in spite of the complexity of the case to make the second list of questions as complete as possible so as to avoid a third request for information'. The Commission was, however, unable to manage this since, on 5 May 2003, it sent the Belgian authorities the third and final request for information concerning a not inconsiderable number of points, such as the assumptions as to the possible development of La Poste's activity, its financial forecasts, the breakdown of the allocation of the public financial services to the public service, the proportion of the investments attributed to universal service activities, the risk associated with 85% of the subsidiaries' profits being concentrated in two activities and the taking into account of the cancellation of a provision for early retirement.

106 It follows from all those matters that it must be conceded that the procedure conducted by the Commission in the present case considerably exceeded what is normally required for an initial examination carried out pursuant to the provisions of Article 88(3) EC and, accordingly, that that circumstance constitutes probative evidence of the existence of serious difficulties.

107 It is, therefore, necessary to examine whether matters concerning the content of the contested decision may also constitute evidence showing that the Commission experienced serious difficulties in the examination of the measures at issue.

— Whether the examination in the contested decision of the cancellation of the provision for pensions was insufficient

108 It should be recalled that, in 1992, on its transformation into an autonomous undertaking, La Poste created a provision of EUR 100 million in order to cover a part of the pension payments in respect of rights acquired by employees from 1972 to 1992. In return, buildings necessary for the public service, and accordingly inalienable, were transferred to La Poste by the Belgian State. In 1997, when the pension system for postal workers employed as public officials was brought into line with the general system, that provision, which, since its creation, had never been called upon, was transferred to the revaluation reserve.

109 It is, however, apparent from the contested decision and from the documents produced by the Commission at the Court's request that the Commission did not obtain information which would have enabled it to rule in the light of Article 87 EC on the classification of the transfer by the Belgian State of properties in favour of La Poste, even though such measures might have secured an advantage for that undertaking. The

Commission took the contested decision without having at its disposal evidence which, in particular, could have enabled it to assess the advantage secured by making the properties available gratuitously. It should, however, have carried out a detailed investigation of the effects of that measure before ruling on its classification as State aid.

110 Consequently, the fact that, during the preliminary examination procedure, the Commission was not in a position to carry out a sufficient examination of the transfer of properties by the Belgian State to La Poste constitutes additional evidence of the existence of serious difficulties.

— Whether the examination in the contested decision of the cost of providing SGEIs was incomplete

111 It is necessary to point out at the outset that the applicants' argument concerning the lack of examination by the Commission of the cost of providing the SGEIs is based on the conditions laid down by the Court of Justice in *Altmark*, paragraph 45 above, a judgment which was delivered after the contested decision was adopted and the contents of which therefore could not have been known to the Commission when it adopted its decision.

112 However, the Court of Justice did not place any temporal limitation on the scope of its findings in *Altmark*, paragraph 45 above. In the absence of such a limitation *ratione temporis*, these findings resulting from an interpretation of Article 87(1) EC are therefore fully applicable to the factual and legal situation of the present case as it presented itself to the Commission when it adopted the contested decision (see, to that effect, Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraph 158).

113 In that connection, it must be borne in mind that an interpretation which the Court of Justice gives of a provision of Community law is limited to clarifying and defining the meaning and scope of that provision as it ought to have been understood and applied from the time of its entry into force. It follows that the provision as thus interpreted may, and must, be applied even to legal relationships which arose and were established before the judgment in question and it is only exceptionally that, in application of a general principle of legal certainty which is inherent in the Community legal order, the Court may decide to restrict the right to rely upon a provision, which it has interpreted, with a view to calling into question legal relationships established in good faith. Such a restriction can be allowed only in the actual judgment ruling upon the interpretation sought (see, to that effect and by analogy, Case C-209/03 *Bidar* [2005] ECR I-2119, paragraphs 66 and 67, and Case C-292/04 *Meilicke and Others* [2007] ECR I-1835, paragraphs 34 to 36 and the case-law cited). The Court of First Instance considers that those considerations, which derive from case-law dealing, in particular, with the national courts' duty to apply Community law, apply mutatis mutandis to the Community institutions when they, in turn, are required to implement the provisions of Community law which are subsequently interpreted by the Court of Justice (*BUPA and Others* v *Commission,* paragraph 112 above, paragraph 159).

114 In the present case, it is thus appropriate to examine whether the Commission carried out an examination which enabled it to determine whether the level of compensation paid to La Poste was fixed on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the necessary means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (see, to that effect, *Altmark*, paragraph 45 above, paragraph 93).

115 It is apparent both from the contested decision and from the exchange of letters and the minutes of the meetings between the Commission and the Belgian authorities that the Commission never verified that the services of general interest which La Poste provided were at a cost which would have been borne by a typical undertaking which was well-run, in accordance with the principle laid down by *Altmark*, paragraph 45 above. The Commission merely relied on the negative balance of all the items of overcompensation

and undercompensation in respect of the additional cost of the SGEIs for its finding that the measures examined did not constitute State aid within the meaning of Article 87(1) EC.

116 Thus, on the basis of those factors, it must be concluded that the Commission did not carry out an examination of the cost of the services of general interest provided by La Poste compared with the costs which a typical undertaking would have borne, an appraisal which might have enabled it to find that the measures examined did not constitute State aid.

117 The fact that the Commission was not in a position during the preliminary examination procedure to carry out a complete examination of whether the level of compensation awarded by the Belgian State to La Poste was appropriate constitutes further evidence of the existence of serious difficulties.

118 It follows from the examination of the second plea and of the fourth and seventh pleas, in so far as they seek to establish that the examination carried out by the Commission during the preliminary examination stage was insufficient or incomplete, that there exists a body of objective and consistent evidence – deriving from the excessive length of the preliminary examination procedure, from the documents which reveal the scope and complexity of the examination to be carried out and from the partially incomplete and insufficient content of the contested decision — which shows that the Commission adopted the contested decision in spite of the existence of serious difficulties. Without it being necessary to rule on the applicants' third and fifth pleas inasmuch as they seek to establish that the Commission's examination may have been incomplete or insufficient with regard to the exemption from corporation tax and the possibility of benefiting from a State guarantee for loans taken out, it has therefore to be concluded that assessment of the compatibility of the notified measure with the common market raised serious difficulties which should have led the Commission to initiate the procedure referred to in Article 88(2) EC.

119 The contested decision must therefore be annulled.

Costs

120 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to bear its own costs and to pay those of the applicants.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Annuls Commission Decision C(2003) 2508 final of 23 July 2003 raising no objections, following the preliminary examination procedure provided for in Article 88(3) EC, to various measures adopted by the Belgian authorities in favour of La Poste SA, the Belgian public postal undertaking;**

2. Orders the Commission to bear its own costs and to pay those incurred by Deutsche Post AG and DHL International.

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 10 February 2009.

[Signatures]

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