Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber, Extended Composition)

10 April 2019 *

(State aid – Postal services – Financing of the additional labour and social costs relating to some of the staff of Deutsche Post by means of subsidies and revenue generated by the remuneration for price-regulated services – Decision to extend the formal investigation procedure – Decision establishing the existence of new aid on conclusion of the preliminary investigation stage – Action for annulment – Act open to challenge – Interest in bringing proceedings – Admissibility – Consequences of annulment of the final decision – Obligation to state reasons)

In Case T-388/11,

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

applicant,

v

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

defendant,

supported by

UPS Europe SPRL/BVBA, formerly UPS Europe NV/SA, established in Brussels (Belgium),

and

United Parcel Service Deutschland Sàrl & Co. OHG, formerly UPS Deutschland Inc. & Co. OHG, established in Neuss (Germany),

represented initially by T. Ottervanger and E. Henny, subsequently by T. Ottervanger and lastly by R. Wojtek, lawyers,

interveners,

APPLICATION based on Article 263 TFEU and seeking annulment of Commission Decision C(2011) 3081 final of 10 May 2011 to extend the formal investigation procedure laid down in Article 108(2) TFEU, in respect of State aid C 36/07 (ex NN 25/07) granted by the Federal Republic of Germany to Deutsche Post, a summary of which was published in the *Official Journal of the European Union* (OJ 2011 C 263, p. 4),

* Language of the case: German.

THE GENERAL COURT (First Chamber, Extended Composition),

composed of I. Pelikánová, President, V. Valančius, P. Nihoul, J. Svenningsen and U. Öberg (Rapporteur), Judges,

Registrar: N. Schall, Administrator,

having regard to the written procedure and further to the hearing on 7 February 2018,

gives the following

Judgment

Background to the dispute

The investigation procedure between 1999 and 2002

1 In 1950, the Federal Republic of Germany set up a postal institution, Deutsche Bundespost. In 1989, the Federal Republic of Germany set up three separate entities to replace Deutsche Bundespost. These were Postdienst (postal activity), Postbank (banking activity) and Telekom (telecommunications activity).

2 Pursuant to the Gesetz zur Umwandlung der Unternehmen der Deutschen Bundespost in die Rechtsform der Aktiengesellschaft (Law on the transformation of the undertaking of the German Federal Post Office into a limited company) of 14 September 1994 (BGBl. 1994 I, p. 2325), Postdienst became Deutsche Post AG, which is the applicant in the present case, and Postbank and Telekom also acquired the legal form of limited companies, with effect from 1 January 1995.

3 On 17 August 1999, after receiving a complaint lodged by UPS Europe NV/SA, now UPS Europe SPRL/BVBA ('UPS'), intervener in these proceedings, the Commission of the European Communities decided to initiate a formal investigation procedure against the Federal Republic of Germany concerning several types of aid granted to Postdienst, and then to the applicant ('the 1999 initiation decision'). The aid at issue included the subsidies paid by the German authorities to the applicant in order to cover the pension costs of employees engaged as officials ('the pension subsidies').

4 By 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) ('the 2002 final decision'), the Commission concluded the formal investigation procedure commenced in 1999. After finding that the State compensation granted for the net additional costs due to a rebate policy with respect to door-to-door parcel services open to competition did constitute an advantage within the meaning of Article 87(1) EC, the Commission held, in Article 1 of the operative part of that decision, that the public aid at issue granted to the applicant, amounting to EUR 572 million, was incompatible with the common market and, in Article 2 of that operative part, ordered the Federal Republic of Germany to recover the aid. According to the Commission, the aid at issue took various forms, that is to say, in particular, financial transfers from Telekom to the applicant, public guarantees given to the applicant and the pension subsidies.

5 On 4 September 2002 the applicant brought an action before the General Court, registered under case number T-266/02, seeking annulment of the 2002 final decision.

6 By judgment of 1 July 2008, *Deutsche Post* v *Commission* (T-266/02, EU:T:2008:235, the Court annulled the 2002 final decision on the ground that the Commission had not shown that there was an advantage to the applicant.

7 By judgment of 2 September 2010, *Commission* v *Deutsche Post* (C-399/08 P, EU:C:2010:481), the Court of Justice dismissed the appeal brought against that judgment.

(a) The 2007 decision to initiate the formal investigation procedure

8 By letter of 12 September 2007, following a second complaint lodged by UPS, claiming that not all of the measures listed in the first complaint had been investigated and that unlawful aid had been granted after the adoption of the 2002 final decision, and a further complaint by a competitor of the applicant, the Commission informed the Federal Republic of Germany of its decision to initiate the procedure laid down in Article 88(2) EC in respect of State aid C 36/07 (ex NN 25/07) granted by the German authorities to Deutsche Post (OJ 2007 C 245, p. 21) ('the 2007 initiation decision'). In that new decision, the Commission referred to the need to carry out a comprehensive investigation into all distortions of competition resulting from the public funds granted to the applicant. It stated that the procedure begun by the 1999 initiation decision would be supplemented in order to incorporate the newly submitted information and to adopt a definitive position on the issue of whether the grant of those public funds was compatible with the EC Treaty.

9 By application lodged at the Registry of the General Court on 22 November 2007 and registered under case number T-421/07, the applicant applied to the Court for annulment of the 2007 initiation decision.

10 By judgment of 8 December 2011, *Deutsche Post* v *Commission* (T-421/07, EU:T:2011:720), the Court found, in paragraph 75 of the judgment, that 'when the [2007 initiation decision] was adopted, the formal investigation procedure initiated in 1999 with regard to the measures at issue had not been closed by the 2002 [final] decision beyond the EUR 572 million referred to in the operative part of the latter decision.' The Court inferred from this, in paragraph 78 of that judgment, that, 'at the time of its adoption, the [2007 initiation decision had] neither altered the legal scope of the measures at issue nor the applicant's legal situation', and, in paragraph 80 of the judgment, ruled that the action had to be declared inadmissible.

11 On appeal, the Court of Justice found, in its judgment of 24 October 2013, *Deutsche Post* v *Commission* (C-77/12 P, not published, EU:C:2013:695), that when, in Article 1 of the operative part of the 2002 final decision, the Commission declared the aid to be incompatible with the common market and, in Article 2 of that operative part, ordered the Federal Republic of Germany to recover the aid, it had completely closed the procedure begun by the 1999 initiation decision. The Court of Justice accordingly found that the General Court had erred in law when it found that the formal investigation procedure initiated in 1999 had not been closed by the 2002 final decision beyond the EUR 572 million referred to in the operative part of the 2002 decision. The Court of Justice therefore set aside the judgment of 8 December 2011, *Deutsche Post* v *Commission* (T-421/07, EU:T:2011:720), and referred the case back to the General Court.

12 In its judgment of 18 September 2015, *Deutsche Post* v *Commission* (T-421/07 RENV, EU:T:2015:654), the General Court took the view, in paragraph 44, that the 2007 initiation decision had to be regarded, in so far as concerned all the measures to which it related, as a decision re-opening a formal investigation procedure that had been completely closed. The Court found that the 2007 initiation decision had been taken in breach of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1) and the principle of legal certainty, since the Commission had reopened the formal investigation procedure that had been

completely closed by the 2002 final decision, in order that a new final decision might be adopted, without the 2002 final decision being either revoked or withdrawn. Since that judgment has not been the subject of appeal, it has acquired the force of *res judicata*.

(b) The 2011 decision to extend the formal investigation procedure and the 2012 final decision

13 On 10 May 2011, the Commission notified the Federal Republic of Germany of Decision C(2011) 3081 final to extend the formal investigation procedure laid down in Article 108(2) TFEU, in respect of State aid C 36/07 (ex NN 25/07) granted by the Federal Republic of Germany to Deutsche Post, a summary of which was published in the *Official Journal of the European Union* (OJ 2011 C 263, p. 4), ('the contested decision'). By that decision, the formal investigation procedure concerning State aid granted to the applicant by way of compensation in respect of its universal service obligations was extended to the subsidies paid by the German authorities to the applicant in order to cover the pension costs of employees engaged as officials. That new decision was intended to widen the formal investigation procedure that had been reopened in 2007 in order to carry out a more specific examination of the pension arrangements, which had previously been addressed only cursorily.

14 By Decision 2012/636/EU of 25 January 2012 concerning Measure C 36/07 (ex NN 25/07) implemented by Germany for Deutsche Post (OJ 2012 L 289, p. 1) ('the 2012 final decision'), the Commission took the view, in particular, that the public funding of pensions constituted unlawful State aid that was incompatible with the internal market. By contrast, the Commission found certain public transfers to the applicant to be State aid that was compatible with the internal market and that the public guarantees for the debt obligations entered into by Deutsche Bundespost before it was transformed into three limited companies had to be analysed as existing aid.

15 By application lodged at the Registry of the General Court on 30 March 2012 and registered under case number T-143/12, the Federal Republic of Germany brought an action seeking annulment of the 2012 final decision.

16 By application lodged at the Registry of the General Court on 4 April 2012 and registered under case number T-152/12, the applicant also brought an action seeking annulment of Articles 1, 2 and 4 to 6 of the 2012 final decision.

17 By judgment of 14 July 2016, *Germany* v *Commission* (T-143/12, EU:T:2016:406), the Court annulled Articles 1 and 4 to 6 of the 2012 final decision on the ground that the Commission had not shown that there was an advantage to the applicant.

18 No appeal was brought within the applicable time limit against the judgment of 14 July 2016, *Germany* v *Commission* (T-143/12, EU:T:2016:406). It has therefore become final.

19 By order of 17 March 2017, *Deutsche Post* v *Commission* (T-152/12, not published, EU:T:2017:188), the Court held that there was no longer any need to proceed to judgment in the action in Case T-152/12, since it had the same subject matter as the action in Case T-143/12, which had given rise to the judgment of 14 July 2016, *Germany* v *Commission* (T-143/12, EU:T:2016:406), a judgment partially annulling a decision and that had become final.

Procedure and forms of order sought

20 By application lodged at the Court Registry on 22 July 2011, the applicant brought the present action.

21 By separate document lodged at the Court Registry on 6 October 2011, the Commission raised a plea of inadmissibility, pursuant to Article 114(1) of the Rules of Procedure of the General Court of 2 May 1991.

22 By order of 23 July 2013, after hearing the parties, the Court suspended proceedings in the present case pending the final decision of the Court of Justice in Case C-77/12 P, concerning the judgment of 8 December 2011, *Deutsche Post* v *Commission* (T-421/07, EU:T:2011:720), which decision was delivered on 24 October 2013.

23 By order of 12 May 2014, UPS and UPS Deutschland Inc. & Co. OHG, now United Parcel Service Deutschland Sàrl & Co. OHG, were granted leave to intervene in support of the form of order sought by the Commission.

24 By order of 15 September 2014, proceedings in the present case were again suspended pending the final decision in Case T-421/07 RENV, which was delivered on 18 September 2015 and resulted in annulment of the 2007 initiation decision.

25 Following resumption of the proceedings, by order of 20 November 2015, the Court reserved the plea of inadmissibility for final judgment.

26 On 7 January 2016, the Commission lodged its defence.

27 On 25 February 2016, the applicant lodged its reply.

28 On 14 March 2016, the interveners lodged a joint statement in intervention.

29 On 20 April 2016, the Commission lodged a rejoinder.

30 By a letter from the Registry of 24 November 2016, in the context of measures of organisation of procedure, the Court invited the parties to submit their observations on the inferences to be drawn from the judgment of 14 July 2016, *Germany* v *Commission* (T-143/12, EU:T:2016:406), in respect of whether the case should proceed to judgment, under Article 131(1) of the Rules of Procedure of the General Court, in particular in relation to continuing the formal investigation procedure in respect of the part of the 2012 final decision that had been annulled and in regard to whether the applicant retained an interest in bringing proceedings.

31 The parties submitted their observations within the prescribed time limits.

32 Further to a proposal of the First Chamber, the Court referred the case to a chamber sitting in extended composition, in accordance with Article 28 of the Rules of Procedure.

33 By letter from the Registry of 18 December 2017, in the context of measures of organisation of procedure, the Court put questions to the parties to be answered in writing with a view to the hearing.

34 The parties answered the Court's questions within the prescribed time limits.

35 The applicant claims that the Court should:

– reject the plea of inadmissibility;

– annul the contested decision;

– order the Commission to pay the costs.

36 The Commission, supported by the interveners, claims that the Court should:

– primarily, dismiss the action as inadmissible;

– in the alternative, declare that it is no longer necessary to proceed to judgment, on the ground that the applicant no longer has an interest in bringing proceedings;

– in the further alternative, dismiss the action as unfounded;

– order the applicant to pay the costs.

Law

Admissibility

37 In its plea of inadmissibility, the Commission argues that the contested decision was intended solely to safeguard the rights of defence of the Federal Republic of Germany in respect of the concept of aid and the compatibility of the measures at issue with the internal market, without producing independent legal effects, and that it is therefore not an act that is open to challenge. For that same reason, according to the Commission, the applicant does not in any event have any interest in having that decision annulled. The Commission also argues against a decision not to proceed to judgment as a result of the judgment of 14 July 2016, *Germany* v *Commission* (T-143/12, EU:T:2016:406).

38 The applicant takes issue with the Commission's arguments and contends that it will continue to have an interest in bringing proceedings so long as the Commission has not withdrawn the contested decision.

39 The interveners support the form of order sought by the Commission in relation to the admissibility of the action and likewise argue against a decision not to proceed to judgment as a result of the judgment of 14 July 2016, *Germany* v *Commission* (T-143/12, EU:T:2016:406). According to the interveners, as a result of the Court's annulment of the 2012 final decision, the applicant retains an interest in the Commission adopting a new final decision.

40 It should be noted that, in essence, the Commission relies on the same grounds of inadmissibility for the present action as those which it had already raised in relation to the action brought against the 2007 initiation decision. Even though the Court of Justice has already rejected those arguments in its judgment of 24 October 2013, *Deutsche Post* v *Commission* (C-77/12 P, not published, EU:C:2013:695), the Commission confirmed at the hearing that it wished to maintain its plea of inadmissibility.

41 It is apparent from well-established case-law that acts and decisions can be the subject of an action for annulment within the meaning of Article 263 TFEU where they have binding legal effects that are capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (judgments of 13 October 2011, *Deutsche Post and Germany* v *Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraphs 37 and 38, and of 24 October 2013, *Deutsche Post* v *Commission*, C-77/12 P, not published, EU:C:2013:695, paragraph 51).

42 With specific regard to its binding legal effects, a decision to initiate the formal investigation procedure laid down in Article 108(2) TFEU in relation to a measure in the course of implementation and classified as new aid necessarily alters the legal situation of the measure at issue and that of the undertakings benefiting from it, in particular as regards its continued implementation. Following the adoption of such a decision, there is at the very least an element of doubt as to the legality of the

measure which must lead the Member State to suspend its application, since initiation of the procedure under Article 108(2) TFEU excludes the possibility of an immediate decision that the measure is compatible with the common market, which would enable it to continue to be lawfully implemented. Such a decision could be invoked before a national court called upon to draw all the appropriate conclusions arising from an infringement of the last sentence of Article 108(3) TFEU. Finally, it is capable of leading the undertakings which are beneficiaries of the measure to refuse in any event new payments or to hold the necessary sums as provision for possible subsequent repayments. Businesses will also take account, in their relations with those beneficiaries, of the uncertainty cast on those beneficiaries' legal and financial situation (see judgment of 24 October 2013, *Deutsche Post* v *Commission*, C-77/12 P, not published, EU:C:2013:695, paragraph 52 and the case-law cited, and order of 22 May 2015, *Autoneum Germany* v *Commission*, T-295/14, not published, EU:T:2015:350, paragraph 17).

43 In the present case, in paragraph 80 of the contested decision, the Commission classified the pension subsidies as new aid. In paragraph 103 of the contested decision it referred to an amount of several billion euros, corresponding to the sum that the applicant would have had to contribute to the pension fund between 1995 and 2007 in order to remain competitive with other operators in the same market. The Commission also reminded the Federal Republic of Germany, in paragraph 106 of the contested decision, of its obligation to suspend the contested aid measures.

44 As can be seen from the case-law referred to in paragraph 42 above, the obligation to suspend implementation of the measure in question is not the only legal effect of a decision, such as the contested decision, to initiate the formal investigation procedure. As a result of such a decision, the applicant is exposed in particular to the risk that a national court may order interim measures in order to safeguard, first, the interests of the parties concerned and, secondly, the effectiveness of the decision to initiate the formal investigation procedure. In that context the national court may, specifically, order the recovery of any aid granted (see, to that effect, judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraphs 29 to 31).

45 In the present case, the applicant confirmed at the hearing that, as a result of the adoption of the contested decision, it had set aside the necessary sums as provision for any repayments that it might be liable to make in the event of a negative final decision being adopted.

46 In the light of all the foregoing, it must be found that the contested decision was, at the time when the action was brought, an act capable of affecting the applicant's interests by bringing about a distinct change in its legal position and that it therefore satisfies all the requirements for it to be an act open to challenge within the meaning of Article 263 TFEU.

47 Furthermore, in regard to the arguments of the Commission and the interveners seeking to question whether the applicant still has an interest in bringing proceedings, it should be recalled that, according to settled case-law, an interest in bringing proceedings is the essential first requirement of any legal action (see order of 15 May 2013, *Post Invest Europe* v *Commission*, T-413/12, not published, EU:T:2013:246, paragraph 22). That requirement ensures, in procedural terms, in the interests of the proper administration of justice, that the Court is not required to deal with requests for opinions or purely theoretical questions (see, to that effect, judgment of 19 June 2009, *Socratec* v *Commission*, T-269/03, not published, EU:T:2009:211, paragraph 38). The EU Courts may, going beyond the arguments relied upon by the parties alone, examine of their own motion whether an applicant has an interest in bringing or in maintaining an action on the ground that an event subsequent to the action deprives that action of any advantage to the applicant, and declare the action inadmissible or devoid of purpose for that reason (see, to that effect and by analogy, judgment of 19 October 1995, *Rendo and Others* v *Commission*, C-19/93 P, EU:C:1995:339, paragraph 13).

48 The interest in bringing proceedings must continue until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be liable, if successful, to procure an advantage for the party bringing it (judgment of 7 June 2007, *Wunenburger* v *Commission*, C-362/05 P, EU:C:2007:322, paragraph 42, and order of 7 December 2011, *Fellah* v *Council*, T-255/11, not published, EU:T:2011:718, paragraph 12).

49 In an action for annulment, the question whether an applicant retains his interest in bringing proceedings must be assessed in the light of the specific circumstances, taking account, in particular, of the consequences of the alleged unlawfulness (judgment of 28 May 2013, *Abdulrahim* v *Council and Commission*, C-239/12 P, EU:C:2013:331, paragraph 65). It is a precondition of the applicant retaining an interest in bringing proceedings that annulment of the contested act is still capable, of itself, of having legal effects in relation to the applicant (see order of 15 May 2013, *Post Invest Europe* v *Commission*, T-413/12, not published, EU:T:2013:246, paragraph 22 and the case-law cited).

50 In the present case, the Court must examine, without necessarily confining itself to the arguments relied upon by the parties alone, whether the contested decision – which extends the procedure reopened by the 2007 initiation decision in order to 'investigate more in depth' whether or not the pension subsidies conferred an advantage on the applicant – continues to produce legal effects vis-à-vis the applicant following adoption of the 2012 final decision, which had the effect of closing the procedure reopened in 2007, as extended by the contested decision, and after delivery of the judgment of 14 July 2016, *Germany* v *Commission* (T-143/12, EU:T:2016:406), which annulled the 2012 final decision.

51 It is apparent from the case-law that, when actions are brought, first, against a decision to open a formal investigation procedure into a national measure and, secondly, against a final decision closing that procedure and declaring the national measure under analysis to be State aid incompatible with the internal market, dismissal of an action brought against that latter decision causes the action brought against the decision to open the formal investigation procedure to become devoid of purpose (see, to that effect, judgments of 13 June 2000, *EPAC* v *Commission*, T-204/97 and T-270/97, EU:T:2000:148, paragraphs 153 to 159; of 6 March 2002, *Diputación Foral de Álava* v *Commission*, T-168/99, EU:T:2002:60, paragraphs 22 to 26; and of 9 September 2009, *Diputación Foral de Álava and Others* v *Commission*, T-30/01 to T-32/01 and T-86/02 to T-88/02, EU:T:2009:314, paragraphs 345 to 363).

52 However, that case-law cannot be transposed to the present case, since the contested decision is peculiar in that, first, it comes after the judgment of 1 July 2008, *Deutsche Post* v *Commission* (T-266/02, EU:T:2008:235), by which the Court annulled the 2002 final decision, secondly, it is intended to expand upon the 2007 initiation decision, which was subsequently annulled by the judgment of 18 September 2015, *Deutsche Post* v *Commission* (T-421/07 RENV, EU:T:2015:654), and, thirdly, it preceded the 2012 final decision, which was, in turn, also annulled by the judgment of 14 July 2016, *Germany* v *Commission* (T-143/12, EU:T:2016:406). It should be borne in mind that no appeal has been brought against the latter judgment and that it has therefore become final.

53 Given that the 2012 final decision was annulled by the judgment of 14 July 2016, *Germany* v *Commission* (T-143/12, EU:T:2016:406), it should be noted, by contrast, that, according to settled case-law, except where the irregularity found has vitiated the entire proceeding with illegality, the procedure intended to replace an unlawful act that has been annulled can be resumed at the exact point at which the unlawfulness occurred. The annulment of an EU act therefore does not necessarily affect the preparatory acts, and the annulment of an act closing an administrative procedure containing various phases does not necessarily entail annulment of the entire procedure preceding adoption of the contested act irrespective of the substantive or procedural grounds of the judgment annulling the act (judgments of 7 November 2013, *Italy* v *Commission*, C-587/12 P, not published, EU:C:2013:721, paragraph 12, and of 6 July 2017, *SNCM* v *Commission*, T-1/15, not published, EU:T:2017:470, paragraph 69).

54 It is necessary to clarify in this respect that, although the Commission implicitly acknowledged, during the proceedings in this case, that the contested decision, although it had not been removed from the EU legal order, could no longer serve as the basis for a new decision to close the formal investigation procedure, it has not, to date, withdrawn that decision. This could mean that the Commission still has, at the present stage, the option to resume the procedure at the stage at which the contested decision was adopted. The applicant therefore remains exposed to the risk that the Commission may recover the alleged aid pursuant to that decision, as already indicated in paragraph 44 above.

55 Moreover, in view of the interlinked nature of the three formal investigation procedures initiated by the Commission since 1999 and the various successive decisions of the Court of Justice and the General Court concerning the decisions to initiate and to close those procedures, it should be noted that, as a result of its obligations under Article 266 TFEU, the Commission is obliged to take the measures necessary to comply with the judgments of 1 July 2008, *Deutsche Post* v *Commission* (T-266/02, EU:T:2008:235), of 18 September 2015, *Deutsche Post* v *Commission* (T-421/07 RENV, EU:T:2015:654), and of 14 July 2016, *Germany* v *Commission* (T-143/12, EU:T:2016:406), already delivered by the EU Courts and which have acquired the force of *res judicata*.

56 According to settled case-law, it is, admittedly, for the institution which adopted the acts annulled by the EU Courts to determine the measures required to give effect to the judgments annulling those acts. Nevertheless, in the exercise of the discretion which it has for that purpose, the institution concerned must comply both with the grounds of those judgments and with the applicable provisions of EU law (see judgment of 24 April 2017, *HF* v *Parliament*, T-584/16, EU:T:2017:282, paragraph 79 and the case-law cited).

57 Article 266 TFEU requires the institution concerned to ensure that any decision intended to replace an annulled decision is not vitiated by the same irregularities as those identified in the judgment annulling that decision. Those principles apply with all the more reason where the judgment annulling the decision in question has acquired the force of *res judicata* (judgment of 10 November 2010, *OHIM* v *Simões Dos Santos*, T-260/09 P, EU:T:2010:461, paragraphs 70 and 73).

58 It follows that the applicant retains an interest in securing annulment of the contested decision and in having that decision removed from the legal order, since, if the contested decision is annulled, and in the event that the Commission were to decide to adopt a new decision reopening the formal investigation procedure, in order to adopt measures implementing the three annulment judgments referred to in paragraph 55 above that it is required to adopt in accordance with Article 266 TFEU, the Commission would be obliged to ensure that that new decision is not vitiated by the same irregularities as all of the decisions that preceded it.

59 In any event, in the light of the exceptional procedural complexity associated with the existence of several administrative and judicial decisions relating to the same aid measures, the applicant must be found to be subject to a singular level of legal uncertainty that can only be clarified by an examination of the substance of this case and the possible annulment of the contested decision, which gives the applicant an even greater interest in bringing proceedings against that decision.

60 It must be stated clearly in this regard that, so long as the Commission believes that it is still able to adopt a new final decision, the applicant cannot, even provisionally, predict the amount of the aid or, as the case may be, the interest that it might be liable to repay for the period of unlawfulness.

61 Indeed, depending on whether the Commission considers that the sums made available to the applicant relate independently to the procedure begun in 1999, that begun in 2007 or that begun in 2011, the amount of any recoverable aid could vary considerably, in the event of the aid at issue being classified as new aid and found to be incompatible with the internal market, since, in accordance with Article 17(2) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9), the first measure adopted by the Commission or

by a Member State, acting at the request of the Commission, in respect of the unlawful aid interrupts the limitation period. In the event that any aid were to be found to be compatible with the internal market, with the result that the Commission could only order recovery of interest for the period of unlawfulness (see, to that effect, judgment of 12 February 2008, *CELF and Ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraph 55), the period of unlawfulness on the basis of which that interest would have to be calculated would likewise be different depending on the commencement date of the Commission's formal investigation procedure.

62 In the light of all of the foregoing, it must be found that the applicant retains an interest in bringing proceedings against the contested decision, even though the 2007 initiation decision and the 2012 final decision have already been annulled.

63 The action must consequently be found, first, to be admissible and, secondly, not to have become devoid of purpose. The plea of inadmissibility must therefore be rejected in its entirety, as must all the arguments of the Commission and the interveners alleging that the applicant has lost its interest in bringing proceedings.

Substance

64 The applicant puts forward, in essence, six pleas in law in support of its action. The first five pleas allege manifest errors of assessment on the part of the Commission. The sixth plea alleges infringement of the obligation to state reasons, under the second paragraph of Article 296 TFEU, and of the principles of proportionality, legal certainty and non-discrimination.

65 It should be recalled that the plea in law alleging absence of reasons or inadequacy of the reasons stated is intended to establish an infringement of essential procedural requirements and, therefore, calls for an examination that, as such, differs from the assessment as to the inaccuracy of the grounds for the contested decision, which are reviewed as part of the examination of the merits of that decision (see, to that effect, judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 67, and of 15 December 2005, *Italy* v *Commission*, C-66/02, EU:C:2005:768, paragraph 26).

66 In the present case, the sixth plea in law, in so far as it alleges, inter alia, infringement of the obligation to state reasons under the second paragraph of Article 296 TFEU, should be examined before the Court, if necessary, reviews the substantive legality of the contested decision, which is the subject matter of the other pleas.

67 Article 107(1) TFEU provides that 'save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'

68 According to settled case-law, classification as 'State aid' for the purposes of Article 107(1) TFEU requires that all the conditions set out in that provision are fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (see judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 40 and the case-law cited).

69 In order provisionally to classify a measure in legal terms as 'State aid' in a decision to initiate a formal investigation procedure, the obligation to state reasons must be complied with in relation to all of the conditions referred to in Article 107(1) TFEU.

70 The statement of reasons required by the second paragraph of Article 296 TFEU and by Article 41(2)(c) of the Charter of Fundamental Rights of the European Union must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review (see judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 46 and the case-law cited).

71 With more specific regard to the statement of reasons in a Commission decision to initiate the formal investigation procedure under Article 108(2) TFEU, it should be noted that, in accordance with Article 4(2) and (4) of Regulation 2015/1589, the Commission can adopt such a decision only if it finds, after a preliminary examination, that the measure constitutes new State aid and gives rise to doubts as to whether it is compatible with the internal market.

72 It follows that, unless the obligation to state reasons under the second paragraph of Article 296 TFEU is to be rendered meaningless, any decision that the Commission makes on completion of the preliminary investigation phase must include a preliminary assessment as to whether the State measure in question is in the nature of State aid and must set out, at the time when it decides to initiate the formal investigation procedure, the Commission's doubts as to the measure's compatibility with the common market (see, to that effect, judgment of 22 October 2008, *TV2/Danmark and Others* v *Commission*, T-309/04, T-317/04, T-329/04 and T-336/04, EU:T:2008:457, paragraph 138 and the case-law cited).

73 Such a decision, adopted on completion of the preliminary investigation phase, must in particular provide interested parties with the opportunity effectively to participate in the formal investigation procedure, during which they will have the opportunity to put forward their arguments. To that end, it must enable them to be aware of the reasoning which led the Commission to conclude provisionally that the measure in issue might constitute new State aid and to doubt whether it is compatible with the common market (see judgment of 22 October 2008, *TV2/Danmark and Others* v *Commission*, T-309/04, T-317/04, T-329/04 and T-336/04, EU:T:2008:457, paragraph 139 and the case-law cited).

74 In the context of the analysis of the sixth plea in law, it is necessary, in particular, to ascertain whether, in the contested decision, the Commission adequately set out the reasons why it concluded, after a preliminary investigation, that the measure at issue might provisionally constitute State aid, before even verifying whether that aid was new and whether it was compatible with the internal market.

75 The applicant asserts, in essence, that the Commission infringed its obligation to set out reasons in the present case. First, it argues that, in the contested decision, the Commission failed to calculate the difference between the amount of the social contributions that the Federal Republic of Germany had actually paid to the applicant (less the amount corresponding to the increased regulated letter prices) and the amount of the social contributions that its competitors paid under the general social insurance scheme. Secondly, according to the applicant, the Commission failed to set out in detail the reasons why it considered that the extent to which the applicant had paid its social contributions was irrelevant for the purposes of calculating the amount of the alleged State aid. Thirdly, the Commission failed to set out sufficient reasons for its view that there was alleged cross subsidisation, through an increase in regulated postal prices intended to finance the social costs paid by the applicant. Fourthly, it failed to explain why, in the context of that analysis, it was appropriate to rely solely on an investigation as to whether the costs were compatible with the internal market.

76 The Commission and the interveners dispute the applicant's arguments.

77 First, it should be noted that the contested decision is not the first decision to initiate a formal investigation procedure adopted by the Commission in relation to the measure at issue. The aid granted in the form of contributions to the applicant's pension fund has in fact already been the subject matter of the 1999 initiation decision, of the 2007 initiation decision and of the 2002 and 2012 final decisions.

78 By judgment of 18 September 2015, *Deutsche Post* v *Commission* (T-421/07 RENV, EU:T:2015:654), the Court annulled the 2007 initiation decision, in the context of which, as the Commission indicated in paragraph 5 of the contested decision, it had made only a 'cursory assessment' of the issue of whether or not the pension subsidy conferred an advantage on the applicant, which it was appropriate to 'investigate more in depth'.

79 Given that specific procedural context, it is appropriate to find that, at the time when it adopted the contested decision, the Commission was under a specific obligation to state reasons, within the meaning of the second paragraph of Article 296 TFEU, since, in the context of the formal investigation procedure originally initiated in 1999 and re-opened in 2007, it had already been in a position to address the question of whether the State contributions to the applicant's pension fund constituted State aid within the meaning of Article 107(1) TFEU.

80 Given that the Commission described the contested decision as a decision extending the procedure reopened in 2007, the Commission could not, without infringing the obligation to state reasons set out in the second paragraph of Article 296 TFEU, take the view that it was not in a position to determine, even provisionally, whether one of the criteria laid down in Article 107(1) TFEU was satisfied and confine itself to expressing doubts, without providing sufficient reasons for doing so.

81 It is apparent from paragraphs 64 to 67 of the contested decision that, in the part given over to assessing whether there was State aid in the light of Article 107(1) TFEU and in particular whether there was an exclusive economic advantage, the Commission merely referred to the difficulties that it would have faced had it been required to identify economic operators which might be in a legal and factual situation comparable to that of the applicant. The Commission stated in particular that, since the applicant had an exclusive right in relation to universal postal services and had benefited from numerous public transfers and guarantees in the context of transformation of the State postal entity, it was in a unique and unprecedented situation.

82 In the light of those factors, the Commission formed the view that it was not possible to demonstrate the existence of an exclusive economic advantage using a comparison between the burdens on the applicant and those on its competitors. By contrast, it stated that a comparative analysis with the applicant's competitors would be appropriate for examining the compatibility of the aid measures, in particular at the stage of assessing the distortion of competition in greater detail.

83 Subsequently in the contested decision, the Commission accordingly found, at the stage of examining whether the aid was compatible with the internal market, that the social contributions paid by the applicant could be compared with those paid by its private competitors, on the basis of a benchmark rate. However, it did not provide any reasoning explaining why the findings which it made when examining the compatibility of the aid at issue supported or did not conflict with those which it made when assessing whether there was a selective economic advantage and, with all the more reason, whether there was State aid within the meaning of Article 107(1) TFEU.

84 In the light of all of the foregoing, it must be found that, by pointing out that the contested decision, at the stage of classifying the measure at issue as State aid within the meaning of Article 107(1) TFEU, contains no calculation enabling a comparison to be made of the applicant's costs and those that would be payable by its competitors, although such a comparison had been made in order to assess whether the aid at issue was compatible with the internal market, the applicant has, correctly, established that there was an infringement of the obligation to state reasons under Article 296 TFEU.

85 It should be noted in this regard that, in paragraph 148 of the judgment of 14 July 2016, *Germany* v *Commission* (T-143/12, EU:T:2016:406), annulling the 2012 final decision adopted by the Commission on conclusion of the formal investigation procedure that was reopened in 2007 and then extended by the contested decision, the Court referred to the case-law according to which it is indeed at the stage of the application of Article 107(1) TFEU, namely at the stage of proving whether there is an advantage, that the Commission must demonstrate that a partial exemption from the obligation to contribute to the pension fund constitutes, for a former legacy operator, an economic advantage over its competitors.

86 In paragraphs 150 and 151 of the judgment of 14 July 2016, *Germany* v Commission (T-143/12, EU:T:2016:406), the Court held, in essence, that, although the Commission had sought, in the 2012 final decision, to establish that there was a selective economic advantage, it was not until the stage of examining the compatibility of the aid with the internal market that it had examined that issue. The Court therefore upheld the argument of the Federal Republic of Germany that the Commission had erred in law in so far as it had not made 'the slightest comparison with the burdens which an undertaking must "normally" pay with regard to private employees in accordance with German social law except in the context of the examination relating to the compatibility of the measure with the internal market'.

87 The Court also observed, in paragraphs 152 to 154 of the judgment of 14 July 2016, *Germany* v *Commission* (T-143/12, EU:T:2016:406), that the Commission bears an obligation to prove that there was a selective economic advantage for the beneficiary of the aid whenever it is examining whether a measure comes within the scope of Article 107(1) TFEU.

88 Inasmuch as, according to Article 108(2) TFEU, read in conjunction with Article 4(2) and (4) of Regulation 2015/1589, a measure is classified, provisionally, as 'aid' within the meaning of Article 107(1) TFEU as soon as the preliminary investigation takes place and the decision to initiate the formal investigation procedure is adopted, it should be found, in the present case, that the Commission was already under an obligation to state reasons for the existence of a selective economic advantage to the applicant under Article 107(1) TFEU on completion of the preliminary investigation phase, and not solely in relation to the decision adopted on completion of the formal investigation procedure.

89 It follows that, since it failed to state sufficiently clear and unequivocal reasons for the existence of an advantage, in accordance with the requirements under Article 107(1) TFEU, while already assessing the compatibility of the aid at issue with the internal market, the Commission placed the applicant in a state of legal uncertainty, on conclusion of the preliminary investigation phase and at the stage at which the contested decision was adopted. That failure by the Commission means, moreover, that the EU Courts cannot review the provisional classification of the measure at issue as 'aid' within the meaning of Article 107(1) TFEU.

90 The sixth plea in law must therefore be upheld, to the extent to which it alleges infringement of the obligation to state reasons.

91 Since an analysis of that plea, in so far as it alleges infringement of the obligation to state reasons, has shown that the contested decision was vitiated by defects affecting factors of fundamental importance to the general scheme of the contested decision, that decision must be annulled on grounds of infringement of essential procedural requirements, without it being necessary to examine whether the other arguments presented in the context of that plea and the other pleas are well founded.

Costs

92 Under Article 134(1) 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.

93 In the present case, since the Commission has been unsuccessful and the applicant has applied for costs, the Commission must be ordered to bear its own costs and to pay those of the applicant.

94 UPS and United Parcel Service Deutschland shall each bear their own costs, in accordance with Article 138(3) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (First Chamber, Extended Composition)

hereby:

1. **Rejects the plea of inadmissibility;**

2. **Annuls European Commission Decision C(2011) 3081 final of 10 May 2011 to extend the formal investigation procedure laid down in Article 108(2) TFEU, in respect of State aid C 36/07 (ex NN 25/07) granted by the Federal Republic of Germany to Deutsche Post;**

3. **Orders the Commission to bear its own costs and to pay those incurred by Deutsche Post AG;**

4. **Orders UPS Europe SPRL/BVBA and United Parcel Service Deutschland Sàrl & Co. OHG each to bear their own costs.**

Pelikánová Valančius Nihoul

Svenningsen Öberg

Delivered in open court in Luxembourg on 10 April 2019.

[Signatures]