ORDER OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
30 September 1999 *

In Case T-182/98,

UPS Europe SA, a company incorporated under Belgian law, established in Brussels, represented by Tom R. Ottervanger, of the Rotterdam Bar, and Dirk Arts, of the Brussels Bar, with an address for service in Luxembourg at the chambers of Loeff Claeys and Verbeke, 5 Rue Charles Martel,

applicant,

v

Commission of the European Communities, represented by James Flett, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

APPLICATION for the annulment of the Commission's letter of 2 October 1998 (Ref. D/54021),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Fourth Chamber, Extended Composition),

composed of: R.M. Moura Ramos, President, R. García-Valdecasas, V. Tiili, P. Lindh and P. Mengozzi, Judges,

Registrar: H. Jung,

makes the following

Order

Factual background

1 The applicant is one of the companies in the United Parcel Service group ('UPS') which distributes parcels throughout the world. It has offices in all the Member States of the European Community, including Germany.

2 By letter of 7 July 1994 the applicant sent a complaint to the Commission asking it to initiate a procedure to establish *inter alia* that abusive conduct by the Deutsche Bundespost, now Deutsche Post AG ('Deutsche Post'), on the postal

service market and the cross-subsidisation of that postal service were contrary to Article 86 of the EC Treaty (now Article 82 EC), Article 90 of the EC Treaty (now Article 86 EC), Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93 of the EC Treaty (now Article 88 EC).

3 Since the applicant had received no answer on the State aid issues raised in its complaint, by letter of 11 May 1995 it asked the Commission to reply before 20 May 1995.

4 By letter of 18 May 1995 the Commission replied, asking the applicant to produce evidence in support of its allegations of State aid.

5 The applicant produced the information required in a letter dated 27 July 1995 and again asked the Commission to use its investigatory powers under Article 93(2) of the Treaty.

6 On 2 August 1995 the Commission replied that it would need to review the outcome of the investigation conducted by Directorate B, Merger Task Force, of the Directorate-General for Competition (DG IV) before it could consider the possibility of asking the German authorities for their observations concerning possible State aid.

7 By letter of 16 November 1995, the applicant inquired about the outcome of the review. It reiterated that there appeared to be a case of State aid and that the

Commission, being in a much better position than itself to collect further details, should use its investigative powers to examine the matter.

8 On 19 November 1996 counsel for the applicant sent a letter to the Commission calling upon it to act and expressly referring to Article 175 of the EC Treaty (now Article 232 EC).

9 On 12 December 1996 the Director of Directorate G — State aid — of DG IV informed the applicant that 'following the information the Commission has obtained in the above case under the Article 86 procedure, my services are of the opinion that the case could have a distinct State aid aspect and they have therefore made the recent request to the German authorities to comment on your objections as formulated in your letter of 27 July 1995'.

10 On 24 January 1997, following the above letter calling upon the Commission to act, Mr Temple Lang, Director of DG IV, sent a 'communication' to Deutsche Post concerning the part of the complaint based on Article 86 of the Treaty. With regard to the part of the complaint based on Article 92 of the Treaty, he announced that the Commission was investigating the applicant's allegations and that it reserved the right to bring proceedings under that Article.

11 By letter of 25 August 1997 Mr Temple Lang indicated to the applicant that the Commission was suspending its investigation with regard to Article 86 of the Treaty and was proceeding with it with regard to Article 92 of the Treaty.

12 On 22 October 1977 the applicant asked the Commission, referring expressly to Article 175 of the Treaty, to take a position on its complaint lodged on 7 July 1994.

13 On 19 December 1997 the Director General of DG IV sent the applicant a letter referring to Article 6 of Regulation 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition, 1963-64, p. 47). In that letter he stated:

'As indicated above, the Commission is therefore of the opinion that for the time being your complaint should only be examined in so far as it alleges infringements of the State aid rules. The Commission will open the procedure provided for in Article 93(2) of the... Treaty at the beginning of next year... In view of the foregoing, the Commission's services have come to the conclusion that there are no grounds for granting your application in so far as Article 86 of the EC Treaty is concerned...'

14 By letter of 2 February 1998, the applicant submitted its observations to the Commission and asked to be kept informed of the progress of the investigation concerning State aid, not only with regard to the cross-subsidisation from which Deutsche Post benefited but also with regard to the other forms of State aid referred to in the complaint and subsequent correspondence.

15 By letter of 10 August 1998 the applicant asked the Commission to take a position within two months from receipt of its letter on the complaint submitted, pursuant to Article 92 of the Treaty, against the Federal Republic of Germany. The applicant indicated that if the Commission failed to do so it would bring an action under Article 175 of the Treaty before the Court of First Instance.

16 On 2 October 1998 the Deputy Director General of DG IV replied to the applicant:

'In your letter you request the Commission to inform [you] about its position on its complaint as regards possible State aid elements under Article 92. Furthermore, you inform the Commission that you intend to initiate proceedings under Article 175 of the Treaty if the Commission will not take such position within two months.

The Commission has decided to examine the position and behaviour of Deutsche Post AG, alleged in [your] complaint as infringing several of the competition rules of the EC Treaty, under Article 86 of the Treaty and not to initiate — at least for the time being — a procedure under Article 93. However, this does not mean that the Commission precludes the possibility that State aid aspects might be involved in the case. Therefore the Commission reserves the right to start examinations under Article 92 of the Treaty in the future if such move seemed appropriate.'

Procedure and forms of order sought

17 By application lodged at the Registry of the Court of First Instance on 3 November 1998 the applicant initiated the present proceedings, in which it requests the Court to:

— annul the decision of the Commission notified in its letter of 2 October 1998;

— order the Commission to pay the costs;

— take such further action as the Court may deem appropriate.

18 By document lodged at the Registry of the Court of First Instance on 14 December 1998, the Commission submitted a request for a decision on admissibility pursuant to Article 114(1) of the Rules of Procedure of the Court of First Instance. In the light of the observations set out in that document, the Commission requests the Court of First Instance to:

— declare the application inadmissible;

— order the applicant to pay the costs.

19 In its observations on the plea of inadmissibility, lodged on 18 February 1999, the applicant requests the Court of First Instance to:

— declare the application admissible;

— at least, reserve its decision for final judgment;

— order the Commission to pay the costs.

20 By a separate document lodged at the Registry of the Court of First Instance on 9 March 1999, the Commission also made an ancillary application, pursuant to Article 114 of the Rules of Procedure, asking the Court to:

— prescribe a measure of inquiry within the meaning of Article 65(b) of the Rules of Procedure, ordering the applicant and its counsel to produce to the Court of First Instance:

— the original and all copies of the document submitted as Annex 1 to the applicant's observations on the plea of inadmissibility, lodged at the Registry of the Court of First Instance on 18 February 1999, in their possession or held on their behalf by any other person, such documents to be retained by the Court (but not on the file);

— full particulars of the circumstances in which the document came into their possession, including the name of the person who supplied it, the name of the person who received it, and when, where and how it was transmitted; and

— full particulars of any third parties to whom they have shown or given copies of or quotations from, all or any part of the document;

— order that the document be withdrawn from the file;

— order that the written procedure be reopened, and that the Commission be given the opportunity to file written comments on the applicant's observations; and

— in any event, order that the applicant bear any costs associated with this application.

21 The applicant submitted its written observations on the ancillary application on 30 March 1999.

Admissibility

22 Pursuant to Article 114(3) of the Rules of Procedure, where a party applies to the Court of First Instance for a decision on admissibility not going to the substance of the case, the remainder of the proceedings on the plea of inadmissibility is to be oral unless the Court of First Instance decides otherwise. In the present case the Court of First Instance considers that it has sufficient information from an examination of the documents before it. Accordingly there is no need to open the oral procedure before deciding the question of admissibility.

Arguments of the parties

23 In support of its plea of inadmissibility, the Commission maintains that its letter of 2 October 1998 is not an act open to challenge, inasmuch as it is not in the nature of a decision. It makes several points in support of that argument.

24 The Commission claims that even if the complaint that it had not acted 'within a reasonable period of time' was justified, that would still not entitle the applicant to challenge the letter of 2 October 1998. The applicant must either challenge the Commission's decision addressed to the Member State (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 45) or, in the absence of such decision, the Commission's failure to act, under Article 175 of the Treaty. Since the applicant cannot challenge a letter from the Commission informing it of a Commission decision, still less can it challenge a letter informing it that, for the time being, no decision has been taken.

25 The Commission states that where State aid is concerned it is inconceivable that a complainant should be the addressee of a decision. In that context, it could adopt, with regard to the Member State, only one of the three following decisions: that the State measure in question does not constitute 'aid' within the meaning of Article 92(1) of the Treaty; that the measure, although constituting aid within the meaning of Article 92(1), is compatible with the common market under Article 92(2) or (3); that the procedure under Article 93(2) must be initiated. In this case, since it has taken none of those decisions, the preliminary stage remains open and the only course of action open to the applicant is that provided for in Article 175 of the Treaty (Case T-95/96 *Gestevisión Telecinco* v *Commission* [1998] ECR II-3407, paragraph 55).

26 According to the Commission, the purely informative nature of the contested letter is clear from the first sentence and, more specifically, from the phrase 'at least for the time being' and from the statement that it did not 'preclud[e] the possibility that State aid aspects might be involved in the case'. In the contested letter it was simply communicating to the complainant information relating to the procedural situation as it stood. Consequently the letter had no legal effects. The Commission adds that the contested letter did not define its position. It 'accepts that the first sentence of the second paragraph of the letter of 2 October 1998 might conceivably be construed... as suggesting the existence of a Commission Decision under Article 93'. However, it contends that the applicant should have followed the usual course of action of requesting a copy of such a decision.

27 The Commission also contends that the contested letter cannot constitute a decision because it was signed by a Commission official in the name of another, neither of them having a delegation of power pursuant to the Commission's Rules of Procedure authorising them to adopt decisions in the name of the college of its Members, closing the preliminary stage. The contested letter could also be considered non-existent, since 'the precise and certain content' of the alleged measure cannot be ascertained.

28 Lastly, in the Commission's view, the applicant has no legal interest in the annulment of the letter of 2 October 1998, because it is purely informative.

29 The applicant observes that the wording of the contested letter is clear. According to its terms, the preliminary phase of the investigation has come to a halt and the Commission has decided not to initiate a procedure under Article 93(2) of the Treaty, despite the serious difficulties which it is experiencing in assessing whether the aid in question is compatible with the common market. Such a letter therefore has an informative aspect and is in the nature of a decision, inasmuch as it informs the addressee of the current state of the preliminary examination and notifies it that the investigation has been terminated, or at least suspended.

30 The applicant adds that for that reason it is quite obvious that the Commission clearly and unequivocally defined its position in respect of its complaint relating to Article 92 of the Treaty. The fact that the Commission may resume its investigation in the future 'if such a move seemed appropriate' does not imply that it has left its position undefined. According to the applicant, the Commission decided that it was not appropriate at that time to proceed with its investigations.

31 It states that the Commission may define its position in accordance with Article 175 of the Treaty without adopting the measure desired or considered

necessary by the person concerned (Case 8/71 *Komponistenverband* v *Commission* [1971] ECR 705, paragraph 2) or even by adopting an act which has no legal effects. Consequently the Commission has not failed to act and any action under Article 175 of the Treaty would have been declared inadmissible.

32 The applicant points out that it is settled case-law that the Commission is obliged to initiate a procedure under Article 93(2) of the Treaty wherever it encounters serious difficulties in determining whether aid is compatible with the common market (Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 29). In this case the Commission is manifestly obliged to initiate such a procedure. In its letter of 19 December 1997 the Commission recognised that the measures benefiting Deutsche Post were incompatible with the common market or that it was encountering serious difficulties in determining whether the measures were so compatible.

33 Given the Commission's obligation to initiate such a procedure, its decision to defer 'at least for the time being' its preliminary examination of the aid measures clearly constitutes a decision within the meaning of Article 173 of the EC Treaty (now, after amendment, Article 230 EC). Such a decision has legal effects.

34 First, as a 'party concerned', the applicant could have exercised its procedural rights if the Commission had decided to initiate the procedure under Article 93(2) of the Treaty. Secondly, according to the applicant, as long as the Commission has not formally decided to initiate that procedure the Member State concerned may still put the aid in question into effect. Thirdly, even a decision by which Commission action is suspended is capable of adversely affecting the legal position of a complainant (Case T-16/91 *Rendo and Others* v *Commission* [1992]

ECR II-2417, paragraphs 51 and 52). Consequently, such a decision should not be regarded as merely a preliminary decision. The negative effects of the contested decision on the complainant's position will not be eradicated by a subsequent Commission decision to initiate a procedure under Article 93(2) of the Treaty, because the illegality of the delay in initiating such a procedure and all the effects the delay has provoked will persist.

35 With regard to the argument that the content of the contested letter is imprecise and uncertain, the applicant points out that the Commission may not rely on its own failure to comply with Community law.

36 Lastly, the applicant challenges the Commission's interpretation to the effect that it is inconceivable, where State aid is concerned, that the complainant should be the addressee of a decision.

Findings of the Court of First Instance

37 For the purposes of deciding whether the plea of inadmissibility raised by the Commission is well founded, it must be borne in mind that decisions adopted by the Commission in the field of State aid must be addressed to the Member States concerned. That is also so where such decisions concern State measures to which objection is taken in complaints, on the ground that they constitute State aid contrary to the Treaty, and the Commission refuses to initiate the procedure under Article 93(2) because it considers either that the measures complained of do not constitute State aid within the meaning of Article 92 of the Treaty or that they are compatible with the common market. Where the Commission adopts such a decision and proceeds, in accordance with its duty of sound administration, to inform the complainants of its decision, it is the decision addressed to the Member State which must form the subject-matter of any action for annulment which the complainant may bring, and not the letter to that complainant informing him of the decision (*Commission* v *Sytraval and Brink's France*, cited above, paragraph 45).

38 In that connection, even though a decision terminating the investigation as to the compatibility with the Treaty of an aid measure is always addressed to the Member State concerned, a communication addressed to a complainant may outline the terms of such a decision, even if that decision has not been sent to the Member State concerned (Case T-178/94 *ATM* v *Commission* [1997] ECR II-2529, paragraphs 20, 52 and 54).

39 Moreover, according to settled case-law, only a measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment under Article 173 of the Treaty (see, for instance, the order of the Court of Justice in Cases C-66/91 and C-66/91 R *Emerald Meats* v *Commission* [1991] ECR I-1143, paragraph 26, and the order of the Court of First Instance in Case T-274/97 *Ca'Pasta* v *Commission* [1998] ECR II-2925, paragraph 24).

40 Furthermore, in the case of acts or decisions drawn up in a procedure involving several stages, and particularly at the end of an internal procedure, it is only those measures which definitively determine the position of the institution upon the conclusion of that procedure which are open to challenge and not intermediate measures whose purpose is to prepare for the final decision (*Ca'Pasta* v *Commission*, cited above, paragraph 25).

41 Therefore, in order to determine whether the application is admissible, consideration must be given to the question whether it follows from the contested letter that the Commission had resolved to terminate its examination of the question of the compatibility with the Treaty of the State aid complained of by the applicant and thus took a decision, whose addressee was in reality the Member State concerned, affecting the interests of the applicant by bringing about a distinct change in its legal position.

42 In this case, it must be pointed out that in the contested letter the Commission clearly stated, first, its intention not to initiate, for the time being, a procedure under Article 93 of the Treaty for the purpose of examining the alleged aid, and secondly, that it did not 'preclude the possibility that State aid aspects might be involved in the case'. The contested letter cannot therefore be regarded as reproducing a Commission decision bringing to a conclusion its examination of the compatibility with the Treaty of the State aid complained of by the applicant.

43 Moreover, the contested letter does not contain any characterisation of the facts alleged by the applicant in its complaint with regard to Article 92 of the Treaty. In that letter the Commission does not adopt a reasoned and definitive position on the applicant's complaint with regard to Articles 92 and 93 of the Treaty. It is clear, therefore, from its content that the letter is confined to informing the applicant that the Commission's services did not, for the time being, envisage taking any action. Consequently the contested letter does not have any legal effects.

44 As a result, there can in this instance be no question of any decision having been addressed to the Member State concerned. As the Commission rightly contended, since the applicant cannot challenge a Commission letter informing it of its decision in the area of State aid, still less can it challenge a letter informing it that for the time being no decision has been taken.

45 That conclusion cannot be called into question by the line of argument put forward by the applicant on the basis of an alleged breach of the obligation to act. The applicant's argument to the effect that the Commission's failure to act deprives it of its procedural rights, despite the possibility of bringing an action on the basis of Article 175 of the Treaty, cannot be accepted.

46 It must first be pointed out that the Commission is not allowed to perpetuate a state of inaction (*Gestevisón Telecinco* v *Commission*, cited above, paragraph

86). The Commission is obliged to adopt, with regard to the Member State concerned, a definitive decision and that must, in accordance with the principles of sound administration, be done within a reasonable time (*Gestevisón Telecinco* v *Commission*, cited above, paragraphs 73 to 75). Were the Commission to fail to comply with that obligation, the applicant could bring an action for failure to act. If the action were held to be well founded, it would be for the Commission, in application of Article 176 of the EC Treaty (now Article 233 EC) to take the measures required to comply with the judgment.

47 Moreover, it is settled case-law that when, without initiating the procedure under Article 93(2) of the Treaty, the Commission finds, on the basis of Article 93(3), that a State measure does not constitute aid, or that the measure, although constituting aid, is compatible with the common market, the parties concerned, who are entitled to the procedural guarantees provided for in Article 93(2), may challenge such a decision before the Community judicature (*Commission* v *Sytraval and Brink's France*, cited above, paragraph 47). In addition, in such an action the complainant may rely on any legal defect in the acts preparatory to the definitive decision (Case 60/81 *IBM* v *Commission* [1981] 2639, paragraph 12).

48 With regard to the applicant's argument that the Member State concerned could continue to put the aid in question into effect, it must be pointed out that, according to settled case-law, the direct effect of the prohibition on implementation, referred to in the last sentence of Article 93(3) of the Treaty, extends to all aid which has been implemented without being notified and, in the event of notification, operates during the preliminary period and then, if the Commission sets in motion the contentious procedure, until the final decision (Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon* [1991] ECR I-5505, '*FNCE*', paragraph 11). Moreover, the Commission's final decision does not have the effect of regularising *ex post facto* the implementing measures which were invalid because they had been taken in breach of the prohibition laid down

in that article (*FNCE*, paragraph 16). National courts are also bound — irrespective of the Commission's final determination as to whether the aid is compatible with Article 92 of the Treaty — to require the Member State to comply, at the request of any interested party, with the prohibition on implementation set out in Article 93(3) of the Treaty (*FNCE*, paragraph 12).

49 Finally, having regard to the considerations set out above, the applicant's argument to the effect that even an act by which Commission action is suspended is capable of affecting the legal situation of the complainant is ineffectual in this case.

50 It follows from the grounds set out above that in its letter of 2 October 1998 the Commission does not definitively determine its position as regards the compatibility with the Treaty of the aid complained of by the applicant, and that that letter does not have the characteristics of an act producing binding legal effects with respect to individuals. Accordingly, the action brought under the second paragraph of Article 173 of the Treaty must be dismissed as inadmissible without there being any need to examine the other arguments put forward by the Commission.

The ancillary application

51 First, as regards the Commission's request that the applicant and its counsel be ordered to produce to the Court of First Instance the original and all copies of the document submitted as Annex 1 to the applicant's observations on the plea of inadmissibility and full particulars of the circumstances in which that document came into their possession and of any third parties to whom they have showed or given copies or quotations from it, the Court of First Instance would point out that it may decide to order measures of inquiry if it considers that certain relevant

facts concerning the case before it have not been sufficiently established. Since that is not the case here, there is no need to order the measures of inquiry requested by the Commission (Case T-53/96 *Syndicat des Producteurs de Viande Bovine and Others* v *Commission* [1996] ECR II-1579, paragraph 26). Moreover, the applicant has already volunteered an answer to the question concerning the circumstances in which the document came into its possession.

52 Secondly, with regard to the request that the document annexed to its observations on the plea of inadmissibility be withdrawn from the file, on the ground that it is an internal document which has reached the applicant improperly, it is sufficient to observe that the applicant has agreed to the withdrawal of that document, while denying that it obtained it improperly. In the circumstances, the said document will be removed from the file.

53 Thirdly, the Court of First Instance considers that there is no need to examine the request that the present procedure be reopened in view of the fact that the application is inadmissible.

Costs

54 Under the second subparagraph of Article 87(3) of the Rules of Procedure, the Court of First Instance may order a party, even if successful, to pay those costs which have arisen as a result of the conduct of that party (see Case T-7/96 *Perillo* v *Commission* [1997] ECR II-1061, paragraph 47).

55 In this case the applicant has failed in its application. Nevertheless account must be taken of the conduct of the defendant, which replied in an imprecise manner to

the applicant's letter of 10 August 1998 calling upon it to take a decision. The first sentence of the second paragraph of the letter of 2 October 1998 could be construed as meaning that there was a Commission decision pursuant to Article 93 of the Treaty, as the Commission in fact admitted at paragraph 14 of its request for a decision on admissibility.

56 It must therefore be held that the defendant's conduct was a factor that contributed to giving rise to the dispute. In those circumstances, the applicant cannot be criticised for erroneously initiating proceedings before the Court of First Instance under Article 173 of the Treaty.

57 It is therefore appropriate to order the Commission to bear its own costs and to pay one third of those incurred by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber, Extended Composition)

hereby orders:

1. **The application is dismissed as inadmissible.**

2. **The document produced as Annex 1 to the applicant's observations on the plea of inadmissibility, lodged at the Registry of the Court of First Instance on 18 February 1999, shall be removed from the file in Case T-182/98.**

3. **The ancillary application is dismissed for the remainder.**

4. **The Commission shall bear its own costs and pay one third of the costs incurred by the applicant.**

5. **The applicant shall bear two thirds of its own costs.**

Luxembourg, 30 September 1999.

H. Jung

Registrar

R.M. Moura Ramos

President