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

20 March 2002 *

In Case T-175/99,

UPS Europe SA, established in Brussels (Belgium), represented by T.R. Ottervanger and D. Arts, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by B. Doherty and K. Wiedner, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

supported by

Deutsche Post AG, established in Bonn (Germany), represented by J. Sedemund, lawyer, with an address for service in Luxembourg,

intervener,

APPLICATION for the annulment of Commission Decision SG (99) D/4155 of 10 June 1999 rejecting the applicant's complaint of 8 June 1998 to the extent to which it relates to Article 82 EC and to the partial acquisition of DHL International Ltd by Deutsche Post AG,

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

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

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 25 April 2001

gives the following

Judgment

Facts

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

2 On 11 May 1998 the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1) by which the undertaking Deutsche Post AG sought to acquire, within the meaning of Article 3(1)(b) of that regulation, joint control of DHL International Ltd ('DHL') by purchasing 22.498% of its shares. Deutsche Post would thus control DHL jointly with Deutsche Lufthansa AG ('Lufthansa') and Japanese Airlines Company Ltd ('JAL').

3 On 19 May 1998 prior notice of the proposed concentration was published (Case No IV/M.1168 — DHL/Deutsche Post, OJ 1998 C 154, p. 6) inviting third parties to submit their observations to the Commission.

4 The applicant submitted its comments to the Commission on 29 May 1998. It referred *inter alia* to the fact that Deutsche Post could only muster sufficient

resources for the acquisition of its shares in DHL through its profits on the reserved postal market. The applicant also stated that Deutsche Post was not entitled to use its exclusive rights for purposes other than complying with its obligation to provide the service of general economic interest with which it was entrusted.

5 By letter of 8 June 1998 the applicant lodged with the Commission a formal complaint against the Federal Republic of Germany, Deutsche Post and DHL. The complaint alleged infringements of Articles 81 EC, 82 EC and 87 EC. The applicant requested the Commission to initiate, in particular, a procedure against Deutsche Post for abuse of a dominant position.

6 On 26 June 1998 the Commission adopted a decision, of which notice was published in the *Official Journal of the European Communities* (OJ 1998 C 307, p. 3), declaring a concentration compatible with the common market (Case IV/M.1168 — DHL/Deutsche Post) on the basis of Regulation No 4064/89.

7 By letter of 7 July 1998 the Commission asked the applicant to state whether it wished to maintain its complaint of 8 June 1998. By letter of 10 July 1998 the applicant informed the Commission that it wished to do so.

8 On 21 December 1998 the applicant wrote to the Commission calling on it to take a decision on its complaint under Articles 81 EC and 82 EC.

9 By letter of 8 February 1999 the Commission sent its provisional views to the applicant pursuant to Article 6 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under

Articles [81] and [82] of the EC Treaty (OJ 1998 L 354, p. 18), to the effect that the applicant's request, in so far as it was based on Articles 81 EC and 82 EC, was unfounded.

10 By letter of 29 March 1999 the applicant informed the Commission that it did not agree with the Commission's views and requested it to investigate the matter further under Article 82 EC.

11 By decision of 10 June 1999 the Commission rejected the complaint in so far as it was based on Articles 81 EC and 82 EC (hereinafter 'the contested decision').

12 The contested decision stated:

'16. As the Commission noted in its decision of 26 June 1998, [Deutsche Post] claims that the acquisition was financed by the sale of real estate which was the capital endowment for [Deutsche Post] when it was made into a company. If this proved to be the case, the complaint would be unfounded on a point of fact.

17. In its letter of 29 March 1999, UPS [Europe] correctly points out that it has not been established whether [Deutsche Post's] claim as to the origin of the funds used is correct. However, contrary to the opinion expressed by UPS [Europe] in this letter, it is not necessary for the Commission to investigate this matter. The reason for this is that the complaint would in any event be unfounded in law. Even if [Deutsche Post] should indeed have used profits which it made on the letter market and if all the other conditions set out in Article 82 were fulfilled, there would be no abuse within the meaning of that provision.

18. The fact alone that a company decides to use the resources which are at its disposal in order to purchase a share in another company does not raise concerns under EC competition law as long as this acquisition does not result in the creation or strengthening of a dominant position.

19. In its decision of 26 June 1998, the Commission has come to the conclusion that the notified operation did not raise serious doubts as to its compatibility with the common market.

20. It is therefore necessary to examine the more specific question as to whether there is an abuse within the meaning of Article [82 EC] where an undertaking uses (always on the basis of the assumption that the allegations of UPS [Europe] are correct) profits which it derives from activities for which it enjoys a legal monopoly in order to finance the acquisition of control in a company which is active on a non-reserved market. The Commission considers that this question is to be answered in the negative. Even companies to whom member States have granted an exclusive right in a particular area are not prevented by Article 82 from expanding into other areas. This is without prejudice to the possibility that Article 82 could apply to the behaviour of these companies on the markets for which they enjoy monopoly rights.'

Procedure and forms of order sought

13 By application lodged at the Registry of the Court of First Instance on 2 August 1999, the applicant brought the present action.

14 By application lodged at the Registry on 23 December 1999, Deutsche Post sought leave to intervene in support of the defendant.

15 By order of the President of the Fourth Chamber of the Court of First Instance of 8 February 2000, Deutsche Post was granted leave to intervene in support of the defendant.

16 Pursuant to Article 14(1) and 51(1) of the Rules of Procedure of the Court of First Instance, the case was a referred to a Chamber of five Judges.

17 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry and, by way of a measure of organisation of procedure, asked the Commission to produce before publication its Decision 2001/354/EC of 20 March 2001 relating to a proceeding under Article 82 of the EC Treaty (COMP/35.141 Deutsche Post AG) (OJ 2001 L 125, p. 27).

18 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 25 April 2001.

19 The applicant claims that the Court of First Instance should:

— annul the contested decision in so far as it rejects its complaint under Article 82 EC;

— order the defendant and the intervener to pay the costs;

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

20 The defendant contends that the Court of First Instance should:

— dismiss the application;

— order the applicant to pay the costs.

21 The intervener claims that the Court of First Instance should:

— dismiss the application;

— order the applicant to pay the costs.

Law

22 The applicant raises two pleas in law in support of its application for annulment. The first alleges inadequacy of the statement of reasons. The second alleges infringement of Article 82 EC.

The first plea: inadequate statement of reasons

Arguments of the parties

23 According to the applicant, the contested decision infringes Article 253 EC because, in the circumstances of this case, the Commission is not entitled to confine itself to declaring that Article 82 EC does not prevent an undertaking holding a monopoly from expanding into areas other than those covered by the monopoly.

24 It contends that the contested decision does not give the reason why resources intended for use in providing a service of general economic interest may also be employed for other purposes, such as the acquisition of joint control of an undertaking active in a neighbouring market. It claims that, to its knowledge, the contested decision is the first decision in which the Commission has formally defined its position on this point. Consequently, it contends that the Commission should have carefully stated the reasons for its decision.

25 The applicant states that the obligation to give reasons is underpinned by the fact that Article 82 EC constitutes an 'open' prohibition whose meaning has evolved over time in accordance with Commission practice and the case-law of the Court of Justice. Thus, a decision explicitly stating that particular conduct is not covered by Article 82 EC is as revealing and relevant for the purposes of determining the reach of that article as a decision characterising conduct as constituting an abuse within the meaning of that article.

26 The defendant, supported by the intervener, infers from the fact that Article 82 EC lays down a prohibition that no special reasoning is needed to show that certain behaviour is permitted.

Findings of the Court

27 As a preliminary point, it must be borne in mind that, according to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the nature of the measure in question and must show clearly and unequivocally the reasoning of the institution which enacted the measure so as to inform the persons concerned of the justification for the measure adopted and to enable the Court to exercise its powers of review (Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 71, and Case C-353/92 *Greece* v *Council* [1994] ECR I-3411, paragraph 19).

28 Moreover, the requirement to state reasons must be appraised on the basis of the particular features of the case in point, such as the content of the measure in question and the nature of the reasons given (Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19).

29 As the Court of Justice held in Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719), it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (paragraph 63).

30 It is appropriate to set out the circumstances which give rise to the contested decision.

31 By letter of 29 May 1998 the applicant responded to the invitation to submit its observations on the proposed DHL/Deutsche Post concentration. At point 3 of its

reply, the applicant states, first, that the acquisition of DHL shares by Deutsche Post was financed in breach of Article 82 EC and/or of Article 87 EC, regardless of the Commission's final position on the compatibility of the proposed concentration with the common market. Second, it maintains that, on the basis of the structure of the joint venture envisaged by Deutsche Post and DHL, the future relationship between those two undertakings will infringe Article 81 EC and/or Article 82 EC and/or Article 87 EC. Finally, the applicant stated in its letter that it was considering asking the Commission to initiate a formal procedure against Deutsche Post and against the Federal Republic of Germany for infringement of the Treaty.

32 By letter of 8 June 1998 the applicant lodged a complaint concerning the above matter and asked the Commission to initiate a procedure against Deutsche Post for abuse of a dominant position and against the Federal Republic of Germany for granting State aid in breach of Articles 87 EC and 88 EC. Moreover, the applicant stated that the future links between Deutsche Post would infringe Article 81 EC and/or Article 82 EC and/or Article 87 EC.

33 In the contested decision, the Commission stated that even if Deutsche Post had used income from the 'letter market' and even if the other conditions laid down in Article 82 EC were fulfilled, there would be no abuse within the meaning of that article. It added that the mere fact that an undertaking decides to use resources available to it in order to acquire a holding in another undertaking does not raise difficulties under competition law provided that the acquisition does not create or reinforce a dominant position. It stated that the applicant's complaint had no legal foundation since Article 82 EC does not prohibit companies from expanding into other areas, even if Member States have granted them an exclusive right in a particular area.

34 Accordingly, it must be held that the statement of reasons for the contested decision, although succinct, was nevertheless sufficient to apprise the applicant of the factual and legal grounds relied on by the Commission in rejecting the complaint.

35 It follows that the first plea must be rejected.

The second plea: infringement of Article 82 EC

Arguments of the parties

36 The applicant contends that the contested decision disregards the fact that the use of profits derived from an exclusive right, which was granted solely in order to guarantee the performance of a service of general economic interest in order to acquire control of undertakings active in neighbouring markets constitutes an abuse of a dominant position prohibited by Article 82 EC. Referring to the judgment of the Court of Justice in Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 19, it argues that, since exclusivity is granted to an undertaking charged with a universal service obligation in order to preserve economic equilibrium, the undertaking concerned must not use the income flowing from the exclusivity for other purposes.

37 It adds that the effect on the market is the same whether income from the reserved area is used to finance the acquisition of an undertaking active in a market which is open to competition or to subsidise activities in a liberalised market. In its view, in both cases the use of the income will distort competition.

38 The applicant alleges, finally, that an undertaking which uses monopoly profits can allocate the costs of the acquisition to the monopoly activities. As a result it can offer a price exceeding the price offered by its competitors who, deprived of monopoly profits, have to finance the acquisition with resources generated in a liberalised market and take into account the expected return on investment. Therefore competition is affected not only in the non-reserved market concerned

but also in the market for the acquisition of undertakings active in the non-reserved market.

39 The applicant contests the Commission's interpretation to the effect that Deutsche Post would be prevented from entering or expanding into the parcels market if the conduct criticised by the applicant were condemned. The applicant contends that in such circumstances Deutsche Post could, like any other undertaking, have recourse to other financial means, for example by issuing bonds or shares, by selling a subsidiary or by entering into a loan agreement. It could also freely use for that purpose profits generated in competitive markets. It would only be prevented from entering another market by using monopoly profits.

40 As regards the alleged prohibition of using certain profits, the applicant states that it has never argued that Deutsche Post was not entitled to make a profit in its monopoly market; it has only argued that Deutsche Post is not allowed to use such profits to finance activities in competitive markets. Referring to the *Corbeau* judgment, cited in paragraph 20 above, it maintains that the grant of exclusive rights is intended to enable undertakings rendering a universal service to achieve economic equilibrium. That judgment supports the view that the use of monopoly profits for purposes other than covering losses incurred by rendering a universal service constitutes an abuse under Article 82 EC. Consequently, Deutsche Post is not entitled to realise any profit in the letter market that is higher than the additional costs which that undertaking must bear in rendering a universal service.

41 The applicant states that one of the objectives of Article 82 EC is to ensure fairness between the different companies operating in a particular market and to protect the position of competitors, thereby preventing long-term harm to consumers. Abuses are therefore those practices that are not based on normal business performance and that are contrary to the abovementioned objectives. It adds that the use of profits derived from a protected position based on a legal

monopoly in order to acquire control of a company on a competitive market is not based on normal business performance and thus is unfair and distorts competition. In other words, since the universal service obligation constitutes the sole possible justification for an exclusive right, any other use of profits derived from an exclusive right inevitably constitutes an abuse.

42 The applicant adds that its argument is corroborated by the Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (OJ 1998 C 39, p. 2). In paragraph 17 of the preface to that notice, the Commission expressly states that '[t]o guarantee the funding of the universal service, a sector may be reserved for the operators of this universal service'. In paragraph 3.4 of that notice the Commission states that '[t]he operators referred to in point 4.2 [that is, undertakings to which exclusive rights have been granted] should not use the income from the reserved area to cross-subsidise activities in areas open to competition. Such a practice could prevent, restrict or distort competition in the non-reserved area'.

43 The defendant states that there is no rule of Community law or any case-law to support the interpretation of Article 82 contended for by the applicant.

44 It maintains that the result of the applicant's thesis would be that either Article 82 EC prevents Deutsche Post from expanding into the parcels market entirely or else prevents it from doing so using profits from other activities.

45 With respect to the applicant's argument that Deutsche Post should not use profits generated in a reserved sector to finance activities in a non-reserved sector, the defendant contends that income deriving from an exclusive right granted in

order to provide universal service can also be used for other purposes. It states that *Corbeau* did not establish that an exclusive right is unlawful unless it was conferred with a view to financing a universal service.

46 As regards the possibility of cross-subsidisation, the defendant considers that the applicant is confusing arguments relating to Article 82 EC with arguments relating to Article 86 EC. However, they are two distinct provisions with different aims: Article 82 EC is aimed only at anti-competitive conduct engaged in by undertakings on their own initiative whereas the applicant's arguments concern State measures, which must be examined from the point of view of Article 86 EC. It adds that, in any event, there is no absolute rule prohibiting cross-subsidy. This is because, even though a cross-subsidy can be used to mask an abuse — for example, predatory pricing, excessive pricing or price discrimination — it does not in itself constitute an abuse.

47 In conclusion, it contends that there is no rule in Article 82 EC which prevents a dominant undertaking, even one with exclusive rights, from making a profit. It states that the interpretation of Article 82 EC does not depend on whether a dominant position has been conferred by law or acquired otherwise. That does not mean that monopolies enjoy total freedom: every undertaking in a dominant position is subject to Article 82 EC, which prohibits predatory pricing, excessive pricing or price discrimination. It concludes that there is no positive rule in Article 82 EC preventing Deutsche Post from expanding into new areas using profits from its reserved sector or otherwise. Finally, it notes that UPS's complaint does not attribute to Deutsche Post any conduct of the kind described above.

48 Deutsche Post states that a company which, in full compliance with Community law, has been granted certain exclusive rights should not be prevented from conducting normal business activities which any other company, including dominant companies, may lawfully pursue. It adds that, although Article 82 EC

may prevent an undertaking in a dominant position from charging excessive prices, that provision does not interfere with the economic freedom enjoyed by all companies to use the profits they obtain lawfully from their business, in either reserved or non-reserved markets, in order to penetrate new markets.

49 It states that the acquisition in question was financed by the sale of immovable property forming part of its capital when it was converted into a company limited by shares. The applicant has put forward no argument to dispute that fact.

50 Deutsche Post states that the applicant has produced no evidence of abusive conduct. In its submission, the applicant has not succeeded in demonstrating that the acquisition in question would lead to the reinforcement of a dominant position to the point where the degree of domination thereby achieved would substantially hinder competition. Nor has the applicant shown that the acquisition in question would create structural conditions favouring abuse in the future. Finally, it contends that the fact that it acquired only a minority holding of 22.498% in DHL makes it unlikely that, as a minority shareholder, it would engage in cross-subsidisation.

Findings of the Court

51 As a preliminary observation, it should be pointed out that, as the applicant itself admits, the mere fact that an exclusive right is granted to an undertaking in order to guarantee that it provides a service of general economic interest does not preclude that undertaking from earning profits from the activities reserved to it or from extending its activities into non-reserved areas.

52 Essentially, the applicant is criticising the Commission for failing to take account in the contested decision of the fact that an undertaking vested with an exclusive right in order to guarantee the provision of a service of general economic interest cannot, in principle, use income derived from its activities in the reserved market in order to acquire a holding in an undertaking active in a neighbouring market that is open to competition, without abusing the dominant position which it holds by virtue of that exclusive right, in breach of Article 82 EC.

53 The applicant's case, as set out in its letters of 29 May and 8 June 1998 to the Commission, is based on two contentions:

(a) the financing by Deutsche Post of the acquisition of its holding in DHL implies that it financed that acquisition from income obtained from its activities in the reserved letter market, thereby abusing its dominant position in that market; and

(b) the future relationship between Deutsche Post and DHL will necessarily lead to cross-subsidisation of DHL's activities in the liberalised parcel market by income obtained by Deutsche Post from the reserved market.

54 It should first be observed that the acquisition by Deutsche Post of 22.498% of the shares of DHL was effected under an agreement between Deutsche Post, Lufthansa and JAL. In the light of the provisions of that agreement concerning the composition and organisation of the management of DHL and the allocation and exercise of voting rights for strategic decisions, the Commission concluded, in its decision of 26 June 1998, adopted under Regulation No 4064/89, that Deutsche Post had acquired joint control of DHL with Lufthansa and JAL.

55 Contrary to the impression given by the Commission in paragraphs 17 and 18 of the contested decision, the acquisition of a holding of that kind could raise problems in the light of the Community competition rules where the funds used by the undertaking holding the monopoly derived from excessive or discriminatory prices or from other unfair practices in its reserved market. In such a situation, where there are grounds for suspecting an infringement of Article 82 EC, it is necessary to examine the source of the funds used for the acquisition in question in order to determine whether that acquisition stems from an abuse of a dominant position.

56 It should next be noted that, in its decision of 26 June 1998, which has not been challenged by the applicant, the Commission decided to raise no objections concerning the acquisition by Deutsche Post of joint control of DHL because that acquisition did not have the effect of creating or strengthening a dominant position and was not therefore incompatible with the common market.

57 In those circumstances, the Court must determine whether, notwithstanding the authorisation for a concentration granted by the Decision of 26 June 1998, the applicant's two abovementioned contentions might be well founded and call for a finding that Article 82 EC has been infringed.

58 As regards the applicant's first contention, namely that the use of income from activities in the reserved market to finance the acquisition of the holding in DHL necessarily implies abusive conduct by Deutsche Post on that market, it must be borne in mind, first, that the Commission did not consider it necessary to establish the source of the funds used for that acquisition because, in its opinion, even if they had been obtained from the reserved letter market and not, as contended by Deutsche Post, from real estate transactions, Article 82 EC would not preclude their use for the acquisition in question.

59 In that regard, it should be noted that the applicant has not at any time, either in its letters of complaint to the Commission or in the present proceedings, pointed to any conduct whatsoever on the part of Deutsche Post in the reserved letter market that might be capable of constituting an infringement of Article 82 EC. The applicant confined itself to referring to the fact that postal charges in Germany are the highest in Europe and that the German Government had waived its entitlement to the dividends due to it as a shareholder of Deutsche Post.

60 The mere fact that Deutsche Post possessed funds enabling it to effect the acquisition at issue does not justify presuming the existence of abusive conduct in the reserved market.

61 In the absence of any evidence to show that the funds used by Deutsche Post for the acquisition in question derived from abusive practices on its part in the reserved letter market, the mere fact that it used those funds to acquire joint control of an undertaking active in a neighbouring market open to competition does not in itself, even if the source of those funds was the reserved market, raise any problem from the standpoint of the competition rules and cannot therefore constitute an infringement of Article 82 EC or give rise to an obligation on the Commission to examine the source of those funds in the light of that article.

62 The Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, cited in paragraph 42 above, does not assist the applicant's case. Whilst it is true that paragraph 3.3 of that notice states that subsidising activities open to competition by allocating their costs to reserved services is likely to distort competition and that such conduct could amount to an abuse by an undertaking holding a dominant position, the fact remains that, in the same paragraph, the Commission states that, none the less, dominant companies may compete with other undertakings on price or improve their cash flow unless the prices are predatory or conflict with the relevant national or Community rules.

63 Nor can the applicant rely on the *Corbeau* judgment, cited in paragraph 36 above, because the question referred to the Court of Justice in that case was whether the monopoly conferred on the Belgian postal authority was contrary to the Treaty and, in particular, whether certain postal markets should be opened up to competition. The Court of Justice did not examine the question whether a body such as the Belgian postal authority was precluded from operating competitively in liberalised sectors.

64 As regards the applicant's second contention, to the effect that the future relationship between Deutsche Post and DHL would necessarily involve cross -subsidisation of DHL's business in the parcels market, it need merely be observed that it is clear from the undertaking given by Deutsche Post to the Commission, in response to the requirement to that effect imposed by the decision of 26 June 1998, that Deutsche Post is prohibited from engaging in any such cross-subsidisation, with the result that, for the purposes of this case, that question is academic. Consequently, if, in the future, the applicant were able to prove such cross-subsidisation on the part of Deutsche Post, it would be entitled to apply to the Commission or, by virtue of the direct effect of Article 82 EC, to the competent national court for appropriate penalties to be imposed.

65 It follows that the second plea in law must also be rejected.

Costs

66 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 applicant has been unsuccessful and the Commission and the intervener have applied for costs, the applicant must be ordered to pay their costs and to bear its own.

On those grounds,

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

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs and to pay those of the defendant and the intervener.**

Mengozzi García-Valdecasas Tiili

Moura Ramos Cooke

Delivered in open court in Luxembourg on 20 March 2002.

H. Jung

Registrar

P. Mengozzi

President